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## A Nation Joins in Tears: Implications of the Domestic Deployment of Federal Troops in Portland, Oregon

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A NATION JOINS IN TEARS:  
IMPLICATIONS OF THE DOMESTIC DEPLOYMENT OF  
FEDERAL TROOPS IN PORTLAND, OREGON\*

MARISSA COHEN & JACQUELINE STEVENS\*\*

TABLE OF CONTENTS

INTRODUCTION & CULTURAL CONTEXT .....	120
I. THE EXECUTIVE BRANCH: SCOPE OF POWERS & DEPARTMENTAL ACTION .....	125
A. THE PRESIDENT, THE BALANCE OF POWERS, & EXECUTIVE ORDERS .....	126
B. PROTECTING AMERICAN MONUMENTS, MEMORIALS, AND STATUES AND COMBATING RECENT CRIMINAL VIOLENCE – AUTHORIZATION & AGENCY ACTION.....	130
II. THE EXPANSIVE EXECUTIVE BRANCH.....	135
A. THE INSURRECTION ACT OF 1807 .....	138
B. CONGRESS’S 2020 PROPOSED AMENDMENT TO THE INSURRECTION ACT OF 1807 .....	144
III. CIVIL LIBERTIES & JUDICIAL INTERVENTION .....	146
A. DEFINING INSURRECTION IN THE COURTS .....	146
B. DUE PROCESS GUARANTEES .....	150
C. THE FOURTH AMENDMENT, WARRANTS, & THE USE OF FORCE AGAINST CIVILIANS.....	154
D. DETERIORATION OF THE FIRST AMENDMENT .....	159
CONCLUSION .....	161

INTRODUCTION & CULTURAL CONTEXT

On May 25, 2020, a teenage employee of a Minneapolis food store called 911 alleging that George Floyd had attempted to purchase cigarettes with what appeared to be a fake twenty dollar bill.<sup>1</sup> Police found Floyd around the

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corner from the store, unarmed and sitting with friends in his car.<sup>2</sup> An officer approached, pulled out his gun, and ordered Floyd to show his hands.<sup>3</sup> Floyd was initially uncooperative, but after the officer explained that Floyd was being arrested for “passing counterfeit currency,” Floyd complied with the officers’ requests.<sup>4</sup> Court transcripts of recordings from police body cameras showed Floyd was “co-operative at the beginning of the arrest, repeatedly apologizing to the officers after they approach[ed] his parked car.”<sup>5</sup>

A white police officer, Derek Chauvin, then arrived on the scene.<sup>6</sup> He attempted to pull Floyd from his car and place him in a police car; in the process, Floyd fell to the ground and “lay there, face down, still in handcuffs.”<sup>7</sup> As other officers restrained Floyd, for nine minutes and twenty nine seconds, Chauvin kept his knee on Floyd’s neck.<sup>8</sup> During that period Floyd said more than twenty times that he could not breathe.<sup>9</sup> His last words

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<sup>1</sup> *George Floyd: What Happened in the Final Moments of His Life*, BBC NEWS (July 16, 2020), <https://www.bbc.com/news/world-us-canada-52861726>; *What We Know About the Death of George Floyd in Minneapolis*, N.Y. TIMES (Dec. 9, 2020), <https://www.nytimes.com/article/george-floyd.html>; Elliott C. McLaughlin, *Three Videos Piece Together the Final Moments of George Floyd’s Life*, CNN.COM (updated June 23, 2020, 9:14 AM), <https://www.cnn.com/2020/06/01/us/george-floyd-three-videos-minneapolis/index.html>.

<sup>2</sup> *George Floyd: What Happened*, *supra* note 1; *What We Know*, *supra* note 1; McLaughlin, *supra* note 1.

<sup>3</sup> *George Floyd: What Happened*, *supra* note 1; McLaughlin, *supra* note 1.

<sup>4</sup> *George Floyd: What Happened*, *supra* note 1; *What We Know*, *supra* note 1.

<sup>5</sup> *George Floyd: What Happened*, *supra* note 1.

<sup>6</sup> *Id.*; McLaughlin, *supra* note 1.

<sup>7</sup> *George Floyd: What Happened*, *supra* note 1. The probable cause statement prepared by police describes Floyd “stiffen[ing] up, [falling] to the ground and [telling] the officers he was claustrophobic.” McLaughlin, *supra* note 1. “[H]e went to the ground face down and still handcuffed,” the statement continues. *Id.*

<sup>8</sup> *George Floyd: What Happened*, *supra* note 1; Eric Levenson, *Former Officer Knelt on George Floyd for 9 Minutes and 29 Seconds - Not the Infamous 8:46*, CNN.COM (Mar. 30, 2021, 6:27 AM), <https://www.cnn.com/2021/03/29/us/george-floyd-timing-929-846/index.html>.

<sup>9</sup> *George Floyd: What Happened*, *supra* note 1. *Cf. also* McLaughlin, *supra* note 1 (“Floyd also says, ‘I’m through,’ and repeatedly cries out in anguish, the video shows. . . . He tells the witnesses, ‘They’re going to kill me, man,’ and then to the officers, ‘Don’t kill me.’ . . .

## A NATION JOINS IN TEARS

were a chilling recognition of his fate: “Can’t believe this, man. Mom, love you. Love you. Tell my kids I love them. I’m dead.”<sup>10</sup>

Officer Chauvin kept his knee on Floyd’s neck for at least another minute, although another officer could not detect a pulse.<sup>11</sup> When Chauvin did get up, Floyd’s motionless body “was rolled on to a gurney” and taken to the Hennepin County Medical Center in an ambulance.<sup>12</sup> He was pronounced dead about an hour later.<sup>13</sup> A video of the incident went viral, stirring a nationwide reckoning with twenty-first century racial injustice and the extrajudicial police killings of Black Americans.<sup>14</sup>

That reckoning involved widespread protests. In the days and weeks following Floyd’s death, Americans in more than 1,700 cities flooded the streets to challenge police brutality against Black people in the United States.<sup>15</sup> In some cities with sizable, lasting protests, then-President Donald Trump responded by sending federal troops.<sup>16</sup> Although nominally meant to

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[W]hen [another officer] asked if they should roll Floyd on his side, Chauvin said he was staying put.”).

<sup>10</sup> *George Floyd: What Happened*, *supra* note 1.

<sup>11</sup> *Id.*; McLaughlin, *supra* note 1.

<sup>12</sup> *George Floyd: What Happened*, *supra* note 1.

<sup>13</sup> *Id.*; see also Lorenzo Reyes, Trevor Hughes & Mark Emmert, *Medical Examiner and Family-Commissioned Autopsy Agree: George Floyd’s Death Was a Homicide*, USA TODAY (updated June 1, 2020, 8:46 PM), <https://www.usatoday.com/story/news/nation/2020/06/01/george-floyd-independent-autopsy-findings-released-monday/5307185002/>.

<sup>14</sup> See *What We Know*, *supra* note 1; *George Floyd: What Happened*, *supra* note 1.

<sup>15</sup> Janie Haseman, Karina Zaiets, Mitchell Thorson, Carlie Procell, George Petras & Shawn J. Sullivan, *Tracking Protests Across the USA in the Wake of George Floyd’s Death*, USA TODAY (updated June 18, 2020, 6:48 PM), <https://www.usatoday.com/in-depth/graphics/2020/06/03/map-protests-wake-george-floyds-death/5310149002/>.

