

A Line in the Sand: The Role of Non-Border States at the Southern Border

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*ABSTRACT: The twenty-first century is set to see a departure from traditional enforcement of U.S. immigration policy. In recent years, states have forced courts to more clearly define the constitutional bounds of federalism. But since the Supreme Court decided *Arizona v. United States* in 2012, several states have pushed the principle that immigration law falls squarely under the powers of the federal government by sending their National Guard to the southern border. In doing so, the border becomes a hodgepodge of militarized units without the specific skill set to facilitate border crossings. Migrants, both legal and illegal, also become stigmatized in their communities. This Note analyzes how future proceedings in federal courts will be critical to regaining the pride and strength from being “a nation of immigrants.” Additionally, this Note will argue how careful legislative planning may prevent states from exploiting loopholes that allow them to take federal policy matters into their own hands.*

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INTRODUCTION

Donald Trump and Kamala Harris voters disagreed on a number of key issues in the 2024 U.S. presidential election, and arguably, no issue was more distorted than immigration.¹ Even midwestern states far situated from the southern border agreed that the effects of illegal immigration were evident in their community.² Namely, CNN exit polls in key swing states like Ohio, Michigan, and Wisconsin demonstrated that a sizable number of Republican voters felt immigration was the country’s most important issue, ahead of the economy, foreign policy, abortion, and democracy.³

Prior to the election, midwestern governors responded to the Biden Administration’s “open border” immigration policies by sending members of their National Guard down to the southern border.⁴ Although federal

1. And by a large margin. Of the eleven percent of surveyed voters across the nation who labeled immigration as their “Most important issue,” eighty-nine percent of answers came from Trump voters, and nine percent of answers came from Harris voters. *Election 2024: Exit Polls*, CNN POL. (Dec. 13, 2024, 5:07 PM), <https://www.cnn.com/election/2024/exit-polls/national-results/general/president/o> [https://perma.cc/32WA-Z5G9].

2. See, e.g., Marissa Payne & Michaela Ramm, *Iowa Poll: Most Iowans Say It’s ‘Critical’ to Secure the Border*, DES MOINES REG. (Sept. 20, 2024, 6:06 AM), <https://www.desmoinesregister.com/story/news/politics/iowa-poll/2024/09/20/iowa-poll-how-iowans-do-view-immigration-issues-ahead-of-2024-election-trump-harris/75180353007> (on file with the *Iowa Law Review*); John Murphy, *TARGET 8: Investigating the Politics and Effects of Illegal Immigration in Missouri*, KOMU 8 NEWS (Sept. 5, 2024), https://www.komu.com/news/state/target-8-investigating-the-politics-and-effects-of-illegal-immigration-in-missouri/article_70931bfe-6009-11ef-a432-77abfe07148e.html [https://perma.cc/89TS-HRVD].

3. See *Election 2024: Exit Polls*, *supra* note 1 (choose “Michigan,” “Ohio,” and “Wisconsin” from the “Location” dropdown) (highlighting the results of Michigan, Ohio, and Wisconsin).

4. Kallie Cox, *Midwest States Far from U.S.-Mexico Border Have Spent Millions to Send Troops There*, NPR (Sept. 20, 2024, 6:44 AM), <https://www.krps.org/missouri-news/2024-09-20/midwest-states-far-from-u-s-mexico-border-have-spent-millions-to-send-troops-there> [https://perma.cc/977P-QNWF].

authority is typically required for state governors to assist in enforcing immigration policy,⁵ these governors circumvented this requirement through two key pieces of legislation. The first is the Emergency Management Assistance Compact (“EMAC”), a partnership agreement among the states that was ratified by Congress in 1996 and provides for mutual aid in times of crisis.⁶ The second is Operation Lone Star, a state border initiative launched by Texas Governor Greg Abbott, which, among other things, declares immigration an “invasion” under the U.S. Constitution.⁷ Notably, the constitutionality of Operation Lone Star as it relates to the Invasion Clause has been an ongoing subject of debate in the Fifth Circuit.⁸

As alluded to above, the rhetoric around immigration tends to sharply divide people across their respective political parties. Accordingly, this Note attempts to find common ground on an otherwise divisive issue by analyzing whether state resources are being efficiently allocated when guardsmen and guardswomen are sent to the southern border. After answering that question in the negative, this Note will argue that a reviewing court must reinforce the long-standing status quo that U.S. immigration policy is under the exclusive purview of the federal government. Additionally, this Note will present a possible amendment to EMAC which eliminates a loophole that certain non-border state governors have seemed to exploit. Perhaps after recognizing these solutions, these states can instead combat immigration problems by focusing their budgets on problems that have a closer nexus to the state itself.

I. A (HALF) NATIONAL GUARD

This Part examines the principles that inform modern-day decisions surrounding the proper use of the National Guard in immigration-related issues. To understand the realities of illegal immigration in the United States, Section I.A illustrates America’s fentanyl crisis, the geography of the southern border, and the function of drug cartels. Next, Section I.B discusses the role of the National Guard, which is alluded to as the “militia” in the U.S. Constitution.⁹ And because the National Guard is governed by some relatively old legal doctrines, it is important to keep in mind that matters of public policy are important to reach a consensus on state involvement at the southern border. Finally, Section I.C explores the design of Operation Lone Star, the

5. See U.S. CONST. art. I, § 8, cl. 4 (“The Congress shall have Power . . . To establish a uniform Rule of Naturalization.”).

6. See *infra* Section I.D.1.

7. See *infra* Section I.D.

8. See generally *United States v. Abbott*, 110 F.4th 700 (5th Cir. 2024) (discussing the lawsuit against Governor Greg Abbott for implementing a buoy system to combat illegal immigration in the Rio Grande).

9. See, e.g., U.S. CONST. art. I, § 8, cl. 15 (“The Congress shall have Power . . . To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.”).

statutory structure of EMAC, and the constitutional challenges behind the Fifth Circuit's holding in *United States v. Abbott*.

A. AMERICA'S SOUTHERN BORDER

The southern border spans 1,954 miles from the Gulf of Mexico to the Pacific Ocean.¹⁰ Between that lie four states—Texas, New Mexico, Arizona, and California—with approximately fifty legal land ports of entry¹¹ and over seventy border checkpoints.¹² Millions of people cross the southern border every year, making it one of the busiest borders in the world.¹³ Significant increases in border crossings naturally lead to enforcement challenges, which Democrats and Republicans both agree pose their own unique problems.¹⁴ However, the two sides disagree over whether these issues are primarily driven by ineffective immigration policies from the federal government or widespread levels of displacement from civil conflict and persecution.¹⁵

Geographically, the southern border is home to tremendous navigational difficulties.¹⁶ Unpredictable currents of the Rio Grande and blistering temperatures in the barren Sonoran Desert, for example, pose significant threats to those attempting to cross into the United States illegally.¹⁷ Some humanitarian scholars even argue that, as a deterrence function, U.S. immigration policy steers migrants who try to cross illegally into these natural

10. *An Overview of the US–Mexico Border*, USAFACTS (July 30, 2024), <https://usafacts.org/articles/an-overview-of-the-usmexico-border> [https://perma.cc/PC8T-JHG3].

11. Bureau of Western Hemisphere Affairs, *U.S. Relations with Mexico*, U.S. DEP'T STATE (Sept. 16, 2024), <https://2021-2025.state.gov/u-s-relations-with-mexico> [https://perma.cc/2GR9-KUQQ].

12. U.S. GOV'T ACCOUNTABILITY OFF., GAO-22-104568, *BORDER PATROL: ACTIONS NEEDED TO IMPROVE CHECKPOINT OVERSIGHT AND DATA* 9 (2022).

13. Jasmine Garsd, *Migrants Are Showing Up at the U.S. Southern Border in Historic Numbers. Here's Why*, NPR (Nov. 12, 2023, 8:00 AM), <https://www.npr.org/2023/11/12/1212058889/migrants-u-s-southern-border-historic-numbers-why> [https://perma.cc/ZRW9-qJgG].

14. *See id.*

15. *Id.*

16. A non-U.S. citizen asked on Reddit the mechanics behind crossing the southern border on foot with no barriers, to which users described how crossing is not terribly difficult, but navigating to civilized parts of the southwestern United States is formidable. *See* BlinisAreDelicious, Comment to *Is It Really that Hard to Cross the Mexican-American Border by Foot?*, REDDIT, https://www.reddit.com/r/NoStupidQuestions/comments/196dlqj/is_it_really_that_hard_to_cross_the [https://perma.cc/6WDA-3N5U] (“It’s [two hours] driving to get to a tiny gas station. . . . You have to walk that and the rest. On heavily patrolled roads with miles and miles of visibility.”).

17. *See* CBS Evening News, *Migrants Risk Their Lives in Treacherous Journey Across Rio Grande*, YOUTUBE (Sept. 21, 2023), <https://www.youtube.com/watch?v=XcnEy8JTN1E> [https://perma.cc/UY3C-G25A] (starting at 00:14); *see also* Camilo Montoya-Galvez, Justo Robles & Suvro Banerji, *Finding Missing Migrants Along the U.S.-Mexico Border, the World's Deadliest Land Migration Route*, CBS NEWS (Sept. 20, 2024, 9:15 AM), <https://www.cbsnews.com/news/immigration-arizona-desert-missing-migrants> [https://perma.cc/S7H2-CM4Z].

barriers.¹⁸ For its part, the Department of Homeland Security has cautioned against crossing between legal ports of entry, noting the risks of dehydration and drowning, along with the prospect of encountering dangerous organized crime syndicates.¹⁹ The latter alludes to run-ins with members of drug cartels, who “have turned the extortion of migrants into a highly sophisticated, and lucrative, criminal enterprise.”²⁰

Because crossing into the United States drives immigrants toward dangerous environments and syndicates, a vast majority of illegal entries into the United States do not arise from the so-called barrier gaps that divide the Mexican and American fronts.²¹ In fact, most persons who are classified as “illegal immigrants” actually entered into the United States legally but then “overstayed their visas.”²² Despite this, depictions from popular news outlets or political advertisements emphasizing that the southern border is in a state of crisis contain rhetoric that is difficult for federal policymakers to combat, especially when illegal immigration tends to be one of the most charged issues in the political sphere.²³ However, the answer is not quite as simple as sending as many people as we can to monitor the southern border.²⁴

18. *The Real Cost of an Open Border: How Americans Are Paying the Price: Joint Hearing Before the Subcomm. on Border Sec. & Enf't and the Subcomm. on Counterterrorism, L. Enf't, & Intel.*, 118th Cong. 92 (2023) (statement of Ari Sawyer, U.S. Border Researcher, Human Rights Watch) (noting that the Clinton Administration adopted a policy that cut off smuggling routes known for successful illegal entry in order to drive migrants into more unforgiving and rugged areas).

19. *Securing the Border*, DEP'T HOMELAND SEC. (Jan. 22, 2025), <https://www.dhs.gov/immigrationlaws> [<https://perma.cc/9695-RPWE>] (“Smugglers, criminals, cartels, and bad actors prey on vulnerable migrants, who risk kidnapping, extortion, and other threats to their personal safety. The terrain is hazardous, risking medical issues like injuries, heat stroke and dehydration, or drowning.”).

