



# Federal Police Oversight: Criminal Civil Rights Violations Under 18 U.S.C. § 242

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The May 2020 death of George Floyd in police custody and subsequent [nationwide protests](#) against the use of force by law enforcement have sparked heightened interest in Congress’s ability to prevent and remedy civil rights abuses by public safety officers. Among other [existing legal remedies](#), a provision of the federal criminal code, [18 U.S.C. § 242](#) (Section 242) makes it a crime for government officials, including law enforcement officers, to subject any person to a deprivation of federally protected rights or impose different punishments based on a person’s race. This Sidebar provides an overview of Section 242 before discussing proposals to amend the law, as well as certain legal considerations related to those proposals.

## History and Text of Section 242

Section 242 originates from section 2 of the [Civil Rights Act of 1866](#). Congress [amended and broadened](#) the statute in 1874 pursuant to its [constitutional authority](#) to enforce the protections of the [Fourteenth Amendment](#) through “appropriate legislation.” Although Congress has amended the statute several times since then and changed its location in the U.S. Code, the law’s core prohibition has changed little since the nineteenth century. As currently in force, Section 242 imposes criminal penalties on any person acting “under color of any law, statute, ordinance, regulation, or custom” who

willfully subjects any person . . . to [1] the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to [2] different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens[.]

A simple violation of the statute is punishable by a fine and/or up to a year in prison. If bodily injury results, the offender may be fined and/or imprisoned for up to ten years. If death results or other aggravating factors are present, Section 242 provides for a fine and/or imprisonment for ten years to life or a death sentence (though the Constitution [forbids death sentences for non-homicide offenses](#)).

A related provision of federal criminal law, [18 U.S.C. § 241](#) (Section 241), makes it a crime for “two or more persons [to] conspire to injure, oppress, threaten, or intimidate any person . . . in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States[.]”

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Violations of Section 241 are punishable by up to ten years in prison or, if certain aggravating factors are present, up to life in prison or death.

## Enforcement and Judicial Interpretation of Section 242

The U.S. Department of Justice (DOJ) enforces Section 242 by bringing criminal charges against individuals accused of violating the statute. People who believe their rights have been infringed may report such violations to DOJ, but Section 242 provides no private right of enforcement, meaning that victims of official misconduct cannot sue under the statute. (A victim of conduct that violates Section 242 may be able to bring a separate civil suit under 42 U.S.C. § 1983 (Section 1983) or, for federal officers, under the *Bivens* doctrine, though qualified immunity may limit officials' liability.) To secure a criminal conviction under Section 242, DOJ must establish three elements: (1) the defendant acted "under color of" law; (2) the defendant acted "willfully"; and (3) the defendant deprived the victim of rights under the Constitution or federal law or subjected the victim to different punishments on account of the victim's race, color, or alien status. The following subsections examine each of those elements in greater detail.

### Acting Under Color of Law

Section 242 applies only to persons acting "under color of" law, meaning "under 'pretense' of law." That statutory phrase originates from the Reconstruction era, and variations of it appear in multiple federal hate crime and civil rights statutes. Essentially, a person acts under color of law when they act with either actual or apparent federal, state, or local government authority. Officers and employees of the government generally fall within this category: the Supreme Court has held that "officers of the State . . . performing official duties," including public safety officers, act under color of law for purposes of Section 242. State officials act under color of law if they derive their perceived authority from state or local law, even if their conduct was not actually authorized under state or local law. For instance, in one leading case, a Georgia sheriff who arrested a black man on suspicion of theft and then beat him to death argued that he did not act under color of state law because the killing was illegal under Georgia law. The Supreme Court rejected that argument, explaining that "[a]cts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it."

Off-duty law enforcement officers may be subject to Section 242 if they act or claim to act in their official capacity. Moreover, a person need not actually be a government employee or official to act under color of law. For example, in *United States v. Price*, the Supreme Court held that private individuals who conspired with law enforcement to murder three civil rights workers could be charged under Section 242. However, a person acting purely in a private capacity is not subject to the statute, even if the person is a government employee: the Supreme Court has stated that "acts of [law enforcement] officers in the ambit of their personal pursuits are plainly excluded."