<sup>16</sup> See Shane Dixon Kavanaugh, *Trump Sent the Feds to Quash Portland’s Protests: What We Know Amid the Nightly Turmoil*, OREGONIAN (July 25, 2020), <https://www.oregonlive.com/news/2020/07/trump-sent-the-feds-to-quash-portlands-protests-what-we-know-amid-the-nightly-turmoil.html>; Kevin Liptak, *Trump Announces ‘Surge’ of Federal Officers to Chicago As He Campaigns on ‘Law and Order’ Mantle*, CNN.COM (updated July 22, 2020, 6:45 PM), <https://www.cnn.com/2020/07/22/politics/donald-trump-federal-law-enforcement-chicago-albuquerque/index.html> (describing orders to send federal officers to Chicago, Kansas City,

quell civil unrest, these troops frequently resorted to physical violence and largely failed to bring any peace to cities where they were deployed.<sup>17</sup> In Portland, Oregon—the epicenter of Trump’s federal response—local police reported 6,283 uses of force during protests between May and the end of September 2020.<sup>18</sup> Federal troops “cleared Portland city streets alongside Portland police” and participated in the pervasive violence.<sup>19</sup> Among other actions, federal units deployed in Portland fired canisters of military-style Maximum Smoke HC Grenades at crowds of civilians.<sup>20</sup> Smoke produced by the canisters causes “nausea, vomiting, central nervous system depression, and kidney and liver damage.”<sup>21</sup> The HC grenades also

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and Albuquerque); *Trump Says U.S. Will Crack Down on Anti-Racism Protests in Democratic-led U.S. Cities*, CBC (July 20, 2020, 10:46 AM), <https://www.cbc.ca/news/world/portland-protest-us-crackdown-anti-racism-1.5655893> (reporting Trump’s stated plans to send law enforcement to cities in light of “anti-racism protests,” including New York, Chicago, Philadelphia, Detroit, Baltimore, and Oakland).

<sup>17</sup> See Kavanaugh, *supra* note 16 (“Weeks of raucous demonstrations had nearly wound down in Portland . . . . Then President Donald Trump sent in federal forces. The protests against police violence and systemic racism quickly grew bigger and louder.”); Trevor Hughes & Lindsay Schnell, *This is Not a Dictatorship’: Portland Protestors Push Back Harder Against Trump, Federal Agents*, USA TODAY (updated July 23, 2020, 5:04 PM), <https://www.usatoday.com/story/news/nation/2020/07/22/portland-protests-grow-larger-after-trump-sends-feds/5483028002/>; see also Robert Evans, *Opinion: Portland is Living in America’s Terrifying Future*, BUS. INSIDER (Oct. 28, 2020, 8:27 AM), <https://www.businessinsider.com/portland-america-trump-future-police-fbi-riots-border-patrol-protests-2020-10> (“Federal law enforcement entered the picture in July . . . . Shortly after arriving, one of the Marshals shot activist Donovan Labella in the face with a rubber bullet, shattering his skull and nearly killing him.”).

<sup>18</sup> Maxine Bernstein, *Portland Police Report 6,283 Uses of Force During Protests in 2020, But Data Has Significant Gaps*, OREGONIAN (updated Nov. 17, 2020), <https://www.oregonlive.com/crime/2020/11/portland-police-report-6283-uses-of-force-during-protests-in-2020-yet-consultant-found-significant-gaps-in-force-reports.html>.

<sup>19</sup> Conrad Wilson & Jonathan Levinson, *Federal Law Enforcement Agencies Deployed to Portland Protests*, OR. PUB. BROAD. (updated July 7, 2020, 9:53 AM), <https://www.opb.org/news/article/federal-law-enforcement-agencies-deployed-to-portland-protests-federal-buildings-personnel/>.

<sup>20</sup> Sharon Lerner, *Federal Agents Used Toxic Chemical Smoke Grenades in Portland*, INTERCEPT (Oct. 10, 2020, 8:00 AM), <https://theintercept.com/2020/10/10/portland-tear-gas-chemical-grenades-protests/>.

<sup>21</sup> *Id.*

## A NATION JOINS IN TEARS

released zinc chloride, which can cause “fever, chest pain, and liver damage, and is associated with anorexia, fatigue, and weight loss.”<sup>22</sup>

Despite these military-like tactics by federal agents in the city, the protests remained remarkably peaceful. One example was the “Wall of Moms,” organized by Bev Barnum,<sup>23</sup> who responded to Floyd’s last words as a call to his own mother.<sup>24</sup> Concerned by the federal government’s sudden presence in Portland, Barnum was adamant: “Let’s make it clear that we will protect protesters without the use of violence, we will shine a light of the unjust narrative being thrown around.”<sup>25</sup> Initially, nearly 40 mothers—mostly “upper-middle-class white women” who had previously stood on the sidelines—responded to Barnum’s call, educating themselves about racial injustice and lining up on the front lines of protests in Portland to chant “Feds stay clear, moms are here.”<sup>26</sup> Larger numbers of mothers gathered the following evening. Within a week, hundreds of moms joined to make their stand, many dressed in yellow and carrying sunflowers.<sup>27</sup>

A wall of concerned mothers offered “little protection once the federal officers started firing teargas and flash-bangs and charging with batons,” however.<sup>28</sup> On July 11, protester Donovan La Bella was shot in the forehead with an impact munition, leaving him with a fractured skull.<sup>29</sup> On July 21, a reporter “watched as blood streamed down Andre Miller’s face after he was

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<sup>22</sup> *Id.*

<sup>23</sup> Chris McGreal, ‘I Wanted to Take Action’: Behind the ‘Wall of Moms’ Protecting Portland’s Protesters, *GUARDIAN* (July 21, 2020, 2:53 PM), [www.theguardian.com/us-news/2020/jul/21/trump-federal-agents-portland-protests-moms](http://www.theguardian.com/us-news/2020/jul/21/trump-federal-agents-portland-protests-moms).

<sup>24</sup> Lonnae O’Neal, *George Floyd’s Mother Was Not There, But He Used Her as a Sacred Invocation*, *NAT’L GEOGRAPHIC* (MAY 30, 2020), <https://www.nationalgeographic.com/history/2020/05/george-floyds-mother-not-there-he-used-her-as-sacred-invocation>.

<sup>25</sup> *Id.*; McGreal, *supra* note 23.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Sarah Jeong, *The Battle of Portland*, *NEW REPUBLIC* (Sept. 3, 2020), <https://newrepublic.com/article/159169/battle-portland-protests-federal-agents-racist-police-violence>.

struck in the head right below his helmet.”<sup>30</sup> On July 25, Kristen Jessie-Uyanik, a woman standing with the Wall of Moms, was struck in the forehead just above her left eye.<sup>31</sup> “Trump’s troops,” as some protesters took to calling the federal agents facing them in Portland’s streets,<sup>32</sup> reappeared night after night. For four continuous weeks, the “federal occupation” of Portland became “an all-consuming vortex of conflict.”<sup>33</sup>

President Trump’s decision to deploy federal troops, the manner in which he determined to do so, and the actions those troops took once on the ground in Portland raise numerous legal questions. Their importance to our constitutional democracy is hard to overstate. This Article attempts to address those concerns in three parts. Part I provides background on the federal Executive Branch and President Trump’s use of an Executive Order to deploy troops in Portland. Part II analyzes the growing powers of the Executive, specifically under the Insurrection Act of 1807, which last summer’s historic events confirm includes the power to deploy federal troops domestically without the consent of either Congress or State or local governments. Part III addresses the civil liberties at stake in such a scheme, as well as the likely results of judicial intervention should similar issues arise in the future. Our hope in writing this essay is to inspire Americans to get or stay involved in protecting their unalienable rights. Democracy cannot be allowed to decrescendo.

#### I. THE EXECUTIVE BRANCH: SCOPE OF POWERS & DEPARTMENTAL ACTION

Federal troops arrived in Portland after President Trump issued an Executive Order on June 26, 2020, authorizing the Attorney General and the Secretaries of Defense and Homeland Security to send federal personnel to “assist with the protection of Federal monuments, memorials, statues, or

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> See McGreal, *supra* note 23.

<sup>33</sup> Jeong, *supra* note 29.

## A NATION JOINS IN TEARS

property.”<sup>34</sup> The nature of that Order, and the President’s power to proclaim it, are the subject of this first part.