20. Jason Beaubien, *Brutal Cartels Make Crossing U.S. Border Even Riskier*, NPR (July 8, 2011, 12:46 PM), <https://www.npr.org/2011/07/08/137647286/brutal-cartels-make-crossing-u-s-border-even-riskier> [<https://perma.cc/8HRV-XFA5>].

21. See Sean McMinn & Renee Klahr, *Where Does Illegal Immigration Mostly Occur? Here's What the Data Tell Us*, NPR (Jan. 10, 2019, 4:58 PM), <https://www.npr.org/2019/01/10/683662691/where-does-illegal-immigration-mostly-occur-heres-what-the-data-tell-us> [<https://perma.cc/Q9Z-NYUPY>]; see also John Moore & Kyle Almond, *This Is What the US-Mexico Border Looks Like*, CNN, <https://www.cnn.com/interactive/2018/12/politics/border-wall-cnnphotos> [<https://perma.cc/WN7F-33HY>].

22. McMinn & Klahr, *supra* note 21.

23. Anu Joshi, *Three Ways the Media Introduces Bias to the Immigration Debate*, ACLU (Oct. 7, 2024), <https://www.aclu.org/news/immigrants-rights/three-ways-the-media-introduces-bias-to-the-immigration-debate> [<https://perma.cc/KZ4Y-6MMB>].

24. See generally Edward Alden, *Trump's Immigration Orders Will Bring Chaos to the Border*, FOREIGN POL'Y (Jan. 23, 2025, 3:48 PM), <https://foreignpolicy.com/2025/01/23/trump-immigration-orders-mexico-border-control> [<https://perma.cc/G7LG-A4D2>] (discussing how Trump's executive order declaring a national emergency at the southern border will likely increase illegal crossings).

B. WHY THE NATIONAL GUARD?

The significance of the National Guard traces as far back as the American Revolution, where state militias and the Continental Army fought against a very skilled British Army.²⁵ Serving in the state militia was a point of pride for many, and those with no shortage of bravery volunteered as minutemen—those ready to fight “in a minute’s notice.”²⁶ The Continental Army, in contrast, represented the sort of “professional military” embodied by the present-day U.S. Armed Forces.²⁷ But in the years following the Revolution, state militias and minutemen were highly praised by the colonists,²⁸ whereas standing armies like the British were viewed as bands of mercenaries whose only true loyalty lay with their king.²⁹ After the ratification of the Articles of Confederation, however, the Founding Fathers quickly realized that a haphazard blend of state militias could not defend against internal rebellions, foreign nations, or Native American tribes.³⁰ Accordingly, the Constitution created a system that allocated military powers between the Legislature, the Executive, and the several States³¹ to balance concerns of control and tyranny.³²

25. Rob Orrison, *Militia, Minutemen, and Continentals: The American Military Force in the American Revolution*, AM. BATTLEFIELD TR. (Dec. 15, 2021), <https://www.battlefields.org/learn/articles/militia-minutemen-and-continentals-american-military-force-american-revolution> [https://perma.cc/FDH6-WC5E].

26. See Mark Wilcox, *What Is a Minuteman?*, AM. BATTLEFIELD TR. (Dec. 15, 2021), <https://www.battlefields.org/learn/articles/what-minuteman> [https://perma.cc/Q6DM-68TK]; see also *The Militia and Minute Men of 1775*, NAT’L PARK SERV. (Nov. 6, 2021), <https://www.nps.gov/mima/learn/historyculture/the-militia-and-minute-men-of-1775.htm> [https://perma.cc/XU8D-7Z9A].

27. See Benjamin Daus, Note, *The Militia Clauses and the Original War Powers*, 11 J. NAT’L SEC. L. & POL’Y 489, 493–95 (2021) (outlining how the modern-day military institution is structured to “segregate military and civilian life” through boot camp, service academies, and administrative law functions); see also *Demographics of the U.S. Military*, COUNCIL ON FOREIGN RELS. (July 13, 2020, 9:00 AM), <https://www.cfr.org/backgrounder/demographics-us-military> [https://perma.cc/KW3W-4SUB] (identifying six branches of the U.S. Armed Forces: Army, Navy, Marine Corps, Coast Guard, Air Force, and Space Force).

28. See THE FEDERALIST NO. 25, at 211 (Alexander Hamilton) (Benjamin Fletcher Wright ed., Harvard Univ. Press 1961) (“The American militia, in the course of the late war, have, by their valor on numerous occasions, erected eternal monuments to their fame . . .”).

29. See THE DECLARATION OF INDEPENDENCE para. 14 (U.S. 1776).

30. See Daus, *supra* note 27, at 504. These concerns were effectively reduced to writing in the Constitution. See Stephen I. Vladeck, Note, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 157 (2004) (noting that Article I, Section 8, Clause 15 grants Congress the ability to call the militia in order to enforce the laws, suppress insurrections, and repel invasions).

31. See 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1196 (1833).

32. See, e.g., Washington’s Sentiments on a Peace Establishment (May 1, 1783), *reprinted in Founders Online*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Washington/99-01-02-11202> [https://perma.cc/L3E4-7HSM] (“[Although] a large standing Army in time of Peace hath ever been considered dangerous to the liberties of a Country, yet a few Troops, under certain circumstances, are not only safe, but indispensably necessary.”); THE FEDERALIST NO. 41, at 296 (James Madison) (Benjamin Fletcher Wright ed., Harvard Univ. Press 1961) (“A standing force, therefore, is a dangerous, at the same time that it may be a necessary, provision.”); 3 STORY, *supra*

The most important constitutional doctrines relating to the National Guard are the Militia Clauses and the Commander in Chief Clause. Like many doctrines in constitutional law, both clauses have been subject to different interpretations throughout the nation's history.³³ Broadly speaking, Article I provides that Congress may enforce the laws, suppress insurrections, and repel invasions with either the standing army or the state militias.³⁴ A related clause is the Invasion Clause in Article IV, which provides that the federal government "shall protect each [State] against Invasion."³⁵ Immediately, one may see how the meaning of the word "invasion" could raise some debate in the context of immigration.³⁶

Article II, on the other hand, grants the President authority over the National Guard when it is "called into the actual Service of the United States."³⁷ Importantly, the Constitution does not provide the President with the sole authority to call the National Guard into direct federal service.³⁸ As a practical matter, the Posse Comitatus Act—signed into law by Rutherford B. Hayes in 1878—provides that the military cannot intervene in matters involving civilian law enforcement.³⁹ However, Congress has indeed authorized the President to call the National Guard into service, commonly known as "federalizing" the National Guard, under other statutory provisions.⁴⁰ For example, the Insurrection Act, which has been described as "dangerously vague,"⁴¹ allows the President to federalize the National Guard primarily in cases "to restore public order."⁴² Another provision is the Stafford Act, which

note 31, § 1199 (1833) ("[U]niformity in the organization and discipline of the militia will be attended with the most beneficial effects . . . [which] can be attained only through the superintending power of the national government.").

33. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring) (stating that the "cryptic words" in the Commander in Chief Clause "have given rise to some of the most persistent controversies in our constitutional history").

34. See U.S. CONST. art. I, § 8, cl. 15.

35. *Id.* art. IV, § 4.

36. See generally Mitch McCarthy, Comment, *Immigration Is Not an Invasion: The Case Against Allowing State Actors to Implement Immigration Policies Under the Scope of the Invasion Clause*, 60 CAL. W. L. REV. 645 (2024) (weighing the plausibility behind illegal immigration constituting an "invasion").

37. U.S. CONST. art. II, § 2, cl. 1.

38. See *id.*

39. Joseph Nunn, *The Posse Comitatus Act Explained*, BRENNAN CTR. FOR JUST. (June 11, 2025), <https://www.brennancenter.org/our-work/research-reports/posse-comitatus-act-explained> [https://perma.cc/S9G2-JXPX].

40. JENNIFER K. ELSEA & R. CHUCK MASON, CONG. RSCH. SERV., RS22266, *THE USE OF FEDERAL TROOPS FOR DISASTER ASSISTANCE: LEGAL ISSUES* 2–3 (2012).

41. Joseph Nunn, *The Insurrection Act Explained*, BRENNAN CTR. FOR JUST. (June 10, 2025), <https://www.brennancenter.org/our-work/research-reports/insurrection-act-explained> [https://perma.cc/6LY7-C3CM].

42. See ELSEA & MASON, *supra* note 40, at 2; see also Pete Williams, *What Is a President's Authority to Send in Federal Troops?*, NBC NEWS (June 2, 2020, 2:18 PM), <https://www.nbcnews.com/politics/politics-news/what-president-s-authority-send-federal-troops-n1222166> [https://perma.cc/XB

permits the President to call in the National Guard for emergency assistance with natural disasters.⁴³

When the National Guard is carrying out a mission on behalf of the federal government, it is either operating under Title 10 or Title 32 status.⁴⁴ The National Guard primarily operates under Title 10 status when serving overseas.⁴⁵ While under Title 10 status, National Guard personnel serve as active-duty members in the U.S. Armed Forces.⁴⁶ Significantly, National Guard personnel are only subject to the limitations of *posse comitatus* (i.e., they cannot engage in “civilian law enforcement”) when acting under Title 10 status.⁴⁷ This is because Title 10 provides strictly for federal missions covered by federal statutes.⁴⁸

On the other hand, when the National Guard is cloaked with Title 32 status, state governors retain a form of *de facto* control.⁴⁹ That is to say, although the National Guard is performing a federal mission, state governors are actually in charge of their deployment.⁵⁰ A good illustration of Title 32 in practice is Operation Jump Start, a border initiative launched in 2006 by President George W. Bush.⁵¹ Under Operation Jump Start, the President requested six thousand members from the several states to help mitigate illegal immigration, a thousand of which former Governor Arnold Schwarzenegger provided on behalf of California.⁵² A few weeks later, however, the President wrote to Governor Schwarzenegger requesting an additional fifteen hundred members.⁵³ Because the requests were made under Title 32, the Governor could refuse the President’s request, and he ultimately did so, citing that California would be unable to respond to local emergencies (e.g., wildfires or earthquakes) if it supplied the additional troops.⁵⁴

93-V79D] (highlighting that the Insurrection Act was invoked to help with the 1992 Los Angeles riots and “to enforce court-ordered school desegregation”).

43. ELSEA & MASON, *supra* note 40, at 4.

44. NAT’L GUARD, NATIONAL GUARD BUREAU FACT SHEET: NATIONAL GUARD DUTY STATUSES, <https://www.nationalguard.mil/Portals/31/Resources/Fact%20Sheets/NGB-Fact-Sheet-Duty-Status-Reference-FINAL.pdf> [<https://perma.cc/6N5K-T5DV>].

45. *Id.*

46. See JENNIFER K. ELSEA, CONG. RSCH. SERV., LSB10121, THE PRESIDENT’S AUTHORITY TO USE THE NATIONAL GUARD OR THE ARMED FORCES TO SECURE THE BORDER 1 (2023).

47. *Id.* at 2–3.

48. See Nunn, *supra* note 39.

49. See ELSEA, *supra* note 46, at 1.

50. Nunn, *supra* note 39.

51. *Operation Jump Start*, NAT’L GUARD, <https://www.nationalguard.mil/Resources/Image-Gallery/Historical-Paintings/Heritage-Series/Jump-Start> [<https://perma.cc/HF6P-E3JZ>].