### Deprivation of Rights

A defendant may violate Section 242 by depriving a person of "any rights, privileges, or immunities secured or protected by" either the "laws of the United States" or the Constitution. With regard to the "laws of the United States," it is unclear if DOJ has brought Section 242 charges in recent history based solely on statutory violations. In the analogous context of civil claims under Section 1983, courts have shown reluctance to imply a civil remedy for statutory violations; the courts may be even less likely to impose criminal liability under statutes that do not expressly provide for it. Moreover, the scope of statutory rights subject to Section 242 may be limited by the constitutional authority Congress relied on to enact the statute. As noted, Section 242 is a product of Congress's power under Section 5 of the Fourteenth Amendment, which allows Congress to enforce the Fourteenth Amendment's guarantees through "appropriate legislation." As a recent Legal Sidebar discusses in greater detail, Supreme Court

precedent allows Congress to use its Section 5 authority to enact prophylactic legislation regulating state and local matters based on evidence of a [history and pattern](#) of past constitutional violations by the states, if such federal legislation is [congruent and proportional](#) to a demonstrated [constitutional wrong](#). Absent such circumstances, however, it is uncertain when Section 242 could be used to prosecute violations of “laws of the United States” that do not amount to violations of the Constitution.

In light of the foregoing, prosecutions under Section 242 generally allege a deprivation of constitutional rather than statutory rights. Charges under Section 242 may involve rights guaranteed by the Fourteenth Amendment, including provisions of the Bill of Rights that have been [incorporated against the states](#). For example, DOJ has brought Section 242 charges based on infringement of the [right to vote](#), imposition of [cruel and unusual punishment](#), and various [due process violations](#). And, of particular relevance to law enforcement reform, DOJ may bring Section 242 charges alleging the use of [excessive force](#) in violation of the Fourth Amendment’s protections against unreasonable seizures.

### Differential Punishment

In the alternative, a defendant may violate Section 242 by subjecting a person to different “punishments, pains, or penalties” “by reason of” the victim’s color or race or “on account of” the victim’s alien status. In practice, however, it appears DOJ rarely brings charges under this provision of Section 242. One reason for this seems to be the general [difficulty of proving](#) that a defendant had a particular subjective motivation—in this context, the motivation to impose a different punishment “by reason of” the victim’s race or other covered characteristic. Furthermore, a DOJ official involved in Section 242 litigation in the 1940s [stated](#): “When a community has consistently permitted its law enforcement officers to deny the protection of the laws to certain groups, the same methods will assuredly be used against members of other groups who happen to offend the officials.” Thus, pervasive misconduct by law enforcement officers could undermine DOJ’s case on this element. Another possible reason for the dearth of charges under the “punishments, pains, or penalties” provision of Section 242 is that conduct that violates that provision likely also violates the statute’s deprivation of rights provision: the Equal Protection Clause [prohibits the government](#) from imposing different punishments because of a person’s race.

### Willfulness Requirement

By its text, Section 242 applies only to violations that are committed “willfully.” The Supreme Court stringently construed the willfulness standard in the 1945 case *Screws v. United States* (the main opinion in *Screws* was joined by only four justices, but binding opinions of the Supreme Court have since [adopted its analysis](#)). In *Screws*, a defendant convicted of violating the statute now codified as Section 242 argued that the law was void for vagueness—that is, it violated the [Fifth Amendment’s Due Process Clause](#) because it did not give potential defendants clear notice of the conduct it proscribed. The Supreme Court rejected that argument by interpreting “willfully” to require the government to show that a defendant acted with a “[specific intent](#) to deprive a person” of constitutional rights or with “[open defiance](#) or in reckless disregard of a constitutional requirement.”

The *Screws* plurality [recognized](#) that its interpretation of Section 242 differed from the usual mental state standard in criminal cases. To obtain a conviction for a crime, the plurality explained, the prosecution usually must show that the defendant intentionally performed some action, and the action was prohibited by law; but prosecutors ordinarily need not show that the defendant knew the conduct at issue was illegal or specifically intended to violate the law. However, Section 242 imposes criminal liability for constitutional violations, and courts examining the “[broad and fluid](#) definitions of due process” may interpret the Constitution to protect rights not expressly enumerated in the Constitution or prior court decisions. In those circumstances, the plurality [observed](#), “Those who enforced local law today might not know for many months (and meanwhile could not find out) whether what they did deprived some one of

due process of law.” In the view of the *Screws* plurality, such a construction would raise serious [vagueness concerns](#):

Under that test a local law enforcement officer violates [Section 242] and commits a federal offense for which he can be sent to the penitentiary if he does an act which some court later holds deprives a person of due process of law. And he is a criminal though his motive was pure and though his purpose was unrelated to the disregard of any constitutional guarantee.

To avoid that result, the plurality [concluded](#) that in a Section 242 case the prosecution must prove the defendant had “a specific intent to deprive a person of a federal right made definite by decision or other rule of law.” Such a defendant [cannot assert a lack of notice](#) because he “is aware that what he does is precisely that which the statute forbids.” However, the plurality [explained](#), the defendant’s “purpose need not be expressed; it may at times be reasonably inferred from all the circumstances attendant on the act.”