### A. *The President, the Balance of Powers, and Executive Orders*

The Constitution provides for concurrent authority between the States and federal government, and at the federal level a basic tri-branch structure for the United States government. Each branch may exercise only the limited powers permitted by the Constitution.<sup>35</sup> Article I grants Congress “[a]ll legislative Powers” outlined in the federal charter.<sup>36</sup> Article II vests in the president “the executive Power.”<sup>37</sup> Article III gives “judicial Power” to the United States Supreme Court and “such inferior Courts as Congress may from time to time ordain and establish.”<sup>38</sup> The Founding Fathers intentionally chose this structure to create a system of checks and balances.<sup>39</sup> Each branch must share power with the others. Within the spheres of the federal government’s purview, the United States is guaranteed independence “from any control by the respective States.”<sup>40</sup> Meanwhile, any powers “not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>41</sup> The distribution of powers among the federal branches and between the federal and state governments are the foundations of our federalist system.

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<sup>34</sup> Exec. Order No. 13933, *Protecting American Monuments, Memorials, and Statues and Combating Recent Criminal Violence*, 85 Fed. Reg. 40081, 40081–84 (issued June 26, 2020).

<sup>35</sup> See *Marbury v. Madison*, 1 Cranch 137, 176 (1803) (“The powers of [the branches] are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.”); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (“The Constitution limits [the President’s] functions in the lawmaking process . . . [and] is neither silent nor equivocal about who shall make laws which the President is to execute.”).

<sup>36</sup> U.S. CONST. art. I, § 1.

<sup>37</sup> *Id.* art. II, § 1.

<sup>38</sup> *Id.* art. III, § 1.

<sup>39</sup> See, e.g., THE FEDERALIST NO. 51 (Alexander Hamilton or James Madison) (“[T]he greatest security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachment of the others.”).

<sup>40</sup> *Trump v. Vance*, 140 S. Ct. 2412 (2020).

<sup>41</sup> U.S. Const. amend. X.

The limited authority of the federal Executive is among the most important features of this design. The President “occupies a unique position in the constitutional scheme.”<sup>42</sup> Her duties “range from faithfully executing the laws to commanding the Armed Forces, [and] are of unrivaled gravity and breadth.”<sup>43</sup> Today, in addition to commanding the “largest military establishment on earth,” the President also controls a “colossal array of agencies” that form the modern administrative state.<sup>44</sup> Yet “[i]n contrast to a king, who is born to power and can ‘do no wrong,’ the President of the United States is ‘of the people’ and subject to the law.”<sup>45</sup> Thus, even the President is subject to restrictions.

Despite these limitations, President Trump acted unilaterally in sending federal troops to Portland. Officers were deployed by means of Executive Order commanding actions by various federal agencies.<sup>46</sup> The Order, entitled “Protecting American Monuments, Memorials, and Statues and Combating Recent Criminal Violence,” among other things authorized the Attorney General and the Secretaries of Defense and Homeland Security to send federal personnel to “assist with the protection of Federal monuments, memorials, statues, or property.”<sup>47</sup> This was necessary, the Order declared, to resist a weeks-long “sustained assault on the life and property of civilians, law enforcement officers, governmental property, and revered American monuments.”<sup>48</sup> The President theorized that these acts were carried out by “rioters, arsonists, and left-wing extremists,” many of whom he believed “explicitly identified themselves with ideologies—such as Marxism—that call for the destruction of the United States system of government.” The President did not cite Portland in particular. Instead, he declared that “[a]narchists and left-wing extremists” were promoting a “fringe ideology

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<sup>42</sup> *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982).

<sup>43</sup> *Vance*, 140 S. Ct. at 2425.

<sup>44</sup> Martin S. Flaherty, *The Most Dangerous Branch*, 105 *YALE L.J.* 1725, 1728 (1996).

<sup>45</sup> *Vance*, 140 S. Ct. at 2422.

<sup>46</sup> See Exec. Order No. 13933, 85 Fed. Reg. 40081, 40083 (ordering actions by the Attorney General, the Secretaries of the Interior, Homeland Security, and Defense, and “heads of all executive departments and agencies”).

<sup>47</sup> *Id.* § 5.

<sup>48</sup> *Id.* § 1.

## A NATION JOINS IN TEARS

that paints the United States of America as fundamentally unjust and have sought to impose that ideology on Americans through violence and mob intimidation.”<sup>49</sup> Citing protests surrounding federally-maintained monuments in San Francisco, Charlotte, and Boston, the Order surmised that “State and local governments appear to have lost the ability to distinguish between the lawful exercise of rights to free speech and assembly and unvarnished vandalism.”<sup>50</sup> To the President’s mind, that “abdication of . . . law enforcement responsibilities” by State and local governments meant Trump’s own, federal administration needed to end the “violent assault” instead.<sup>51</sup>

Generally speaking, Executive Orders like Trump’s No. 13933 are an exercise of the President’s Article II authority under the “Take Care Clause,” which grants the President power to ensure that the laws of the United States are “faithfully executed.”<sup>52</sup> They are a regular feature of the modern presidency.<sup>53</sup> Executive Orders can be implemented quickly, have the force of law, and frequently require federal agencies to respond within their administrative capacities.<sup>54</sup> They often take the form of proclamations with broad, “profound” ramifications.<sup>55</sup> Presidents have historically taken “an

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> See U.S. CONST. art. II, § 3, cl. 5; Melina T. Oliviero, *The Role of the Executive in Rulemaking*, 70 ADMIN. L. REV. 715, 716 (2018); see also Lorraine Boissoneault, *The Debate Over Executive Orders Began with Teddy Roosevelt’s Mad Passion for Conservation*, SMITHSONIAN MAG. (Apr. 17, 2017), <https://www.smithsonianmag.com/history/how-theodore-roosevelts-executive-orders-reshaped-countryand-presidency-180962908/> (describing the nature and several significant historical uses of the executive order).

<sup>53</sup> See Oliviero, *supra* note 52, at 717 (noting that every president except Harrison, who died after thirty-one days in office, has “exercised his right to use executive orders”).

<sup>54</sup> *Id.* at 716. Although guidelines require that the President receive financial approval from the Office of Management and Budget and legal review from the Attorney General, there are no consequences for failure to follow that form. *Id.* Even when followed precisely, moreover, this arrangement is “still quicker” than almost any action conceivable by Congress. *Id.*

<sup>55</sup> Boissoneault, *supra* note 52. President Trump’s Executive Order No. 13933 in particular contains sweeping statements about the “policies” of the federal government and the purpose

expansive view of their own power when it suits them, and use executive orders to expand the boundaries of their authority.”<sup>56</sup>

In theory, these executive orders are subject to judicial review, consistent with the federal government’s tri-branch structure and balance of powers.<sup>57</sup> Whether the judiciary assesses executive orders with true neutrality, however, is often either bolstered or stymied by who heads the Executive Branch.<sup>58</sup> Because a court that checks the power of the President must rely on the Executive Branch to then enforce the court’s ruling, these are cases in which the courts are “most vulnerable.”<sup>59</sup> The executive-judicial relationship thus substantially effects judicial decision making.<sup>60</sup> More often than not, courts uphold presidential directives, either on their merits or on jurisdictional grounds, such as that a plaintiff lacks standing or that the issue involves a nonjusticiable political question.<sup>61</sup> For instance, a study conducted in 1999 found that federal courts had struck down just fourteen executive orders, wholly overturning only two.<sup>62</sup> Courts typically avoid interference,

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and necessity for swift, far-reaching federal action. *See* Exec. Order No. 13933, 85 Fed. Reg. 40081, 40082–83 (June 26, 2020).

<sup>56</sup> Kenneth R. Mayer, *Executive Orders and Presidential Power*, 61 J. POL. 445, 448 (1999).

<sup>57</sup> *See* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

<sup>58</sup> *See* Gbemende Johnson, *Executive Power and Judicial Deference*, 68 POL. RSCH. Q. 128, 129 (2015) (demonstrating that “court institutional vulnerability,” which varies between the federal and state governments as well as among states, “can constrain judicial decision making and affect whether courts uphold executive action”).