52. See *id.*

53. Peter Nicholas, *Gov. Refuses Bush Request for Border Troops*, L.A. TIMES (Mar. 20, 2019, 5:44 PM), <https://www.latimes.com/local/la-me-guard24jun24-story.html> (on file with the *Iowa Law Review*).

54. See *id.* The National Guard is commonly deployed to assist with natural disaster relief.

C. U.S. IMMIGRATION LAW AND POLICY

In *Arizona v. United States*, the U.S. Supreme Court wrestled over whether an Arizona statute infringed upon federal enforcement of immigration laws.⁵⁵ Zeroing in on the principle that the federal government “has broad, undoubted power over the subject of immigration and the status of aliens” under Article I of the Constitution, a 5-3 majority invalidated three provisions that related to making illegal immigration a violation of state law.⁵⁶ Writing for the majority, Justice Kennedy focused on the general sentiment that immigration policy authorizing “unilateral state action” is not conducive to the federal scheme.⁵⁷ He reasoned that conflicting interpretations of federal immigration law run counter to U.S. foreign policy—namely, the ability to speak with one unified voice.⁵⁸

Justice Scalia’s dissent in *Arizona v. United States* perhaps opened the discussion for much of the modern-day application of Operation Lone Star.⁵⁹ Scalia remarked that the embodiment of state sovereignty is “the power to exclude” under the Naturalization Clause in Article I of the Constitution.⁶⁰ In answering whether “sovereign States [are] at the mercy of the Federal Executive’s refusal to enforce the Nation’s immigration laws,”⁶¹ Scalia very starkly wrote, “[t]he delegates to the [Constitutional] Convention would have rushed to the exits” if a provision had been inserted granting the President the exclusive authority to enforce immigration laws at their discretion.⁶² In essence, Scalia believed that it was wrong for a state like Arizona to “bear[] the brunt of . . . illegal immigration,”⁶³ especially in situations where Congress fails to provide proper funding for enforcement or if the President inadequately carries out border enforcement.⁶⁴

Consistent with the majority’s holding in *Arizona v. United States* that enforcing U.S. immigration law is a federal duty, the National Guard must operate under and within the direction of federal agents and their agency orders.⁶⁵ Accordingly, when state law enforcement or the National Guard are

55. *Arizona v. United States*, 567 U.S. 387, 392–94 (2012).

56. *Id.* at 394, 416.

57. *Id.* at 410.

58. *Id.* at 395 (noting that the “[p]erceived mistreatment of aliens in the United States may lead to harmful reciprocal treatment of American citizens abroad”).

59. *See infra* Section II.A.

60. *Arizona*, 567 U.S. at 417–18 (Scalia, J., concurring in part and dissenting in part).

61. *Id.* at 436.

62. *Id.*

63. *Id.*

64. *Id.* at 434–35.

65. GUIDANCE ON STATE AND LOCAL GOVERNMENTS’ ASSISTANCE IN IMMIGRATION ENFORCEMENT AND RELATED MATTERS, U.S. DEP’T HOMELAND SEC. 4–8 (2022), <https://www.dhs.gov/sites/default/files/publications/guidance-state-local-assistance-immigration-enforcement.pdf> [<https://perma.cc/E8HK-PER8>].

deployed to the southern border, they often work in conjunction with the Department of Homeland Security—specifically, federal agents from U.S. Customs and Border Protection and U.S. Immigration and Customs Enforcement.⁶⁶ And although the National Guard may undertake a variety of tasks under the purview of these federal authorities,⁶⁷ they cannot independently remove illegal immigrants from U.S. soil,⁶⁸ and they may only arrest illegal immigrants for state law violations “unrelated to immigration.”⁶⁹

D. FACILITATING OPERATION LONE STAR THROUGH NON-BORDER STATES

In March 2021, Texas Governor Greg Abbott launched Operation Lone Star, a state border mission aimed “to combat the smuggling of people and drugs into Texas.”⁷⁰ Two months later, in June 2021, Governor Abbott and Arizona Governor Doug Ducey sent a letter to each U.S. governor, requesting that “all available law-enforcement resources” be sent to manage and eventually curtail illegal border crossings at the southern border.⁷¹ In doing so, the two governors cited the federal government’s “open-border” policies and its refusal to secure the southern border.⁷²

Non-border state governors were quick to respond to Abbott’s call. In 2023, for example, Iowa Governor Kim Reynolds sent over one hundred soldiers from the Iowa Army National Guard and over thirty officers from the Department of Public Safety to the southern border.⁷³ In 2024, Governor Reynolds authorized two additional missions, again with volunteers from both the Iowa National Guard and the Department of Public Safety.⁷⁴ For Iowa, the American Rescue Plan—a \$350 billion economic stimulus package intended

66. *Id.* at 4.

67. *Id.*

68. *Id.*

69. See Colleen Long, *Texas Wants to Arrest Immigrants in the Country Illegally. Why Would That Be Such a Major Shift?*, ASSOCIATED PRESS (Mar. 20, 2024, 12:56 PM), <https://apnews.com/article/migrants-immigration-texas-e3c6bb365005047c837ec2f8666d95be> [<https://perma.cc/9FSC-9Y48>].

70. Press Release, Office of the Texas Governor, Governor Abbott, DPS Launch “Operation Lone Star” to Address Crisis at Southern Border (Mar. 6, 2021), <https://gov.texas.gov/news/post/governor-abbott-dps-launch-operation-lone-star-to-address-crisis-at-southern-border> [<https://perma.cc/2CUH-343Y>].

71. Letter from Greg Abbott, Texas Governor, & Doug Ducey, Arizona Governor, to Fellow Governors (June 10, 2021), https://gov.texas.gov/uploads/files/press/Abbott-Ducey_Compact_Letter_to_Governors.pdf [<https://perma.cc/AW7Q-DCA3>].

72. *Id.*

73. Press Release, Kim Reynolds, Iowa Governor, Gov. Reynolds Provides Results on Operation Lone Star Deployment to U.S. Southern Border (Oct. 25, 2023), <https://governor.iowa.gov/press-release/2023-10-25/gov-reynolds-provides-results-operation-lone-star-deployment-us-southern> [<https://perma.cc/9Y37-AX2B>].

74. Press Release, Kim Reynolds, Iowa Governor, Iowa National Guard, Iowa State Patrol to Deploy Again in Support of Operation Lone Star (Mar. 28, 2024), <https://governor.iowa.gov/press-release/2024-03-28/iowa-national-guard-iowa-state-patrol-deploy-again-support-operation-lone-star> [<https://perma.cc/GWD8-PUDZ>].

to help state and local governments recover from the COVID-19 pandemic⁷⁵—served as a primary source of funding to support Operation Lone Star.⁷⁶

1. Emergency Management Assistance Compact

The statutory basis behind Operation Lone Star is the Emergency Management Assistance Compact.⁷⁷ In 1996, thirteen states entered into EMAC,⁷⁸ which Congress consented to in accordance with the Compact Clause.⁷⁹ A compact between states is best thought of as a mutual aid agreement, and the Constitution requires congressional consent to ensure states do not discriminate against each other.⁸⁰ Iowa became a member of EMAC in 1997, and today, all fifty states are members of the compact.⁸¹

EMAC was primarily intended to provide quick relief to states in response to natural disasters or related emergencies.⁸² Article I of EMAC provides:

The purpose of this compact is to provide for mutual assistance between the states entering into this compact in managing any emergency disaster that is duly declared by the Governor of the affected state, whether arising from natural disaster, technological hazard, man-made disaster, civil emergency aspects of resources shortages, community disorders, insurgency, or enemy attack.⁸³

Since its inception, EMAC has largely been effective in fulfilling its legislative purpose. Notably, EMAC helped coordinate efficient responses to major national events such as the 1998 Florida wildfires, the 9/11 terrorist attacks, Hurricane Katrina, and the COVID-19 pandemic.⁸⁴ To illustrate, in response to the 9/11 attacks, the Iowa Air National Guard escorted President

75. *President Biden Announces American Rescue Plan*, WHITE HOUSE (Jan. 20, 2021), <https://bi denwhitehouse.archives.gov/briefing-room/legislation/2021/01/20/president-biden-announc es-american-rescue-plan> [https://perma.cc/4S38-E5Y4].

76. See Reynolds, *supra* note 73.

77. Abbott & Ducey, *supra* note 71.

78. Emergency Management Assistance Compact of 1996, Pub. L. No. 104-321, 110 Stat. 3877, 3877.

79. See U.S. CONST. art. I, § 10, cl. 3.

80. See STEPHEN P. MULLIGAN, CONG. RSCH. SERV., LSB10807, INTERSTATE COMPACTS: AN OVERVIEW 1–2 (2023).

81. See *Mutual Aid Agreements (IMAC & EMAC)*, IOWA HOMELAND SEC. & EMERGENCY MGMT., <https://homelandsecurity.iowa.gov/programs/mutual-aid-agreements-imac-emac> [https://per ma.cc/D8CY-6TNZ].

82. Emergency Management Assistance Compact, 110 Stat. at 3877–78.

83. *Id.* at 3877.

84. See NAT'L EMERGENCY MGMT. ASS'N, THE EMERGENCY MANAGEMENT ASSISTANCE COMPACT: A HISTORY AND ANALYSIS OF THE EVOLUTION OF NATIONAL MUTUAL AID POLICY AND OPERATIONS, at iii–v (2021).

Bush and Air Force One to Offutt Air Force Base,⁸⁵ which is home to U.S. Strategic Command.⁸⁶ And in the wake of Hurricane Helene, the Iowa National Guard airlifted thirty-four people from a nursing home while helping supply other stranded North Carolina residents with food and water necessities.⁸⁷ Finally, during the COVID-19 pandemic, the Iowa National Guard played a vital role in the state's prevention efforts by transporting personal protective equipment and assisting healthcare providers with care coordination.⁸⁸ National Guard deployments in the scope of the aforementioned events are not only contemplated by the legislative intent of EMAC⁸⁹ but also consistent with the principles of posse comitatus.⁹⁰

However, any law enforcement personnel that are sent to the southern border under Operation Lone Star are "afforded 'the same powers . . . , duties, rights, and privileges as are afforded forces of the state in which they are performing emergency services.'"⁹¹ As previously discussed in Section I.C, the enforcement of U.S. immigration law falls squarely within the federal purview.⁹² However, because both Texas and Arizona have repeatedly tried to enforce laws that make unlawful presence in the United States criminal trespassing under the guise of the Invasion Clause,⁹³ the propensity for state and local officers from non-border states to push the bounds of federal immigration law is high.⁹⁴ In addition, several media outlets have reported otherwise

85. Vincent De Groot, *Iowa ANG on 911, 185TH AIR REFUELING WING* (Sept. 10, 2024), <https://www.185arw.ang.af.mil/News/Article-Display/Article/3901608/iowa-ang-on-911> [https://perma.cc/6JJJ-N59K].

86. *When Bush Came to Nebraska: 9/11 Through the Eyes of Those at Offutt That Day*, KMTV 3 NEWS NOW OMAHA (May 16, 2022, 1:30 PM), <https://www.3newsnow.com/news/9-11-20-years-later/when-bush-came-to-nebraska-9-11-through-the-eyes-of-those-at-offutt-that-day> [https://perma.cc/J57V-BAEH].