Much of the analysis in *Screws* indicates that Section 242 requires proof that a government official intended to violate a specific federal right of which the officer either knew or had notice. For instance, the defendant in *Screws* was a sheriff who beat to death a man in his custody. The plurality [concluded](#) that it was not enough to show a “generally bad purpose” to assault the arrestee; rather “it was necessary for [the jury] to find that [the defendant] had the purpose to deprive the prisoner of a constitutional right, e.g. the right to be tried by a court rather than by ordeal.” However, other portions of the *Screws* plurality opinion could suggest a less stringent mental state requirement. For instance, the plurality [stated](#) that “[t]he fact that the defendants may not have been thinking in constitutional terms is not material where their aim was . . . to deprive a citizen of a right and that right was protected by the Constitution.” The plurality further opined that Section 242 defendants must “at least act in reckless disregard of constitutional prohibitions or guarantees”—indicating it might suffice for a defendant to ignore rather than deliberately violate a constitutional right.

Lower federal courts vary in how they apply the willfulness analysis in *Screws*. The U.S. Court of Appeals for the Fifth Circuit has [held](#) that “willfully” means “that the act was committed voluntarily and purposely with the specific intent to do something the law forbids. That is to say, with a bad purpose either to disobey or to disregard the law.” By contrast, the U.S. Court of Appeals for the Third Circuit, while [remarking](#) that “*Screws* is not a model of clarity,” upheld a jury instruction stating both that “an act is done willfully if it is done voluntarily and intentionally, and with a specific intent to do something the law forbids,” and that the jury could “find that a defendant acted with the required specific intent even if you find that he had no real familiarity with the Constitution or with the particular constitutional right involved.” Overall, however, the Supreme Court’s interpretation of the willfulness requirement has resulted in what some view as a [significant hurdle](#) to bringing Section 242 claims.

## Considerations for Congress

Several recent proposals before Congress would amend Section 242, with some proposals seeking to alter the statute’s mental state requirement and others seeking to criminalize certain practices by law enforcement officers. With respect to the mental state requirement, even before recent calls for police reform, some commentators advocated [altering the specific intent requirement](#) for Section 242 announced in *Screws*. [Section 101](#) of the [Justice in Policing Act of 2020](#) would do so, amending Section 242 by striking the requirement that an offense be committed “willfully” and instead requiring that it be committed “knowingly or with reckless disregard.”

With respect to deterring specific police practices, several recent proposals would seek to limit the use of chokeholds and similar maneuvers. For example, the [Eric Garner Excessive Use of Force Prevention Act of 2019](#) and a [Senate counterpart](#) introduced in June 2020 would amend Section 242 to provide explicitly that “the application of any pressure to the throat or windpipe which may prevent or hinder breathing or reduce intake of air is a punishment, pain, or penalty” that may not be imposed by reason of race.

Likewise, [section 363](#) of the Justice in Policing Act would provide that “the application of any pressure to the throat or windpipe, use of maneuvers that restrict blood or oxygen flow to the brain, or carotid artery restraints which prevent or hinder breathing or reduce intake of air” constitutes a “punishment, pain, or penalty” under Section 242.

More broadly, the Justice in Policing Act would [appropriate](#) \$25,000,000 for DOJ enforcement of Section 242 and a related statute, [34 U.S.C. § 12601](#), which allows DOJ to bring civil suits against law enforcement agencies that engage in a [pattern or practice](#) of unconstitutional behavior.

Amendments to Section 242 may raise new legal questions. For instance, if an amendment to the statute sought to alter the scope of “rights, privileges, or immunities secured or protected by the Constitution or laws of the United States,” challenges could arise asserting that the amendment exceeded Congress’s authority. Amendments such as those related to chokeholds discussed above—which would declare that specific conduct is a “punishment, pain, or penalty” that may not be applied “by reason of” race—may raise fewer constitutional concerns if viewed as simply creating an enforcement mechanism against a specific violation of a constitutional right. If legislation were understood to go beyond that and to attempt to create prophylactic measures to prevent violations of the Constitution, the Supreme Court has held that Congress would [need to show](#) the legislation was a congruent and proportional response to a history and pattern of past constitutional violations by the states.

In addition, an amendment to Section 242’s mental state requirement might revive the questions about vagueness and notice that the Supreme Court addressed in *Screws*. It appears Congress may have some ability to act in this area—in construing the willfulness requirement, the *Screws* plurality [suggested](#), “If Congress desires to give the Act wider scope, it may find ways of doing so.” However, Congress may need to examine whether any revision of Section 242’s mental state requirement provides potential defendants with clear notice of what conduct violates the statute.

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