<sup>59</sup> *Id.* at 130 (citing WILLIAM HOWELL, *POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION* 139 (2003)).

<sup>60</sup> *See id.*

<sup>61</sup> Tara L. Branum, *President or King? The Use and Abuse of Executive Orders in Modern-Day America*, 28 J. LEGIS. 1, 60 (2002).

<sup>62</sup> *Id.* at 59. The two wholesale reversals were *Youngstown*, 343 U.S. at 579, better known as the Steel Seizure case, and *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996), which struck down President Clinton’s 1995 executive order that federal contracts not be awarded to employers who permanently replace employees who strike. *Id.*; Mayer, *supra* note 56.

## A NATION JOINS IN TEARS

even when an executive order is “of—at best—dubious constitutional authority or issued without specific statutory authority.”<sup>63</sup>

### B. *Protecting American Monuments, Memorials, and Statues and Combating Recent Criminal Violence - Authorization & Agency Action*

President Trump’s Executive Order No. 13933 is an example of a president’s “expansive view of [his] own power.”<sup>64</sup> To start, the title of the Order does not match the content of the mandate nor the scope of the actions that officers within the Department of Homeland Security (DHS) took in Portland under its purported authority.<sup>65</sup> The full text of the Order moreover sheds light on the political reasons that motivated Executive intervention, namely, “rioters, arsonists, and left-wing extremists who . . . have explicitly identified themselves with ideologies—such as Marxism—that call for the destruction of the United States system of government.”<sup>66</sup> Although nominally about protecting federal property, the Order lists no monuments, memorials, or statues in Portland specifically.<sup>67</sup> News sources indicate that federal officers were sent to Portland to protect three U.S. courthouses.<sup>68</sup> But protestors in Portland recorded videos and provided personal accounts of their detention by federal authorities, confirming that the President’s troops were “not simply protecting federal property, and part of the reason for that

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<sup>63</sup> Mayer, *supra* note 56, at 448 (quoting Joel L. Fleishman & Arthur H. Aufses, *Law and Orders: The Problem of Presidential Legislation*, 40 LAW & CONTEMP. PROBS. 1, 5 (1976)) (alterations omitted).

<sup>64</sup> *See id.*

<sup>65</sup> Compare Exec. Order No. 13933, 85 Fed. Reg. 40081, 40081 (June 26, 2020) (entitling the order), with, e.g., *supra* notes 17–22 (describing violent tactics employed by federal agents on the ground) and *infra* note 69 (same).

<sup>66</sup> Exec. Order No. 13933, 85 Fed. Reg. 40081, 40081.

<sup>67</sup> *See generally id.* at 40081–84.

<sup>68</sup> *See* Steve Vladeck, *Are the Trump Administration’s Actions in Portland Legal? Are They Constitutional?*, WASH. POST (July 25, 2020, 5:00 AM), <https://www.washingtonpost.com/politics/2020/07/25/are-trump-administrations-actions-portland-legal-are-they-constitutional/>.

is the president himself and the high-ranking officials in DHS have not made [protecting federal property] the primary rationale.”<sup>69</sup>

A more cautious president might have predicted that federal officers within DHS would fail to adhere to a more limited mandate.<sup>70</sup> The Department of Homeland Security is an agency within the Executive Branch that is charged with handling terrorist threats.<sup>71</sup> Created in 2002 by the Homeland Security Act,<sup>72</sup> DHS was “born from the commitment and resolve of Americans across the United States in the wake of the September 11th attacks.”<sup>73</sup> Consistent with that origin, DHS’s anti-terrorist efforts were initially focused on international threats such as Al Qaeda; however, the department’s mission has expanded beyond foreign terrorist organizations and now addresses threats posed by domestic actors.<sup>74</sup> The Department’s broadened agenda was outlined explicitly in its 2019 *Strategic Framework for Countering Terrorism and Targeted Violence*, which acknowledges the ongoing threat posed by foreign terrorist organizations but focuses instead on

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<sup>69</sup> Kristine Phillips, Kevin Johnson & Trevor Hughes, *‘What a Disaster’: Aggressive Federal Response in Portland Raises Legal Questions*, USA TODAY (July 21, 2020 5:03PM), <https://www.usatoday.com/story/news/politics/2020/07/21/portland-protests-trump-administration-response-raises-legal-questions/5481418002/> (quoting the assessment of Michael Dorf, professor of constitutional law at Cornell University).

<sup>70</sup> See Evans, *supra* note 17 (“One of the most violent federal units sent to Portland were the men of the Border Patrol’s elite Bortac unit. . . . ‘They don’t exist within the realm of civilian law enforcement. They view people they encounter in the military sense as enemy combatants, meaning they have virtually no rights,’ [a former Border Patrol agent] told the Guardian. . . . They are soldiers, not cops, and the difference between the two was readily apparent.”).

<sup>71</sup> See 6 U.S.C. § 111 (establishing the Department of Homeland Security as an “executive agency” charged with the “primary mission” of preventing, reducing, minimizing the damage of, and assisting the United States in the recovery of “terrorist attacks within the United States”).

<sup>72</sup> Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

<sup>73</sup> *Mission*, DEP’T OF HOMELAND SEC. (July 3, 2019), <https://www.dhs.gov/mission>.

<sup>74</sup> See DEP’T OF HOMELAND SEC., STRATEGIC FRAMEWORK FOR COUNTERING TERRORISM AND TARGETED VIOLENCE 8–10 (Sept. 2019), [https://www.dhs.gov/sites/default/files/publications/19\\_0920\\_plcy\\_strategic-framework-countering-terrorism-targeted-violence.pdf](https://www.dhs.gov/sites/default/files/publications/19_0920_plcy_strategic-framework-countering-terrorism-targeted-violence.pdf).

## A NATION JOINS IN TEARS

the “growing threat from domestic terrorism and other threats originating at home.”<sup>75</sup>

DHS defines domestic terrorism extremely broadly. The 2019 *Strategic Framework* offers this definition: “an act of unlawful violence, or a threat of force or violence, that is dangerous to human life or potentially destructive of critical infrastructure or key resources, and is intended to effect societal, political, or other change, committed by a group or person based and operating entirely within the United States or its territories.”<sup>76</sup> By contrast, Congress used a more precise definition when forming DHS in the Homeland Security Act, stating:

The term “terrorism” means any activity that involves an act that is dangerous to human life or potentially destructive of critical infrastructure or key resources; and is a violation of [federal or state criminal law]; *and appears to be intended to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by mass destruction, assassination, or kidnapping.*<sup>77</sup>

DHS’s definition thus omits concepts of intimidation and coercion, substituting a general intention to effect change for Congress’s more specific language. That has allowed DHS to maintain that anti-authority groups, rather than being contributors to the political debate over methods of governance, may be viewed as threats to national security.<sup>78</sup>

Combined with President Trump’s Executive Order, DHS’s lax definition of domestic terrorism gave DHS enormous leeway to address protests in America’s cities. Within a week, Acting Secretary of Homeland Security Chad Wolf announced a task force to coordinate DHS law

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<sup>75</sup> *Id.* at ii.

<sup>76</sup> *Id.* at 4 n.6.

<sup>77</sup> 6 U.S.C. § 101(18) (emphasis added). This definition also tracks the definition of domestic terrorism used by Congress in the Patriot Act, now codified at 18 U.S.C. § 2331(5).