87. See Sabine Martin, *Iowa National Guard Rescues Nursing Home Residents Stranded by Hurricane Helene Flooding*, DES MOINES REG. (Oct. 2, 2024, 4:25 PM), <https://www.desmoinesregister.com/story/news/local/2024/10/02/iowa-national-guard-airlifts-north-carolina-nursing-home-residents-after-hurricane-helene-flooding/75481356007> (on file with the *Iowa Law Review*).

88. Hollie Knepper, *What's the Iowa National Guard's Role During COVID-19 Pandemic?*, WE ARE IOWA (Apr. 7, 2020, 5:13 PM), <https://www.weareiowa.com/article/news/local/iowa-national-guard-role-coronavirus-covid-19/524-2b3fg825-2a67-4061-95da-05c2251e7322> [https://perma.cc/7ZPU-LUW7].

89. See Emergency Management Assistance Compact of 1996, Pub. L. No. 104-321, 110 Stat. 3877, 3877.

90. See *supra* Section I.B.

91. Abbott & Ducey, *supra* note 71.

92. See *supra* Section I.C (discussing *Arizona v. United States*).

93. Alejandro Serrano, *If It Survives in Court, Texas' Immigration Law Could Upend Immigration Enforcement Nationwide*, TEX. TRIB. (Oct. 24, 2024, 5:00 AM), <https://www.texastribune.org/2024/10/24/texas-immigration-law-sb4-supreme-court-migrants-border> [https://perma.cc/8YSF-RS W2].

94. See Emily Hernandez, *What Is Operation Lone Star? Gov. Greg Abbott's Controversial Border Mission, Explained.*, TEX. TRIB. (Mar. 30, 2022, 5:00 AM), <https://www.texastribune.org/2022/03/30/operation-lone-star-texas-explained> [https://perma.cc/2DKQ-HgV2] (explaining that

unethical conduct by law enforcement personnel along the border, especially through the use of unnecessary force or even violence.⁹⁵

2. Operation Lone Star in *United States v. Abbott*

State governors have claimed authority to carry out Operation Lone Star under the relevant invasion clauses of the Constitution.⁹⁶ In fact, the U.S. Department of Justice brought suit against Governor Abbott in 2023 for installing a thousand-foot buoy system in the Rio Grande to deter migrant crossings.⁹⁷ The Western District of Texas granted a preliminary injunction against Abbott's buoy system, which the Fifth Circuit overruled.⁹⁸

Although the majority opinion did not address the "invasion" argument on its merits after declaring it a nonjusticiable political question,⁹⁹ the en banc rehearing provided both concurring and dissenting opinions with valuable perspectives.¹⁰⁰ Judge Dana Douglas wrote a vehement dissent, arguing that a state is only allowed to "engage in war" pursuant to Article I insofar as the time necessary for the federal government to respond.¹⁰¹ Otherwise, a state governor can, in theory, fight a "war in perpetuity" simply because the federal government's response to the purported invasion is deemed inadequate by the governor.¹⁰² On the other hand, Judge James Ho concurred with the majority's ruling but further elaborated that in the face of acquiescence by the executive branch, state governors have historically been allowed to use

although the National Guard cannot enforce immigration laws, they may assist in enforcing state laws such as trespassing).

95. See Adam Isacson, *Soldiers Confronting Migrants: Texas's Dangerous Precedent*, WASH. OFF. ON LATIN AM. (Sept. 12, 2024), <https://www.wola.org/analysis/soldiers-confronting-migrants-texas-dangerous-precedent> [<https://perma.cc/RKQ5-TDAX>].

96. See U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion . . ."); see also *id.* art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.").

97. *United States v. Abbott*, 110 F.4th 700, 707 (5th Cir. 2024).

98. *Id.*

99. *Id.* at 718 n.86.

100. See Jacqueline Thomsen, *Trump-Stocked Fifth Circuit Eyes Record Number of En Banc Cases*, BLOOMBERG L. (Mar. 14, 2024, 3:45 AM), <https://news.bloomberglaw.com/us-law-week/trump-stocked-fifth-circuit-eyes-record-number-of-en-banc-cases> [<https://perma.cc/L99M-VRP8>] (noting the Fifth Circuit's recent propensity for hearing notable constitutional and administrative law cases en banc). The aforementioned uptake in en banc rehearings reflects the messy procedure surrounding *United States v. Abbott*.

101. See *Abbott*, 110 F.4th at 759–60 (Douglas, J., dissenting).

102. See *id.* at 760.

state troops and local law enforcement to quell “private, non-sovereign acts” at the border.¹⁰³ Both judges’ opinions are analyzed more in Part III.¹⁰⁴

II. NON-BORDER STATE INVOLVEMENT UNDERMINES FEDERAL IMMIGRATION POLICY

This Part analyzes the problems that Operation Lone Star creates. Section I.A begins by looking into the reasons that midwestern governors have cited for supporting Operation Lone Star and then finding the flaws in those justifications. Section I.B pivots toward the inner workings of the National Guard at the southern border—namely, internal and external perceptions of the National Guard’s effectiveness, the duties guardsmen and guardswomen are tasked with, and the operations they are carrying out. Finally, Section I.C looks at the finances behind Operation Lone Star, with a specific emphasis on the state budgets of several midwestern states.

A. FLAWED JUSTIFICATIONS

A number of midwestern governors have blamed illegal immigrants for increases in crime.¹⁰⁵ However, undocumented migrants are generally not responsible for a disproportionate number of violent crimes.¹⁰⁶ Although data from U.S. Customs and Border Protection indicates that the number of “criminal aliens” has increased since 2017,¹⁰⁷ those numbers are perhaps deceptive given that the number of “Illegal Entry, Re-Entry” convictions have risen from 4,502 in 2017 to 10,935 in 2024.¹⁰⁸ “Illegal Entry, Re-Entry” itself is certainly not a violent crime, and for the most part, other crimes do not resemble such a drastic increase over the five-year period.¹⁰⁹

103. See *id.* at 726 (Ho, J., concurring) (referring to how Texas governors permitted state troops to guard the border in response to individuals illegally crossing the border to steal livestock and, in some cases, kill American ranchers).

104. See *infra* Section III.A.

105. See generally Forbes Breaking News, *JUST IN: Kristi Noem, Kim Reynolds, & More GOP Govs Join Greg Abbott to Slam Biden Border Policy*, YOUTUBE (Aug. 21, 2023), <https://www.youtube.com/watch?v=LHoh6CFglJI> [<https://perma.cc/Y8LP-YQTM>] (starting at 5:25) (highlighting the statements of Iowa Governor Kim Reynolds, South Dakota Governor Kristi Noem, and Nebraska Governor Jim Pillen).

106. Michael T. Light & Ty Miller, *Does Undocumented Immigration Increase Violent Crime?*, 56 CRIMINOLOGY 370, 395–96 (2018).

107. See *Criminal Alien Statistics*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/criminal-noncitizen-statistics> [<https://perma.cc/3NgV-2GXZ>] (defining “criminal aliens” as “individuals who have been convicted of one or more crimes . . . prior to interdiction by the U.S. Border Patrol”).

108. See *id.*

109. For example, the number of theft-related convictions went from 595 in 2017 to 697 in 2024. See *id.* At the same time, however, the number of DUIs went up from 1,596 in 2017 to 2,844 in 2024, and the number of assault, battery, and domestic violence convictions rose from 692 in 2017 to 1,084 in 2024. See *id.*

But newsworthy crimes committed by illegal immigrants have intensified the political will to combat illegal immigration.¹¹⁰ In April 2024, for example, Iowa passed a law that made illegal entry or re-entry by migrants into the state an aggravated misdemeanor, with the potential to rise to a class “C” or class “D” felony in certain circumstances.¹¹¹ After the law was blocked in federal district court,¹¹² district Judge Stephen Locher alluded to the strong political will from states to combat illegal immigration despite most efforts being at odds with the federal constitution.¹¹³ And indeed, the State of Iowa appealed the district court’s ruling to the Eighth Circuit, which initially affirmed but ultimately vacated the district court’s decision after the United States voluntarily dismissed its petition in wake of President Trump taking office.¹¹⁴ Although other midwestern states have not adopted similar laws, the rhetoric behind increases in undocumented migrants leading to increases in crime is mostly consistent from state to state.¹¹⁵ Regardless of whether data affirms or debunks that correlation, blaming migrants for increases in crime develops or further exacerbates biases against immigration,¹¹⁶ which ultimately stigmatizes immigration in its entirety.¹¹⁷

Midwestern governors have also justified sending National Guard members to the border in response to increased levels of fentanyl circulating throughout the nation’s towns and cities.¹¹⁸ For example, Iowa Governor Kim Reynolds

110. See, e.g., Michael Levenson, *Farmworker Convicted of Fatally Stabbing Iowa College Student*, N.Y. TIMES (Aug. 31, 2021), <https://www.nytimes.com/2021/05/28/us/mollie-tibbetts-murder-guilty-sentence.html> (on file with the *Iowa Law Review*) (discussing the murder of Mollie Tibbetts, a twenty-year-old college student from Brooklyn, Iowa).

111. See 2024 Iowa Acts 68–72 (codified at IOWA CODE §§ 718C.2, 718C.5 (2025)) (commonly known as “Senate File 2340”).

112. See *United States v. Iowa*, 737 F. Supp. 3d 725, 749 (S.D. Iowa 2024) (holding that Iowa’s illegal re-entry law is likely unconstitutional given the Supreme Court’s holding in *Arizona v. United States*), vacated, No. 24-2265, 2025 WL 1140834 (8th Cir. Apr. 15, 2025).

113. See *id.* at 732 (“As a matter of politics, the new legislation might be defensible. As a matter of constitutional law, it is not.”).

114. See *United States v. Iowa*, 126 F.4th 1334, 1341 (8th Cir. 2025), vacated, No. 24-2265, 2025 WL 1140834 (8th Cir. Apr. 15, 2025). The decision of the Eighth Circuit affirming the statute’s unconstitutionality was vacated after the United States voluntarily dismissed its petition after President Trump took office. See *United States v. Iowa*, No. 24-2265, 2025 WL 1140834, at *1 (8th Cir. Apr. 15, 2025).

115. For example, look no further than the events in Springfield, Ohio, leading up to the 2024 U.S. presidential election. See generally PBS NewsHour, *Ohio City with Haitian Migrant Influx Thrust into Spotlight*, YOUTUBE, at 05:20–09:02 (Sept. 9, 2024), <https://www.youtube.com/watch?v=FA8oDOcJnu8> [<https://perma.cc/TP3V-AZ4S>] (discussing the tense climate surrounding recent influxes of migrants into U.S. communities).

116. See David S. Rubenstein, *Immigration Blame*, 87 FORDHAM L. REV. 125, 146–49 (2018) (detailing negativity bias and racial bias).

117. See *id.* at 148–49 (describing how negativity bias makes people “feel exponentially more displeasure with ‘bad’ Latino migrants than satisfaction with the ‘good’ ones”).