<sup>78</sup> See *DHS Announces New Task Force to Protect American Monuments, Memorials, and Statues*, DEP’T HOMELAND SEC. (July 1, 2020), <https://www.dhs.gov/news/2020/07/01/dhs-announces-new-task-force-protect-american-monuments-memorials-and-statues> (describing protestors as “violent anarchists”).

enforcement agency assets in response to Trump’s directives.<sup>79</sup> In a press release, Wolf indicated the task force—Protect American Monuments, Memorials, and Statues (PACT)—would conduct “ongoing assessments of potential civil unrest or destruction and allocate resources to protect people and property.”<sup>80</sup> Those “resources” included Rapid Deployment Teams, which were “pre-positioned . . . across the country to respond to potential threats to facilities and property.”<sup>81</sup>

In theory, the deployment of federal personnel was both consistent with President Trump’s Order and statutorily authorized. Chapter 40 of the United States Code tasks the Secretary of Homeland Security with protecting the “buildings, grounds, and property that are owned, occupied, or secured by the Federal Government,” as well as persons on those properties.<sup>82</sup> The statute permits the Secretary to designate “officers and agents for duty” who may carry firearms, make arrests without a warrant for offenses against the United States, serve warrants and subpoenas issued under the authority of the United States, investigate possible offenses against federally-owned or occupied properties, both “on and off the property in question,” and “such other activities for the promotion of homeland security as the Secretary may prescribe.”<sup>83</sup> Wolf was determined to use these vast, police-like powers to respond to the President’s command. “We won’t stand idly by while violent anarchists and rioters seek not only to vandalize and destroy the symbols of our nation, but to disrupt law and order and sow chaos in our communities,” he said.<sup>84</sup>

As DHS officers and agents in Portland demonstrated, however, President Trump’s Executive Order was interpreted by Acting DHS Secretary Wolf as authorizing aggressive anti-terrorist methods usually deployed to address violent threats to American society on ordinary American citizens. By equating foreign terrorist organizations and US citizens engaged in protests, even those who might subscribe to fringe ideology, DHS brought

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> 40 U.S.C. § 1315(a).

<sup>83</sup> *Id.* at § 1315(b)(2).

<sup>84</sup> *Id.*

## A NATION JOINS IN TEARS

their broad scope of tools originally meant to fight the “terrorism and targeted violence” of groups like al Qaeda to bear against citizens and other residents of the United States who espoused left-leaning ideologies.

Treating protestors like terrorists may have been precisely the point. Throughout the Portland protests, President Trump superimposed his own political messaging on DHS’ deployment of officers and those officers’ anti-terrorist tactics.<sup>85</sup> That influence worked within DHS, as well. A whistleblower complaint from within the Department reveals that the President and political appointees within DHS attempted to “modify” intelligence assessments about domestic terrorism to match President Trump’s rhetoric.<sup>86</sup> President Trump and his political appointees, including Acting Homeland Security Secretary Wolf, tried to downplay the threat posed by White Supremacists and instead play up the “prominence of violent ‘left-wing’ groups.”<sup>87</sup> Among other actions, Wolf specifically attempted to include information about the unrest in Portland within DHS’s intelligence materials.<sup>88</sup> When the Principal Deputy Under Secretary in the Office of Intelligence and Analysis resisted that move, he was demoted, despite twenty

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<sup>85</sup> See, e.g., @realDonaldTrump, TWITTER (Oct. 12, 2020, 7:30 AM), <https://twitter.com/realDonaldTrump/status/1315615735612346369> (“The Radical Left fools in Portland don’t want any help from real Law Enforcement which we will provide instantaneously.”); @realDonaldTrump, TWITTER (Oct. 12, 2020, 7:34 AM), <https://twitter.com/realDonaldTrump/status/1315616788986712065> (“Put these animals in jail, now!”); @realDonaldTrump, TWITTER (Oct. 12, 2020, 7:41 AM), <https://twitter.com/realDonaldTrump/status/1315618688612159489> (“ANTIFA RADICALS. Get them FBI, and get them now!”); @realDonaldTrump, TWITTER (Oct. 12, 2020, 7:59 AM), <https://twitter.com/realDonaldTrump/status/1315623184729858048> (“The FBI and Law Enforcement must focus their energy on ANTIFA and the Radical Left, those who have spent the summer trying to burn down poorly run Democrat Cities throughout the USA!”); see also *Judge in Portland Cites Trump Tweets in Restricting Feds at Protests*, SEATTLE TIMES (updated Nov. 1, 2020, 2:01 PM), [seattletimes.com/seattle-news/northwest/judge-cites-trump-tweets-in-restricting-feds-at-protests/](https://seattletimes.com/seattle-news/northwest/judge-cites-trump-tweets-in-restricting-feds-at-protests/) (describing one judge’s determination that the President’s tweets “helped incite improper conduct by federal officers responding to racial justice demonstrations in Portland”).

<sup>86</sup> Whistleblower Reprisal Complaint at 13, *In re: Murphy* (Dep’t of Homeland Sec. Office of Inspector General Sept. 8, 2020), <https://int.nyt.com/data/documenttools/homeland-security-whistleblower/0819ec9ee29306a5/full.pdf>.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 14.

years of public service.<sup>89</sup> The President's insistence on first proposing and then investigating unsubstantiated classifications of domestic threats has extended to other federal agencies, as well. As recently as the autumn of 2020, the FBI confirmed that it was targeting for investigation the "extremist 'Antifa' demonstrators who engaged in recent violent protests."<sup>90</sup>

## II. THE EXPANSIVE EXECUTIVE BRANCH

President Trump's politicization of domestic security threats, exemplified by his Executive Order, is just one example of growing Executive power in the United States. Despite the limitations on the President's powers in the Constitution and in the spheres of the several States, every presidential administration has expanded the President's role.

The push for broad Executive powers is not new. As president, Thomas Jefferson refused to enforce the Alien Sedition Acts of 1798 and ordered that prosecutions under the law be discontinued, as he "affirm[ed] that act to be no law, because in opposition to the Constitution."<sup>91</sup> His refusal to enforce legislation enacted by Congress rested on his own broad vision of his role as Chief Executive.<sup>92</sup> More than two hundred years later, President Barack Obama continued that tradition by openly denouncing the Defense of Marriage Act<sup>93</sup> and imploring the Supreme Court to issue an "authoritative ruling" of the act's unconstitutionality.<sup>94</sup> The Court agreed to hear the case,

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<sup>89</sup> *Id.*

<sup>90</sup> Mark Hosenball & Sarah N. Lynch, *FBI Chief Says U.S. 'Antifa' Demonstrators Are Targets of Multiple Probes*, REUTERS (Sept. 24, 2020), <https://www.reuters.com/article/instant-article/idUKL2N2GL1FC>.

<sup>91</sup> Letter from Thomas Jefferson to Edward Livingston (Nov. 1, 1801), in 8 THE WRITINGS OF THOMAS JEFFERSON 57–58 n.1 (Paul Leicester Ford ed., 1897) (regarding the nolle prosequi entered in the case brought against William Duane under the Sedition Act).

<sup>92</sup> *See id.* ("The President is to have the laws executed. He may order an offense then to be prosecuted. If he sees a prosecution put into a train which is not lawful, he may order it to be discontinued and so put into legal train. I found a prosecution going on against Duane . . . founded on the sedition act. . . . and I shall treat it as a nullity, wherever it comes in the way of my functions.").

<sup>93</sup> Pub. L. 104-199, 110 Stat. 2419.

<sup>94</sup> *See* Nat Stern, *Separation of Powers, Executive Authority, and Suspension of Disbelief*, 54 HOUS. L. REV. 125, 159–60 (2016).

## A NATION JOINS IN TEARS

greatly enhancing the Executive's authority and effectively permitting presidents to "direct the path of the law."<sup>95</sup>

Presidents have not only refused to implement enacted legislation, playing a form of presidential defense against laws with which they disagree. Presidents have also played offense by circumventing Congress entirely. The most disconcerting example is the expansion of the President's powers as Commander and Chief, where Congress and the States have essentially become powerless to check the President's authority. Although the Constitution makes the President the "Commander in Chief of the Army and Navy of the United States" and of the State militias "when called into the actual Service of the United States,"<sup>96</sup> the term "commander in chief" was not uniformly defined in eighteenth century law, and generally meant merely the highest person in a particular chain of command.<sup>97</sup> Some states used the term close in time to the ratification of the U.S. Constitution to refer to individuals "subordinate to another ultimate decision maker," such as Esek Hopkins of Rhode Island, who was named "commander-in-chief" of "the fleet" in 1776.<sup>98</sup> The President's powers as Commander in Chief are accordingly not necessarily so sweeping as to put the Executive above the other branches of the federal government in matters of war.