118. See, e.g., Daniel Williams, *Governor Mike Parson Announces Deployment of National Guard/Highway Patrol to Texas Southern Border*, OZARK RADIO NEWS (Feb. 21, 2024), <https://www.ozarkradionews.com/local-news/governor-mike-parson-announces-deployment-of-national-guard>

noted that the state saw “a 500% increase in fentanyl seizures” dating back to 2020,¹¹⁹ and Missouri Governor Mike Parson remarked that “[t]he Missouri State Highway Patrol seized nearly 12,500 grams of fentanyl in 2023 alone.”¹²⁰ And this is undoubtedly a real problem in the United States.¹²¹

However, tracing sources of fentanyl is convoluted, and several countries play various roles in the global supply chain.¹²² The U.S. Drug Enforcement Administration (“DEA”) has specifically identified China, India, and Mexico as countries that house “sophisticated” fentanyl-producing plants, and noted that cooperation with each respective government is the best way to crack down on drug trafficking into the United States.¹²³ Some policy analysts have suggested that U.S. foreign policy has indeed been effective in reducing levels of fentanyl in the country, particularly through demanding increased cooperation by foreign governments such as China and Mexico.¹²⁴ During the first Trump Administration, for example, China agreed to impose “maximum penalties” on fentanyl traffickers and manufacturers.¹²⁵ And more recently, then-President Biden discussed China’s role in reducing the global supply chain of fentanyl at multiple summits with President Xi Jinping.¹²⁶

At the same time, it is difficult for U.S. lawmakers to hang their hats on assurances from the Chinese and Mexican governments. The former is known

-highway-patrol-to-texas-southern-border [https://perma.cc/4SN4-3W32]; Press Release, Gov. Jim Pillen, Gov. Pillen Visits Border, Reaffirms Nebraska’s Commitment to Texas (Feb. 5, 2024), https://governor.nebraska.gov/press/gov-pillen-visits-border-reaffirms-nebraska%E2%80%99s-commitment-texas [https://perma.cc/TQQ6-QB6N]; Press Release, Kim Reynolds, *supra* note 73.

119. Press Release, Kim Reynolds, *supra* note 73.

120. See Williams, *supra* note 118.

121. See, e.g., *The Fentanyl Crisis in America: Inaction Is No Longer an Option: Hearing Before the Subcomm. on Crime & Fed. Gov’t Surveillance of the H. Comm. on the Judiciary*, 118th Cong. 2 (2023) (statement of Rep. Andy Biggs, Chairman, H. Judiciary Subcomm. on Crime & Fed. Gov’t Surveillance) (“Between 1999 and 2020, approximately 564,000 people died from overdoses involving an opioid prescription or illicit. In 2021, however, overdose deaths surpassed 100,000, with [sixty-seven] percent of those deaths involving fentanyl.”); Yanzhong Huang & Marcel Arsenault, *Washington and Beijing Don’t Understand Each Other’s Fentanyl Positions*, FOREIGN POL’Y (Aug. 27, 2024, 2:32 PM), https://foreignpolicy.com/2024/08/27/china-us-fentanyl-crisis-perceptions-drug-trafficking (on file with the *Iowa Law Review*) (“Fentanyl misuse has emerged as a top [issue in the 2024 election], with 80 percent of swing-state voters considering it important in their voting decisions, outranking topics such as abortion, climate change, and international conflicts.”).

122. See DEA, FENTANYL FLOW TO THE UNITED STATES 2 (2020).

123. See *id.* at 2–4.

124. Brian Mann, *The Pipeline of Deadly Fentanyl into the U.S. May Be Drying Up, Experts Say*, NPR (Oct. 1, 2024, 6:03 PM), https://www.npr.org/2024/09/30/nx-s1-5124997/fentanyl-overdose-opioid-https-drug-cartel-xyzazine-tranq-mexico-china [https://perma.cc/28BX-FGZM].

125. Press Release, Off. of Nat’l Drug Control Pol’y, ONDCP Statement on Chinese Prosecution and Sentencing of Fentanyl Traffickers and Producers (Nov. 7, 2019), https://trumpwhitehouse.archives.gov/briefings-statements/ondcp-statement-chinese-prosecution-sentencing-fentanyl-traffickers-producers [https://perma.cc/79MZ-3ZU8] (noting that President Xi Jinping agreed to classify all “fentanyl-related substances as Controlled Substances”).

126. Huang & Arsenault, *supra* note 121.

to leverage its cooperation in exchange for “concessions” regarding the independence of Taiwan,¹²⁷ and the latter is said to be under the influence of Mexican drug cartels.¹²⁸ So, while trends surrounding recent U.S. foreign policy look positive,¹²⁹ it still must account for the current fentanyl problem at the border.¹³⁰

To make matters more complicated, most fentanyl that passes through the southern border can be attributed to per se legal crossings that are facilitated by drug cartels.¹³¹ Put differently, most fentanyl is actually facilitated into the United States through legal ports of entry.¹³² And because the people who want to bring fentanyl into the United States will find new creative ways to smuggle it, the flow of fentanyl will likely continue regardless of the number of National Guard soldiers present at the border.¹³³ In other words, America’s fentanyl problem will be better combated with strong, effective foreign policymaking than with a larger border presence.¹³⁴

B. INEFFECTIVENESS

Smooth and effective border operations are key to immigration. When border personnel are coordinating together and being equipped with the necessary tools to operate efficiently, then the economic benefits of immigration become apparent, such as the diversification of ideas.¹³⁵ But when National

127. *Id.*

128. Vanda Felbab-Brown, *How the Sinaloa Cartel Rules*, BROOKINGS INST. (Apr. 4, 2022), <https://www.brookings.edu/articles/how-the-sinaloa-cartel-rules> [<https://perma.cc/KN39-XQ9Q>].

129. *See generally* The Journal, *China Is Finally Doing Something About the Fentanyl Crisis*, WALL ST. J. (Aug. 13, 2024, 4:37 PM), <https://www.wsj.com/podcasts/the-journal/china-is-finally-doin-g-something-about-the-fentanyl-crisis/obcd7354-18d7-4d06-8c6e-61d2dc2b41fd> [<https://perma.cc/XNQ9-PMFN>] (noting that after the summit meetings between President Biden and President Xi, China slowly began taking significant steps in dealing with the fentanyl crisis).

130. Christian Penichet-Paul, *Illicit Fentanyl and Drug Smuggling at the U.S.-Mexico Border: An Overview*, FORUM (Oct. 25, 2023), <https://immigrationforum.org/article/illicit-fentanyl-and-drug-smuggling-at-the-u-s-mexico-border-an-overview> [<https://perma.cc/6ECV-25TW>] (finding that border authorities seized 27,000 pounds of fentanyl in 2023).

131. *See* Joel Rose, *Who Is Sneaking Fentanyl Across the Southern Border? Hint: It’s Not the Migrants*, NPR (Aug. 9, 2023, 5:00 AM), <https://www.npr.org/2023/08/09/1191638114/fentanyl-smuggling-migrants-mexico-border-drugs> [<https://perma.cc/GRB8-L9VA>]; *see also* Susan Benesch & Catherine Buerger, Opinion, *Many Americans Believe Migrants Bring Fentanyl Across the Border. That’s Wrong and Dangerous*, L.A. TIMES (Feb. 12, 2024, 2:01 AM), <https://www.latimes.com/opinion/story/2024-02-12/fentanyl-border-migrants-immigration-mexico-overdose-misinformation> (on file with the *Iowa Law Review*).

132. *See* Penichet-Paul, *supra* note 130.

133. *See, e.g.*, Felipe Puerta, *5 Creative Ways Drug Traffickers Evade Authorities*, INSIGHT CRIME (Sept. 18, 2018), <https://insightcrime.org/news/5-creative-ways-drug-traffickers-evade-authorities> [<https://perma.cc/USD7-F6RP>].

134. *See supra* notes 122–33 and accompanying text.

135. *See Every State Is a Border State: Examining Secretary Mayorkas’ Border Crisis: Hearing Before the H. Comm. on Homeland Sec.*, 118th Cong. 57–58 (2023) [hereinafter *Every State Is a Border State*] (statement of David Bier, Assoc. Dir. of Immigr. Stud., Cato Inst.) (stating that “the \$1 trillion in

Guard members are sent to the southern border from all over the country without a well-defined goal, the National Guard gets reduced to a political football, and immigrants are labeled as “security threats” or “enemy combatants.”¹³⁶ It thus follows that the purported successes surrounding Operation Lone Star are misleading.¹³⁷

Although the rhetoric that “every state is a border state” has appealed to many¹³⁸ and has even made its way before lawmakers in Washington, D.C.,¹³⁹ most citizens in Iowa, Nebraska, or Missouri, for example, should have no trouble supporting their local politicians’ decisions surrounding illegal immigration, and understandably so. After all, military bases are not being built in their backyards, and their recreational areas have not been turned into areas of constant tension between migrants and soldiers. So, if a governor chooses to combat illegal immigration by taking matters into their own hands, many may commend that action as proactive, rather than reckless.¹⁴⁰

But personal accounts from guardsmen and guardswomen stationed in border towns are “mixed.”¹⁴¹ On the one hand, some members believe they are gaining valuable experience by working under agencies that demonstrate how federal missions are coordinated.¹⁴² Additionally, many Guard members

lost productivity from unfilled open jobs in this country” is a major driving factor in inflation, and legal immigration can help fill these vacant positions, thereby lowering the costs of goods).

136. Joseph Nunn, *End Military Operations at the U.S.-Mexico Border*, BRENNAN CTR. FOR JUST. (May 22, 2023), <https://www.brennancenter.org/our-work/analysis-opinion/end-military-operations-us-mexico-border> [<https://perma.cc/3K4H-3C7B>].

137. A Reddit thread criticized Governor Reynolds’ motivations for sending Iowa National Guard members down to the southern border as purely political. See Classiceagle63, Comment to *National Guard Mission at US-Mexico Border Has ‘No Military Training Value,’ Chief Warns*, REDDIT (June 19, 2024), https://www.reddit.com/r/Iowa/comments/1djf7sy/national_guard_mission_at_usmexico_border_has_no/?q=sit+&type=comments&cId=fegc0339-7f3b-4788-b315-3927ofa286ba&Id=277381e0-8746-418f-95ff-ocbd78a7d51a [<https://perma.cc/AX2K-SEXK>] (positing that Iowa’s National Guard members “sit in hotel rooms,” play video games, and are otherwise extremely limited in terms of their law enforcement capacity at the southern border).

138. See Julia Johnson, *Heartland Voters Feeling Strain of Mass Migration: ‘Every State Is a Border State,’* FOX NEWS (Apr. 15, 2024, 4:00 AM), <https://www.foxnews.com/politics/heartland-voters-feeling-strain-mass-migration-every-state-border-state> [<https://perma.cc/F4UY-US55>].

139. See generally *Every State Is a Border State*, *supra* note 135, at 4–7 (statement of the Honorable Sheila Jackson Lee) (calling on Democrats and Republicans to set aside their differences to pass legislation that would strengthen the Immigration and Nationality Act of 1990).

140. This is not intended to diminish the magnitude of those who have been indirectly affected by fentanyl use or undocumented immigrant crime. “Migrant blame,” however, is deeply rooted in our nation’s history. See Rubenstein, *supra* note 116, at 135 (“[E]ven lawfully present migrants get blamed for societal ills.”).

141. Will Martin, *Southwest Border Mission Spurs ‘Mixed Feelings’ Among Guardsmen*, RSRV. & NAT’L GUARD MAG. (Feb. 1, 2023), <https://reservenationalguard.com/reserve-guard-deployment/southwest-border-mission-spurs-mixed-feelings-among-guardsmen> [<https://perma.cc/2XJQ-LVKW>].

142. Carson Frame, *Here’s What Life Is Like for National Guard Troops on the Border*, TEX. PUB. RADIO (Mar. 6, 2020, 3:28 PM), <https://www.tpr.org/military-veterans-issues/2020-03-06/heres-what-life-is-like-for-national-guard-troops-on-the-border> [<https://perma.cc/73YW-FDQS>].

have spoken highly about the communities in which they are stationed.¹⁴³ On the other hand, some Guard members feel that they are being exploited for political purposes.¹⁴⁴ But one of the major concerns with National Guard deployments to the southern border—which does not receive the attention it deserves—relates to the mental health of Guard members themselves.¹⁴⁵

1. *Army Times* Investigation

Davis Winkie—a former National Guard member and the senior Army reporter for the *Military Times*¹⁴⁶—conducted an in-depth analysis into the spirit of Operation Lone Star in 2021 for the *Army Times*.¹⁴⁷ In doing so, Winkie analyzed numerous anonymous reports submitted to the *Army Times* and conducted several interviews with National Guard members, both of which revealed a disheartening state of affairs.¹⁴⁸

First, Winkie reported that “only three Army Guard troops died on overseas deployments in 2021, out of tens of thousands.”¹⁴⁹ However, Operation Lone Star has yielded seventeen deaths of National Guard troops since 2021.¹⁵⁰ Of the deaths that were reported, four were due to suicide, two were due to accidental shootings, and another was the result of a medical emergency occurring at a hotel.¹⁵¹ The causes of the remaining deaths have not yet been reported.¹⁵² Nevertheless, recurring suicide, accidental, and unknown deaths exert particularly unnerving feelings about the actual mission at hand.¹⁵³

143. For example, the Hildalgo County La Quinta Inn—where guard members from Iowa and Kentucky were quartered—displays “[a]n appreciation plaque . . . behind the check-in desk.” *Id.* Many guard members also “blend into the community” by spending free time at local gyms and restaurants. *Id.*

144. Martin, *supra* note 141.

145. See Davis Winkie, *Death, Drugs and a Disbanded Unit: How the Guard’s Mexico Border Mission Fell Apart*, ARMY TIMES (Dec. 8, 2021) [hereinafter Winkie, *Death, Drugs and a Disbanded Unit*], <https://www.armytimes.com/news/your-army/2021/12/08/death-drugs-and-a-disbanded-unit-how-the-guards-mexico-border-mission-fell-apart> [<https://perma.cc/FAZ4-U4UJ>].

146. Davis Winkie, LINKEDIN, <https://www.linkedin.com/in/daviswinkie> [<https://perma.cc/A6VE-SZZH>].

147. See Winkie, *Death, Drugs and a Disbanded Unit*, *supra* note 145.

148. See *id.*

149. See *id.*

150. Jonathan Lehrfeld, *At Least 17 Guardsmen Have Died While on Texas Border Mission*, ARMY TIMES (Aug. 29, 2024), <https://www.armytimes.com/news/your-army/2024/08/29/at-least-17-guardsmen-have-died-while-on-texas-border-mission> [<https://perma.cc/8KH2-G5BF>].

151. *Id.*

152. *Id.*

153. See THOMAS HOWARD SUITT III, HIGH SUICIDE RATES AMONG UNITED STATES SERVICE MEMBERS AND VETERANS OF THE POST-9/11 WARS 3 (2021), https://watson.brown.edu/costsofwar/files/cow/imce/papers/2021/Suitt_Suicides_Costs%20of%20War_June%2021%202021.pdf [<https://perma.cc/BCP3-KYLX>] (describing that suicide rates among U.S. military personnel come from a myriad of factors, many of which are not under the soldier’s control).

In addition to these noncombat deaths, Winkie reported extensive alcohol and drug abuse among guardsmen and guardswomen.¹⁵⁴ In doing so, he found that members of the National Guard have faced more legal and administrative proceedings during the course of Operation Lone Star, at least compared to similar deployments.¹⁵⁵ Although these types of problems can happen during the course of any military deployment, the fact that soldiers do not spend enough time performing meaningful work is a likely driving factor.¹⁵⁶

There is ample evidence that the National Guard is indeed ineffective at the southern border. And this ineffectiveness is the result of posse comitatus, which forbids troops from enforcing the law.¹⁵⁷ That is to say, Guard members are severely limited in terms of what type of missions they can carry out at the border.¹⁵⁸ For most National Guard members, this limitation is demoralizing and misconstrues their motto of “Always Ready, Always There.”¹⁵⁹

The primary missions charged to National Guard troops at the border are around-the-clock monitoring of designated “lookout sites.”¹⁶⁰ Here, soldiers are tasked with searching for migrants with binoculars and reporting to federal agents if they find anything.¹⁶¹ But reports have indicated that sometimes troops are so underequipped that they are looking into the dark and barren desert without night vision goggles.¹⁶² A news team even captured two guardsmen sleeping while migrants stood outside their truck, waiting to turn themselves in and begin the asylum process.¹⁶³ “We’re useless and [U.S. Customs and Border Patrol] treats us like we’re useless. We cost the taxpayer millions of dollars in pay, benefits, per diem, hotels, [and] vehicle rentals,” remarked an anonymous National Guard officer.¹⁶⁴

2. General Hokanson’s Senate Testimony

General Daniel R. Hokanson, who served as the U.S. National Guard Chief during Operation Lone Star, has stated that the presence of the National Guard

154. See Winkie, *Death, Drugs and a Disbanded Unit*, *supra* note 145.

155. *Id.*

156. See *supra* note 137 and accompanying text.

157. See *supra* notes 44–48 and accompanying text (describing the Posse Comitatus Act as applied to Title 10 and Title 32 status).

158. See Winkie, *Death, Drugs and a Disbanded Unit*, *supra* note 145.

159. See *id.*; see also Alan W. Dowd, *National Guard Lives Up to Name, Motto*, AM. LEGION (Mar. 15, 2021), <https://www.legion.org/information-center/news/landing-zone/2021/march/national-guard-lives-up-to-name-motto> [<https://perma.cc/6HGQ-TKSN>].

160. See Winkie, *Death, Drugs and a Disbanded Unit*, *supra* note 145.

161. See *id.*

162. See *id.*

163. See *id.*

164. See *id.*

at the southern border provides “no military training value.”¹⁶⁵ He believes that a National Guard soldier’s “military skill set” does not translate to border missions, and that takes away from the time that can be spent preparing for more relevant training exercises.¹⁶⁶ Similarly, U.S. Senator Ruben Gallego (D-AZ), a former Marine and a member of the Armed Services Committee, has argued that “100 customs officers is better than 100 National Guardsmen.”¹⁶⁷ Before being elected to the U.S. Senate and as the representative of Arizona’s Third Congressional District, Gallego introduced two bills that would help streamline the hiring process for federal agents and accelerate the asylum process.¹⁶⁸

It also makes perfect sense why U.S. Customs and Border Protection (“CBP”) officers and National Guard soldiers are prone to butt heads at the southern border—both undergo very different training regimens.¹⁶⁹ A stark difference is that a prospective National Guard member goes through Basic Combat Training, where they are trained to become soldiers.¹⁷⁰ CBP trainees, on the other hand, are trained to become law enforcement officers.¹⁷¹ Significantly, CBP officers spend extensive time in the classroom to understand immigration law and international trade law, and must be well-versed in their communication skills.¹⁷²

Military police units have also been deployed to the southern border with the National Guard.¹⁷³ Unlike the average guardsman or guardswoman, however, military police officers are trained both as soldiers and police officers.¹⁷⁴ Additionally, they often have similar skills to those of a CBP agent: being

165. *A Review of the President’s Fiscal Year 2025 Budget Request for the National Guard and Reserves: Hearing Before the Subcomm. on Def. of the S. Comm. on Appropriations*, 118th Cong. (2024) (statement of Gen. Daniel R. Hokanson, Chief of the National Guard Bureau).

166. *Id.*

167. See Winkie, *Death, Drugs and a Disbanded Unit*, *supra* note 145.

168. See Samantha-Jo Roth, *Gallego Becomes First Democrat to Back Border Bill to Expand CBP Hiring*, WASH. EXAM’R (Aug. 5, 2024, 9:14 PM), <https://www.washingtonexaminer.com/news/campaigns/congressional/3111590/gallego-first-democrat-back-border-bill-to-expand-cbp-hiring> (on file with the *Iowa Law Review*).

169. *Compare CBP Officer*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/careers/cbp-o-basic-training-academy> [<https://perma.cc/W5DQ-64BJ>], with *Guard FAQs*, ARMY NAT’L GUARD, <https://nationalguard.com/guard-faqs> [<https://perma.cc/9AP9-5HDP>].

170. See *Welcome to Basic*, ARMY NAT’L GUARD, <https://nationalguard.com/basic-combat-training> [<https://perma.cc/RJC9-MTZJ>] (outlining the ten weeks of basic training, where trainees learn how to handle specialized weapons, undertake physical tests, and prepare for combat).

171. See *CBP Officer*, *supra* note 169.

172. See *id.*

173. See Rose L. Thayer, *Military Police, Engineer Units from Army, Marines Deploy to the US-Mexico Border*, STARS & STRIPES (Jan. 24, 2025), <https://www.stripes.com/theaters/us/2025-01-24/military-soldiers-marines-deploy-mexico-border-16589946.html> [<https://perma.cc/D5MT-22VY>].

174. *Military Police*, ARMY NAT’L GUARD, <https://nationalguard.com/31b-military-police> [<https://perma.cc/6V35-2UNB>].

knowledgeable on relevant laws and communicating with people.¹⁷⁵ However, the military police are a rather extreme type of personnel that is sent to deal with border issues, as they practice in a very specialized type of law enforcement and even engage in combat support across the globe.¹⁷⁶

Furthermore, citizens in border towns are directly affected when thousands of troops are deployed to the border.¹⁷⁷ In Eagle Pass, Texas—home to one of the busiest land ports of entry in the southwestern United States¹⁷⁸—local residents have described their town as being “militarized.”¹⁷⁹ In order to support the influx of troops, the state turned a public park into an eighty-acre military base.¹⁸⁰ Additionally, helicopters, speedboats, and other patrol vehicles engage in around-the-clock monitoring, which now consumes once-scenic areas alongside the Rio Grande, where families could once fish or just enjoy the outdoors.¹⁸¹ Taken together, turning towns into heavily militarized areas impacts civilians’ everyday lives.¹⁸²

C. ECONOMIC COSTS

As described above, midwestern states’ mobilizations of troops in support of Operation Lone Star are not funded by the federal government.¹⁸³ Accordingly, state taxpayers almost certainly bear the cost to some degree.¹⁸⁴ Along with paying each soldier a salary, states must transport soldiers and supplies down to the border and take care of food and lodging.¹⁸⁵ These

175. See *id.*

176. Jason Sessions, *To Serve & Protect: The Importance of Military Police in the U.S. Army*, U.S. ARMY V CORPS (Sept. 25, 2024), <https://www.vcorps.army.mil/Newsroom/Articles/Article-Display/Article/3916811/to-serve-protect-the-importance-of-military-police-in-the-us-army> [https://perma.cc/R8PS-3UWE].