The structure of the Constitution confirms the point. "Consistent with a narrow understanding of 'Commander in Chief,' Article I gives Congress the power to 'raise and support Armies,' to make rules for 'the Government and Regulation of the land and naval Forces,' and to 'declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.'"<sup>99</sup> Thus declarations of war, the raising and support of armies, and the regulation of those troops are all powers exclusively granted to the Legislative Branch, not the President. A former commander-in-chief "whose accomplishments were particularly well known to the framers" probably understood that Congress would play a large role in war; George Washington,

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<sup>95</sup> *Id.* at 160.

<sup>96</sup> U.S. CONST. art. II, § 2.

<sup>97</sup> Ingrid Brunk Wuerth, *International Law and Constitutional Interpretation: The Commander in Chief Clause Reconsidered*, 106 MICH. L. REV. 61, 83 (2007).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 84 (quoting U.S. CONST. art. I, § 8).

“acting under the title of commander in chief during the Revolutionary War, looked to Congress to manage many aspects of the conduct of war.”<sup>100</sup> Use of the “same title in the Constitution” suggests the president was expected to enjoy approximately the same war powers as Washington had during the Revolutionary War, unless some other provision of the Constitution broadened his powers more explicitly.<sup>101</sup>

But the idea that Congress alone can dictate whether and how war will be waged no longer stands in the United States. When President Richard Nixon sought to invade Cambodia in 1970, William Rehnquist, then an Assistant Attorney General in the Office of Legal Counsel, authored a memo assuring Nixon that his actions were “authorized under even a narrow reading of his power as Commander in Chief.”<sup>102</sup> Rehnquist urged that the President should have no concern taking military action without congressional permission, writing:

It is too plain . . . to admit of denial that the Executive, under his power as Commander in Chief, is authorized to commit American forces in such a way as to seriously risk hostilities, and also to actually commit them to such hostilities, without prior congressional approval. . . . [The] constitutional practice must include executive resort to Congress in order to obtain its sanction for the conduct of hostilities which reach a certain scale. Constitutional practice also indicates, however, that congressional sanction need not be in the form of a declaration of war.<sup>103</sup>

Today, President Trump would no doubt find much agreeable in Rehnquist’s memo. The President’s power as Commander and Chief, whatever its original contours, has been validated as an expansive prerogative to deploy force at whim without authorization by any other branch of government. The violence in Portland moreover demonstrates a frightening aspect of this overbroad power, which is not limited to international conflicts.

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<sup>100</sup> *Id.* at 83.

<sup>101</sup> *See id.*

<sup>102</sup> William H. Rehnquist, Mem. Op. for Charles W. Colson, Special Counsel to the President, *The President and the War Power: South Vietnam and the Cambodian Sanctuaries* 321 (May 22, 1970), <https://www.justice.gov/file/20826/download>.

<sup>103</sup> *Id.* at 331–32.

## A NATION JOINS IN TEARS

Under the Insurrection Act of 1807,<sup>104</sup> Congress itself gave the Executive the ability to deploy troops on the American people in their own towns and neighborhoods.

### A. *The Insurrection Act of 1807*

The Insurrection Act is a long-standing and often-invoked American law which President Trump has considered invoking to justify his use of federal troops in Portland.<sup>105</sup> Currently codified at 10 U.S.C. §§ 251–55, the law permits the President to use the armed forces to suppress “insurrection[s],” “rebellion[s],” and “domestic violence” that interfere with the execution of the laws of a State or of the United States.<sup>106</sup> Many Americans presently think the law prohibits the use of federal troops on American soil.<sup>107</sup> “They also believe that the President has to wait until a governor asks for help before he can send federal troops to help and even only to quell an insurrection. These beliefs are erroneous.”<sup>108</sup> While a separate law in Title 18 of the United States Code criminalizes use of the armed forces “as a posse comitatus”—essentially prohibiting use of the U.S. military as a police force<sup>109</sup>—the Insurrection Act is a “statutory exception” to that law.<sup>110</sup> Today, “the Insurrection Act stands, and it permits the President to use federal troops to enforce the laws either at the request of a governor or on the initiative of the President.”<sup>111</sup>

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<sup>104</sup> Originally enacted as Pub. L. 9-39, 2 Stat. 443.

<sup>105</sup> See Rebecca Kheel, *House Votes to Curtail Insurrection Act Powers*, THE HILL (July 20, 2020), 2020 WL 4059507.

<sup>106</sup> 10 U.S.C. §§ 251–253.

<sup>107</sup> John R. Brinkerhoff, *Understanding the Posse Comitatus Act and the Insurrection Act*, 4 STATE DEF. FORCE J. 3, 3 (2008).

<sup>108</sup> *Id.*

<sup>109</sup> Pub. L. 45-263, 20 Stat. 145, now codified as 18 U.S.C. § 1385.

<sup>110</sup> See Kelly Magsamen, *4 Ways Congress Can Amend the Insurrection Act*, CTR. FOR AM. PROGRESS (June 12, 2020), <https://www.americanprogress.org/issues/security/news/2020/06/12/486261/4-ways-congress-can-amend-insurrection-act/>.

<sup>111</sup> Brinkerhoff, *supra* note 107, at 4.

The Act is rooted in the earliest history of the United States during George Washington's presidency. It was first inspired by the Calling Forth Act of 1792, which gave Washington authority "to call forth the militia when in his judgment they were needed to repel invasions, suppress insurrections, or enforce the laws."<sup>112</sup> Ever hesitant of the power of kings, the second Congress was reluctant to give this power to a president, and so specified that "before using the troops, the President would have to issue a proclamation calling on the insurgents to disperse in a limited time."<sup>113</sup> The Calling Forth Act further specified that domestic insurrections could be quelled with federal forces only upon approval "by an associate justice, or the district judge."<sup>114</sup> The powers delegated to the Executive to employ military force in domestic emergencies were thus "circumscribed in many ways," requiring cooperation from state authorities and the federal judiciary.<sup>115</sup>

In practice, the 1792 Act proved flawed. Already that year Washington was faced with protests over the federal government's first domestic product tax, known today as the Whisky Rebellion.<sup>116</sup> The civil unrest concerned Washington; he feared the protests in Pennsylvania in particular would lead the newly formed nation back into a revolutionary war.<sup>117</sup> The situation on the American frontier did not precisely fit the requirements of the Calling Forth Act, however.<sup>118</sup> Washington's cabinet accordingly asked Congress to

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<sup>112</sup> Brinkerhoff, *supra* note 107, at 5. *See also* An Act to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions, Pub. L. 2-28, 1 Stat. 264 (1792).

<sup>113</sup> Brinkerhoff, *supra* note 107, at 5.

<sup>114</sup> *See* ROBERT W. COAKLEY, *THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS 1789-1878*, at 20 (1988).

<sup>115</sup> *Id.* at 22.

<sup>116</sup> *See* THOMAS P. SLAUGHTER, *THE WHISKEY REBELLION: FRONTIER EPILOGUE TO THE AMERICAN REVOLUTION* 120-22 (1986).

<sup>117</sup> *Id.* at 192, 194.

<sup>118</sup> *See id.* at 192-93. In particular, the 1792 Act "required certification by a Supreme Court justice that the situation was beyond the control of civil authority before troops could be called to the central government's aid." *Id.* Taking advantage of this limitation on the President's authority, representatives from Pennsylvania "uncooperatively asserted that the judicial power was equal to the task of quelling and punishing the riots," thereby suggesting that federal intervention was neither necessary nor justified. *Id.* at 193. Washington's

## A NATION JOINS IN TEARS

grant the President more discretion. Congress complied in 1795, passing an updated law that gave the President “specific authority to call forth the militia upon the request of a governor or state legislature, if the governor were unable to apply for the assistance,” eliminating both the necessity of judicial determination that federal intervention was warranted and the sunset date on the original 1792 law.<sup>119</sup> Though broad, the President’s powers under the updated law, today known as the Militia Act of 1795, still did not allow the Executive to use federal troops on domestic soil at will. The President was permitted to employ the “militia” but not “federal troops,” for one.<sup>120</sup>

The Act was next expanded at the request of President Thomas Jefferson in response to the threat posed by Aaron Burr. Following his tenure as Jefferson’s Vice President, Burr had apparently begun plotting to raise an army and establish his own dynasty in either the Louisiana Territory or Mexico.”<sup>121</sup> Jefferson consulted his Secretary of State, James Madison, to determine whether the Constitution gave him the ability to send federal troops to quash Burr’s plans.<sup>122</sup> Madison responded in a letter quoting the Calling Forth Acts of 1792 and 1795.<sup>123</sup> His analysis was succinct: “It does not appear that regular Troops can be employed, under any legal provision [against] insurrections—but only [against] expeditions having foreign Countries for the object[.]”<sup>124</sup> In search of a legitimate, constitutional source of authority to send the federal armed forces to quell Burr’s plot, Jefferson asked Congress

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administration was ultimately able to satisfy the 1792 Act’s requirements, but were plagued by the administrative and negotiations setbacks. *See id.* at 196.

<sup>119</sup> Thaddeus Hoffmeister, *An Insurrection Act for the Twenty-First Century*, 39 STETSON L. REV. 861, 879-80 (2010); Brinkerhoff, *supra* note 107, at 5; An Act to provide for calling forth the Militia to execute the laws of the Union, suppress insurrections, and repel invasions; and to repeal the Act now in force for those purposes, Pub. L. 3-36, 1 Stat. 424 (1795).

<sup>120</sup> *See Hoffmeister, supra* note 119, at 880.

<sup>121</sup> *See Hoffmeister, supra* note 119, at 881; BUCKNER F. MELTON, JR., AARON BURR: CONSPIRACY TO TREASON 1–2, 64–66 (2002). For a useful overview of Burr’s conspiracy and Jefferson’s response, *see also* Dave Roos, *Thomas Jefferson Signed the Insurrection Act in 1807 to Foil a Plot by Aaron Burr*, HISTORY.COM (June 3, 2020), <https://www.history.com/news/insurrection-act-thomas-jefferson-aaron-burr>.

<sup>122</sup> Hoffmeister, *supra* note 119, at 881.

<sup>123</sup> Letter from James Madison to Thomas Jefferson (Oct. 30, 1806), <https://founders.archives.gov/documents/Madison/99-01-02-1021>.

<sup>124</sup> *Id.* *See also Hoffmeister, supra* note 119, at 881.

in December of 1806 to pass a bill authorizing the employment of the land and Naval forces of the United States in cases of insurrection.<sup>125</sup> Congress responded with the Insurrection Act of 1807, granting the President the power to call forth both federal and state forces in cases of insurrection.<sup>126</sup> The Insurrection Act apparently retained several of the earlier limitations on the President's powers included in the Calling Forth Act of 1792 and the Militia Act of 1795, however. The language of the 1807 law permitted the Executive to employ the United States military only "where it [would be] lawful for the President . . . to call forth the militia."<sup>127</sup>

The Insurrection Act was not, in the end, used against Burr.<sup>128</sup> President Jefferson first invoked the law in 1808 in response to information that "sundry persons" were "confederating together on Lake Champlain . . . for the purposes of forming insurrections against the authority of the United States."<sup>129</sup> The conspiracy involved a group of American merchant ships determined to avoid Jefferson's trade embargo with the British.<sup>130</sup> Enterprising, rebellious Americans had built "[i]mmense rafts of lumber," one of which was "near half a mile long [and] carried a ball-proof fort, and was manned by five or six hundred armed men prepared to defy the custom-house officers."<sup>131</sup>

The Act has been used and amended extensively since these early years. In 1861 at the request of President Abraham Lincoln, the law was again modified to increase Presidential authority to use the militia and federal armed forces to suppress domestic insurrections.<sup>132</sup> Passed as part of the

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<sup>125</sup> Roos, *supra* note 121.

<sup>126</sup> An Act authorizing the employment of the land and naval forces of the United States, in cases of insurrection, Pub. L. 9-41, 2 Stat. 443 (1807); Hoffmeister, *supra* note 119, at 881–82.

<sup>127</sup> 2 Stat. at 443; Hoffmeister, *supra* note 119, at 881.

<sup>128</sup> See Roos, *supra* note 121.

<sup>129</sup> Thomas Jefferson, *Proclamation of April 19, 1808*, in 1 COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 438–39 (James D. Richardson ed., 1897).

<sup>130</sup> Roos, *supra* note 121.

<sup>131</sup> HENRY ADAMS, 3 HISTORY OF THE UNITED STATES OF AMERICA DURING THE ADMINISTRATION OF THOMAS JEFFERSON 249 (Albert & Charles Boni 1930).

<sup>132</sup> Brinkerhoff, *supra* note 107, at 5; Hoffmeister, *supra* note 119, at 887.

## A NATION JOINS IN TEARS

larger Suppression of the Rebellion Act,<sup>133</sup> the law gave the President unfettered discretion to determine when it was “impracticable to enforce the laws by the ordinary course of judicial procedures,” greatly strengthening the Executive’s power and providing Lincoln with a legal basis for deploying troops against the rebellious South during the Civil War.<sup>134</sup> The amendment allowed Lincoln to deploy federal troops on his own initiative and act on his own judgment without waiting for a request from a governor or a certification that judicial authorities were insufficient.<sup>135</sup> The amendment also added “rebellion against the authority of the government of the United States” to the list of contingencies under which the President could act.<sup>136</sup>

The law was amended again during Reconstruction, this time at the request of President Ulysses S. Grant.<sup>137</sup> The former Union general, now the elected Commander in Chief of the United States’ military forces, approached Congress in 1870 to urge the necessity of “reimposing military rule . . . in those sections of the readmitted states where the [Ku Klux] Klan enjoyed virtual hegemony” after the formal end of military conflict during the Civil War.<sup>138</sup> Congress responded in 1871 by granting the President authority to use federal troops or the militia to respond to “insurrection, domestic violence, unlawful combinations, or conspiracies” in the States that would “deprive any portion or class of the people of [the States] any of the rights, privileges, or immunities, or protection, named in the Constitution and secured by [the law]” whenever state authorities “fail in or refuse protection of the people in such rights.”<sup>139</sup> Along with the original grants of authority under the Insurrection Act, these provisions were famously invoked by

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<sup>133</sup> 12 Stat. 281, 281–83 (1861).

<sup>134</sup> Hoffmeister, *supra* note 119, at 887.

<sup>135</sup> Brinkerhoff, *supra* note 107, at 5. *Cf. also* SLAUGHTER, *supra* note 116, at 196 (suggesting that certification by a Court might also serve as justification to employ the militia or federal troops under earlier versions of the Act).

<sup>136</sup> Hoffmeister, *supra* note 119, at 888.

<sup>137</sup> COAKLEY, *supra* note 114, at 309; Brinkerhoff, *supra* note 107, at 5.

<sup>138</sup> COAKLEY, *supra* note 114, at 309.

<sup>139</sup> Ku Klux Klan Act, 17 Stat. 13, 14 (1871) (codified as amended at 18 U.S.C. § 241 and 42 U.S.C. §§ 1983, 1985(3), 1988). An excerpted passage of the relevant section of the Act is reprinted in Hoffmeister, *supra* note 119, at 888. The relevant portion of the law is today codified as amended at 10 U.S.C. § 253(a).