177. See generally Alejandro Serrano, *Eagle Pass Residents Have Mixed Feelings About Sharing Their City with the National Guard*, TEX. TRIB. (July 15, 2024, 5:00 AM), <https://www.texastribune.org/2024/07/15/texas-mexico-border-national-guard-migrants-eagle-pass> [https://perma.cc/2RHV-7QZ2] (describing the effects of Operation Lone Star in Eagle Pass, Texas).

178. See Noi Mahoney, *Borderlands Mexico: Port of Eagle Pass, Texas, Fastest-Growing Border Crossing in the US*, FREIGHTWAVES (May 26, 2024), <https://www.freightwaves.com/news/borderlands-mexico-port-of-eagle-pass-texas-fastest-growing-border-crossing-in-the-u-s> [https://perma.cc/6YD5-LTG2].

179. See Serrano, *supra* note 177.

180. See *id.*

181. See *id.*

182. See *id.*

183. See *supra* note 165 and accompanying text.

184. See, e.g., *Texas Wants \$11 Billion Back from the Government*, NEWSWEEK (Jan. 24, 2025, 7:38 PM), <https://www.newsweek.com/texas-wants-11-billion-back-government-2020125> [https://perma.cc/UXN6-QLKV] (illustrating that Texas has spent an enormous amount on Operation Lone Star and might not receive federal reimbursement, even under the Trump Administration).

185. *States Pledged Hundreds of Troops and Spent Millions to Help Texas at the Border So Far This Year*, UTAH NEWS DISPATCH (July 15, 2024, 6:05 AM), <https://utahnewsdispatch.com/2024/07/15/states-pledged-troops-spent-millions-to-help-at-texas-border> [https://perma.cc/UW7J-Hg8B].

expenses can quickly add up, especially when states assume multiple years' worth of deployments.¹⁸⁶

In 2024, Indiana spent \$7.1 million for a ten-month deployment of fifty of its National Guard troops.¹⁸⁷ Similarly, the Kansas legislature approved a \$15.7 million appropriation to deploy members of the Kansas National Guard to the southern border.¹⁸⁸ And Iowa is estimated to have spent roughly \$4 million between 2021 to 2024.¹⁸⁹ Other midwestern states have been a bit more conservative with their appropriations: Missouri has spent about \$2.2 million, and Nebraska has spent about \$1.27 million.¹⁹⁰

Operation Lone Star has also raised some ethical issues concerning the source of funding. Some of the aforementioned midwestern states (namely, Iowa) have pulled dollars from the American Rescue Plan,¹⁹¹ the \$1.9 trillion economic stimulus enacted by the Biden Administration to help recover from the COVID-19 pandemic.¹⁹² The plan allocated \$350 billion to state and local governments, and permitted a broad range of uses, so long as they are economic in nature.¹⁹³ For all practical purposes, Operation Lone Star is not economic in nature, but the payments have nevertheless been justified under a catchall provision that requires a nexus between government spending and

186. E.g., Cox, *supra* note 4 (“Since 2021, Iowa, Missouri and Nebraska have together sent 519 National Guard service members and 143 state troopers and other law enforcement personnel to the border, according to information published by the states. The combined cost is approximately \$7.1 million.”).

187. Leslie Bonilla Muñiz & Niki Kelly, *Indiana National Guard Texas Deployment to Cost \$7 Million*, IND. CAP. CHRON. (Feb. 16, 2024, 11:47 AM), <https://indianacapitalchronicle.com/2024/02/16/indiana-national-guard-texas-deployment-to-cost-7-million> [https://perma.cc/L8QK-FCR2].

188. Tim Carpenter, *Kansas Legislature Votes to Affirm \$15.7 Million Contribution to Texas Border Security*, KAN. REFLECTOR (Apr. 29, 2024, 2:48 PM), <https://kansasreflector.com/2024/04/29/senate-rebuffs-kansas-governor-affirms-15-7-million-contribution-to-texas-border-security> [https://perma.cc/V8NC-TYRC].

189. In 2021, Iowa used three hundred thousand dollars from the American Rescue Plan to fund Operation Lone Star. See Katie Akin, *Iowa Spent Roughly \$300k on State Troopers' Trip to Southern Border*, IOWA CAP. DISPATCH (July 28, 2021, 4:08 PM), <https://iowacapitaldispatch.com/2021/07/28/iowa-spent-roughly-300k-on-state-troopers-trip-to-southern-border> [https://perma.cc/3ZBX-U6S8]. Then, in 2023, the state increased funding to nearly two million dollars. See Robin Opsahl, *Reynolds Allocated Nearly \$2 Million to Send Iowa Troops to the Border*, IOWA CAP. DISPATCH (Oct. 25, 2023, 4:24 PM), <https://iowacapitaldispatch.com/2023/10/25/reynolds-allocated-nearly-2-million-to-send-iowa-troops-to-the-border> [https://perma.cc/5WUM-ZH4R]. And in 2024, Governor Reynolds allocated another two million to Operation Lone Star. See Pepper Purpura, *Iowa National Guard, Public Safety Officers Heading to Texas Border*, KCCI DES MOINES 8 NEWS (Mar. 28, 2024, 11:37 PM), <https://www.kcci.com/article/iowa-national-guard-department-of-public-safety-deploying-to-texas-border/60336012> [https://perma.cc/4XFT-DXXJ].

190. See Cox, *supra* note 4.

191. See Press Release, Kim Reynolds, *supra* note 73.

192. HOLLAND & KNIGHT, AMERICAN RESCUE PLAN ACT OF 2021: SUMMARY 1 (2021), <https://www.hklaw.com/media/files/insights/publications/2021/03/americanrescueplankeyprovision.s.pdf> [https://perma.cc/ZD46-TB6Q].

193. *Id.* at 16–17.

the pandemic.¹⁹⁴ Although the appropriations are outwardly lawful under the act, those funds are very likely being diverted from those who need them most.

Funding for Operation Lone Star has also uncovered the underlying political motivations for continuing the mission, even if its results are questionable. For one of South Dakota's National Guard deployments in 2021, then-Governor Kristi Noem used a one-million-dollar donation from Willis Johnson—a billionaire GOP donor—to fund the border mission.¹⁹⁵ A nonprofit organization filed suit against the South Dakota National Guard, seeking records related to Johnson's donation and Noem's deployment under the Freedom of Information Act.¹⁹⁶ The settlement ultimately revealed communications that ensured that then-Governor Noem would stress "anti-immigration rhetoric" to justify the donation and its application.¹⁹⁷

III. REESTABLISHING AND REINFORCING FEDERAL SUPREMACY

The aftermath of the 2024 U.S. election created a lot of public uncertainty, especially in the realm of immigration.¹⁹⁸ Theoretically, with President Trump in office, midwestern governors would no longer need to take matters into their own hands, thereby eliminating the need to deploy their National Guard to the southern border.¹⁹⁹ But President Trump's policy proposals indicate that these governors may instead see their roles increase.²⁰⁰ In order to carry out his plan of conducting "the 'largest domestic deportation operation in American history,'" President Trump has stated his intention to "deputize local police officers and National Guard soldiers voluntarily contributed by Republican states."²⁰¹

Trump's cabinet picks further exacerbate some uncertainty in how the National Guard may be used at the border. Former South Dakota Governor Kristi Noem, who was actively involved in Operation Lone Star,²⁰² was confirmed as the Secretary of Homeland Security and will oversee U.S. Immigration and

194. *Id.* at 17.

195. Sara Wiatrak, *How Kristi Noem's Team Prepared to Defend a \$1 Million Donation to Send SD Troops to the Border*, CITIZENS FOR RESP. & ETHICS WASH. (Oct. 3, 2023), <https://www.citizensforethics.org/reports-investigations/crew-investigations/how-kristi-noems-team-prepared-to-defend-a-1-million-donation-to-send-sd-troops-to-the-border> [<https://perma.cc/4MBT-YPC7>].

196. *Id.*

197. *Id.*

198. See Megan Hogan, *Trump vs. Harris on Immigration: Future Policy Proposals*, PETERSON INST. FOR INT'L ECON. (Sept. 9, 2024, 9:00 AM), <https://www.piie.com/blogs/realtime-economics/2024/trump-vs-harris-immigration-future-policy-proposals> [<https://perma.cc/Z6JV-3UGL>].

199. See *supra* note 4 and accompanying text (discussing the Biden Administration's "open border" immigration policies as the basis for taking action at the southern border).

200. See Hogan, *supra* note 198.

201. See *id.*

202. See *supra* notes 195–97 and accompanying text (discussing Kristi Noem's involvement in Operation Lone Star).

Customs Enforcement.²⁰³ Elsewhere, Trump established the Department of Government Efficiency, a “non-government operation” aimed at cutting “government waste and delay.”²⁰⁴ Of the numerous agencies that have been scrutinized by President Trump, however, the Department of Homeland Security is not one of them.²⁰⁵ Instead, Trump increased the number of federal CBP agents, with increasing salaries and bonuses “across-the-board.”²⁰⁶ Granted, this is probably a better alternative than a haphazard blend of the National Guard, local law enforcement, and federal CBP agents at the border. But at the same time, increasing the number of persons at the border will do little to address the perceived ramifications of illegal immigration. Nor does it account for a governor’s ability to circumvent federal law when a future presidential administration changes its immigration policy.

Accordingly, this Part discusses the need for federal action to reinforce federal supremacy at the border before state involvement becomes the norm. Section III.A details why judicial action is the most logical route to strengthening the principles behind the Posse Comitatus Act and refining the Supreme Court’s holding in *Arizona v. United States*. Section III.B then contemplates how legislative action could potentially solve the aforementioned issues.

A. POST-UNITED STATES V. ABBOTT

In *United States v. Abbott*, the Fifth Circuit majority opinion bypassed an in-depth discussion of the Invasion Clause by deeming it a nonjusticiable political question.²⁰⁷ Although other circuits have agreed that “there are no manageable standards to ascertain whether or when an influx of illegal immigrants should be said to constitute an invasion,”²⁰⁸ those cases were premised on the idea that the federal government’s immigration policy had burdened the state’s fiscal policies in some capacity.²⁰⁹ In the context of Operation Lone Star, however, no state is seeking monetary damages from the federal government because of its failure to enforce immigration policies.

203. See Mark Walker, *Rancher, Politician, Trump Ally: Who Is Kristi Noem, the Homeland Security Pick?*, N.Y. TIMES (Nov. 16, 2024), <https://www.nytimes.com/2024/11/13/us/politics/kristi-noem-homeland-security.html> (on file with the *Iowa Law Review*).

204. *The Musk-Ramaswamy Project Could Be Trump’s Best Idea*, WALL ST. J. (Nov. 15, 2024, 5:40 PM), <https://www.wsj.com/opinion/departments-of-government-efficiency-elon-musk-vivek-ramaswamy-donald-trump-1e086dab> (on file with the *Iowa Law Review*).

205. Eric Katz & Sean Michael Newhouse, *An Agency-by-Agency Look at Trump’s Plan to Overhaul Government*, GOV’T EXEC. (Nov. 6, 2024), <https://www.govexec.com/management/2024/11/agency-by-agency-look-trumps-plan-overhaul-government/400885> [<https://perma.cc/DK8G-GR24>].

206. *Id.*

207. *United States v. Abbott*, 110 F.4th 700, 718 n.86 (5th Cir. 2024).

208. *California v. United States*, 104 F.3d 1086, 1091 (9th Cir. 1997).

209. See, e.g., *Padavan v. United States*, 82 F.3d 23, 25 (2d Cir. 1996) (“According to the complaint in this case, the federal government has failed to control illegal immigration, and this failure has had serious financial consequences for New York State.”); *New Jersey v. United States*, 91 F.3d 463, 465 (3d Cir. 1996) (same for New Jersey); *California*, 104 F.3d at 1089 (same for California).

Instead, we have a situation where Texas itself—and technically speaking, roughly half of the states—have invoked the Invasion Clause to take immigration matters into their own hands. Given that several federal judges have opined on the matter, the timing for judicial resolution is perfect.²¹⁰

For example, Judge James Ho’s concurring opinion indicated that Governor Abbott and roughly half of America’s governors made “a good faith invocation” of the Constitution’s Invasion Clause, which related the illegal immigration crisis to an “invasion.”²¹¹ And indeed, a proper invocation of the Invasion Clause enables the states to claim a right to defend themselves.²¹² But as seen in *Arizona v. United States*, this line of reasoning is at odds with basic principles of federal immigration law and prior Supreme Court precedent—immigration is not a policy issue left to the states.²¹³

Equating illegal immigration to an invasion opens up a realm of uncertainty in terms of the doctrine’s applicability and duration. As Fifth Circuit Judge Dana Douglas wrote in her dissenting opinion in *Abbott v. United States*, even if a state makes a valid invocation of the Invasion Clause, the three-year stint of Operation Lone Star is at odds with the plain text of the Constitution.²¹⁴ Judge Douglas focused on the language “or in such imminent Danger as will not admit of delay” in Article 1, Section 10, Clause 3, which means that states can only act until Congress “can be notified and respond.”²¹⁵ Importantly, she stated that “if the window of Texas’s limited war powers depended on the *adequacy* of the federal government’s response, then Congress’s failure to respond to an invasion, *even when it had time to respond*, would enable Governor Abbott to engage in acts of war in perpetuity.”²¹⁶ This is the correct interpretation of the Invasion Clause.

In essence, a state’s determination that the federal government’s response to immigration is inadequate does not give it the right to intervene by itself. But that is exactly what midwestern state governors are doing when they send their National Guards to the southern border. The federal government has had time to respond, and for better or worse, has made its policy determination.²¹⁷ The remedy is not in sending all military and law enforcement personnel to the southern border, but in the political process. And it should

210. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 112 (6th ed. 2019) (“[T]he ripeness doctrine seeks to separate matters that are premature for review because the injury is speculative and never may occur, from those cases that are appropriate for federal court action.”).

211. *Abbott*, 110 F.4th at 725–28 (Ho, J., concurring).

212. *Id.*

213. See *Arizona v. United States*, 567 U.S. 387, 394 (2012) (“The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens.”).

214. *Abbott*, 110 F.4th at 759 (Douglas, J., dissenting).

215. *Id.*

216. *Id.* at 760.

217. See Joseph Nunn, *Biden Can, but Shouldn’t, Federalize the Texas National Guard*, JUST SEC. (Feb. 7, 2024), <https://www.justsecurity.org/91862/biden-can-but-shouldnt-federalize-the-texas-national-guard> [<https://perma.cc/KK7H-RESY>].

be noted that the political process played out: Donald Trump was elected to his second term in office and will take a different position toward immigration than the Biden Administration. Then, if or when the American people do not like his immigration policies, they may choose to elect someone else.

All this to say, immigration policy is a federal problem. In practice, the National Guard not only plays an extremely limited role at the border, but the presence of the military in a civil area undermines constitutional principles. If and when a reviewing court is presented with this question, it should look to first principles and restore immigration policy to the exclusive hands of the federal government.

B. COMPACTS AS CONTRACTS

Because EMAC is the statutory precept for Operation Lone Star, it is possible for Congress to revoke its consent to the compact.²¹⁸ After all, EMAC functions as a partnership agreement among the states, and the Supreme Court has stated that principles of contract law apply to interstate compacts.²¹⁹ Specifically, in *Tarrant Regional Water District v. Herrmann*, the Court noted that if the terms of a compact are ambiguous, then courts may look to the course of performance, course of dealing, and usage of trade to determine the parties' intent.²²⁰ At the same time, however, courts are reluctant to infringe upon state sovereignty by invalidating interstate compacts.²²¹ And because Congress likely will not revoke its consent to a compact altogether,²²² the best course of action is to seek an amendment to EMAC.

EMAC already contains provisions that reserve certain rights to Congress, specifically "[t]he right to alter, amend, or repeal this joint resolution."²²³ Additionally, EMAC already contains specific language referencing the National Guard and the Posse Comitatus Act:

Nothing in this compact shall authorize or permit the use of military force by the National Guard of a state at any place outside that state in any emergency for which the President is authorized by law to call into federal service the militia, or for any purpose for which the use of the Army or the Air Force would in the absence of

218. See Emanuel Celler, *Congress, Compacts, and Interstate Authorities*, 26 LAW & CONTEMP. PROBS. 682, 685 (1961) ("The power to consent to an interstate compact must, therefore, carry with it the power to withdraw that consent.").

219. *Id.*

220. *Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614, 631–36 (2013) (citing RESTATEMENT (SECOND) OF CONTRACTS § 203(b) (AM. L. INST. 1981)).

221. *Alabama v. North Carolina*, 560 U.S. 330, 351–52 (2010).

222. See MULLIGAN, *supra* note 80, at 3–4.

223. Emergency Management Assistance Compact of 1996, Pub. L. No. 104-321, 110 Stat. 3877, 3882.

express statutory authorization be prohibited under § 1385 of Title 18 of the United States Code.²²⁴

Congress should therefore amend EMAC by adding the language “intervention, or law enforcement” after “military force.” The revised statute reads as follows:

Nothing in this compact shall authorize or permit the use of *military force, intervention, or law enforcement* by the National Guard of a state at any place outside that state in any emergency for which the President is authorized by law to call into federal service the militia, or for any purpose for which the use of the Army or the Air Force would in the absence of express statutory authorization be prohibited under § 1385 of Title 18 of the United States Code.

The revised statute closes a loophole that only restricts the use of military force by the National Guard at the southern border, which is already inapplicable under federal immigration law.²²⁵ In other words, this “military force” restriction already applies regardless of whether the National Guard is acting under Title 10 or Title 32 status. So, in the context of Operation Lone Star and under the guise of EMAC, midwestern states are sending their National Guards to the border to intervene in law enforcement activities. And presumably, most guardsmen and guardswomen assist in law enforcement without the use of “military force.” Now, when the National Guard is operating by way of EMAC outside their home state, the restriction of “military force” is expanded to include “intervention” and “law enforcement.”

Moreover, outside of having the President call the National Guard into service under the Insurrection Act,²²⁶ amending EMAC is arguably the most practical avenue for the federal government. This goes back to the principle that EMAC was drafted with the intention of providing states with effective disaster relief in desperate times.²²⁷ And with recent events like Hurricane Helene and the California wildfires, the political pressure to ensure that resources can be available at a moment’s notice is high. Furthermore, it is difficult for lawmakers to justify that a border initiative with little to no tangible benefit outweighs providing support to people whose livelihoods have been taken away.²²⁸ Altogether, however, the goal of this revision is to restrict state interference with a purely federal mission.

224. *Id.*

225. *See generally* *Arizona v. United States*, 567 U.S. 387, 415–16 (2012) (holding that the enforcement of U.S. immigration law and policy rests exclusively within the power of the federal government).

226. 10 U.S.C. §§ 251–54 (2018).

227. Emergency Management Assistance Compact, 110 Stat. at 3877.

228. Although an in-depth debate on the effectiveness of the Federal Emergency Management Agency (“FEMA”) in disaster relief is outside the scope of this Note, the financial questions surrounding FEMA make the proper use of EMAC all the more important. *See, e.g.*,

CONCLUSION

Justice Kennedy wrote in *Arizona v. United States* that “[i]mmigration policy shapes the destiny of the Nation.”²²⁹ As the United States settles into the twenty-first century, its two political parties are not close in terms of agreeing on how the nation’s immigration laws should be enforced.²³⁰ However, state interference with the enforcement of federal immigration law seems to be a constant. On the one hand, Republican governors combated the influx of illegal immigrants by carrying out Operation Lone Star during the Biden Administration.²³¹ And on the other hand, it seems like Democratic governors are poised to combat the mass deportation of immigrants under the second Trump Administration.²³²

Importantly, Republican governors cannot have it both ways. If the constitutional and statutory bounds of immigration are to be tested (like in Operation Lone Star), then blowback from Democratic governors should be expected. And without well-defined statutory parameters and case law, the southern border and America’s immigrants will continue to be used as political footballs from administration to administration. That is to say, what will stop Republican governors from re-upping Operation Lone Star for the next Democratic presidential administration, or vice versa?

When President John F. Kennedy termed the United States “[a] Nation of Immigrants,” he believed that immigrants “enriched and strengthened the fabric of American life.”²³³ If the country is to regain the inherent economic and social benefits that come with immigration,²³⁴ it must take the appropriate measures to reestablish and reinforce federal supremacy over immigration matters.²³⁵ As this Note contemplated, the nation’s courts are in a prime position to address the issue, particularly as it relates to the Invasion Clause,²³⁶ and Congress has the perfect opportunity to fortify effective and efficient

Christopher Flavelle, *Trump Says States Should Manage Disasters and Weighs Shutting FEMA.*, N.Y. TIMES (May 13, 2025), <https://www.nytimes.com/2025/01/24/climate/trump-fema-states-disasters.html> (on file with the *Iowa Law Review*).

229. *Arizona*, 567 U.S. at 415.

230. See Alden, *supra* note 24.

231. See *supra* Section I.D.

232. See Bailee Hill, *Border Czar Tom Homan Sends Message to Far-Left Officials Pushing Back Against Mass Deportations: ‘Game On,’* FOX NEWS (Jan. 22, 2025, 10:57 AM), <https://www.foxnews.com/media/border-czar-tom-homan-sends-message-far-left-officials-pushing-back-against-deportations-game-on> [<https://perma.cc/6ZF4-VGUK>].

233. See JOHN F. KENNEDY, A NATION OF IMMIGRANTS 3 (rev. and enlarged ed. 1964).

234. See David J. Bier, *Unlocking America’s Potential: How Immigration Fuels Economic Growth and Our Competitive Advantage*, CATO INST. (Sept. 13, 2023), <https://www.cato.org/testimony/unlocking-americas-potential-how-immigration-fuels-economic-growth-our-competitive> [<https://perma.cc/V4W5-WXAA>].

235. See *supra* Part III.

236. See *supra* Section III.A.

natural disaster response through EMAC, all while closing a loophole to exploit the compact's purpose.²³⁷

237. See *supra* Section III.B.