President Dwight Eisenhower in 1957 when he sent the 101st Airborne Division to enforce the desegregation of public schools in Little Rock, Arkansas.<sup>140</sup>

More recently, the Insurrection Act has changed from Eisenhower's usage. Instead of enforcing civil rights, Presidents have invoked the Act to quell civil rights protesters—specifically, protests against police violence. In 1992, when violence erupted in Los Angeles following the acquittal of four police officers charged in the beating of Rodney King, President George H.W. Bush invoked the Act in response to the governor of California's request for federal assistance quelling the widespread riots.<sup>141</sup> In many ways, the civil unrest in 1992 mirrors the 2020 protests in Portland. In both circumstances, the President's invocation of the Insurrection Act departed from the Act's original purpose of preventing the violent overthrow of the government and instead effectively silenced citizens who reacted to the deaths of black persons at the hands of the police.

Yet important distinctions remain. President Bush employed the Insurrection Act only after receiving an explicit request from California's governor; President Trump instead circumvented the authority of Oregon's governor by deploying federal personnel that were neither requested nor desired.<sup>142</sup> Portland authorities repeatedly beseeched the federal government not to send any federal troops to their city.<sup>143</sup> Despite their pleas, Trump sent

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<sup>140</sup> See PAUL J. SCHEIPS, *THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS 1945-1992*, at 37–38 (2005); see also Roos, *supra* note 121.

<sup>141</sup> See Hoffmeister, *supra* note 119, at 890; Roos, *supra* note 121.

<sup>142</sup> Emily Badger, *How Trump's Use of Federal Forces in Cities Differs from Past Presidents*, N.Y. TIMES (July 23, 2020), <https://www.nytimes.com/2020/07/23/upshot/trump-portland.html>; see also Madeleine Carlisle, *What Is the Insurrection Act and Does It Give Trump the Authority to Send Military Troops Into States? Here's What to Know*, TIME.COM (June 2, 2020, 4:10 PM), <https://time.com/5846649/insurrection-act-1807-donald-trump/>.

<sup>143</sup> See Erwin Chemerinsky, *Op-Ed: Trump's Troops in Portland are a Constitutional Outrage*, L.A. TIMES (July 24, 2020, 3:40 PM), <https://www.latimes.com/opinion/story/2020-07-24/donald-trump-portland-border-patrol-constitution>.

## A NATION JOINS IN TEARS

troops by the tank-load.<sup>144</sup> Whatever Congress's past intentions for the Insurrection Act, President Trump interpreted it as giving him the power to deploy federal military troops and militia based on his subjective belief that political activity had become violent civil unrest, and that local authorities were unable to handle the crisis. That invocation does not stray far from President Bush's use of the Act. And unless the law is amended, the only authority that might have invalidated his actions were the courts.<sup>145</sup>

### B. *Congress's 2020 Proposed Amendment to the Insurrection Act of 1807*

Congress reacted quickly to Trump's unprecedented actions by exploring ways to amend the Insurrection Act. On July 20, 2020, the House approved language as part of a larger defense spending bill to amend the Act by requiring that the President consult with Congress "in every possible instance" before invoking the law.<sup>146</sup> The Amendment would also have required the President and the Secretary of Defense "certify to Congress that a State is unable or unwilling to suppress an insurrection or domestic violence, or that the State concerned is unable or unwilling to suppress an unlawful rebellion against the authority of the United States," in order to invoke the law.<sup>147</sup> That certification also would have required "demonstrable"

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<sup>144</sup> See Jemima McEvoy, *More Federal Forces Heading to Portland*, FORBES (July 28, 2020, 3:13 PM), <https://www.forbes.com/sites/jemimamcevoy/2020/07/28/more-federal-forces-heading-to-portland/?sh=61cd69c835c9> (noting that, while it remains unclear how many federal officers were deployed to Portland, at least 114 were in the city in mid-July 2020, and 150 additional border patrol personnel and deputy U.S. Marshals were en-route to Portland by the end of that month). Some federal agencies have expressed dismay at use of the term "troops." See, e.g., *Myth vs. Fact: 50+ Nights of Violence, Chaos, and Anarchy in Portland, Oregon*, DEP'T HOMELAND SEC. (July 27, 2020), <https://www.dhs.gov/news/2020/07/27/myth-vs-fact-50-nights-violence-chaos-and-anarchy-portland-oregon> (insisting that "DHS personnel sent to protect federal facilities in Portland are sworn civilian federal law enforcement officers, not active duty military personnel"). To Portland residents who experienced military-based tactics and weapons, the distinction is probably of little value.

<sup>145</sup> See, e.g., Carlisle, *supra* note 142 (noting that, if challenged, the President would likely invoke the Insurrection Act, requiring interpretation of the law by the federal courts).

<sup>146</sup> H.R. Rep. No. 116-617, at 1756 (2020) (Conf. Rep.).

<sup>147</sup> *Id.*

evidence that the State is unable or unwilling to act.<sup>148</sup> Further suggested amendments included language which specified that federal military personnel deployed under the Act are prohibited from “direct participation” in search, seizure, arrest, or other similar activities, unless “expressly authorized by law.”<sup>149</sup> Representative Veronica Escobar, a Democrat from Texas who sponsored the amendment, explained its necessity: “Today, if the president of the United States chooses to use military force abroad the president would have to consult with Congress,” she explained. “Yet that same consultation is not required for use of military force on American soil.”<sup>150</sup> Ultimately, the Senate’s amendment contained no similar provision, and the House receded from the language in order to secure the other body’s cooperation.<sup>151</sup> The defense appropriations bill was passed into law over the veto of President Trump on January 1, 2021, without any amendments to the Insurrection Act.<sup>152</sup>

Congress’s inability to amend the Insurrection Act is disconcerting and disappointing for many reasons. First, as a conceptual matter, the House’s proposed amendment was congruent with the intent of the legislature when the Act was initially ratified. As described above, the Sixth Congress passed the Insurrection Act to address the unique conflict created by Aaron Burr.<sup>153</sup> The Act retained specific limitations on the President’s power included in the earlier Calling Forth Act of 1792 and Militia Act of 1795.<sup>154</sup> These statutes were forged in the fires of federalism and carefully attuned to the United States’ government’s balance of powers in order to purposefully prevent unfettered presidential use of federal troops within the United States. By reinvigorating checks and balances between the Executive and Legislative branches, the proposed amendment would have ensured the Insurrection Act reverted to its original intended, far more limited purposes, rather than serve

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<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> Rebecca Kheel, *In The News: The Hill – House Votes to Curtail Insurrection Act Powers* (July 20, 2020), <https://escobar.house.gov/news/documentsingle.aspx?DocumentID=396>.

<sup>151</sup> See H.R. Rep. No. 116-617, at 1756 (2020) (Conf. Rep.).

<sup>152</sup> See H.R. 6395, 116th Cong. (2020).

<sup>153</sup> See *supra* notes 121–27 and accompanying text.

<sup>154</sup> See *supra* notes 113–15, 120, 127 and accompanying text.

## A NATION JOINS IN TEARS

as an unchecked source of potential presidential authority to use the federal military as internal police in American neighborhoods and cities.

### III. CIVIL LIBERTIES & JUDICIAL INTERVENTION

Without an amendment of the Insurrection Act from Congress, judicial intervention is the only check left to ensure the Executive branch's interloping presence is not limitless. Moreover, even under the current law, the mass arrests and use of violent force by federal agents in Portland evidenced pervasive constitutional violations. Many protestors fear that by exercising their unalienable constitutional rights they will face the same retaliation and combat tactics from federal personnel who are trained and equipped as a militarized national police force as the protesters in Portland.. The judiciary should not shy away from limiting the ever-expanding claims to war powers made by the President, particularly where those claims infringe on American's constitutional rights.

#### A. *Defining Insurrection in the Courts*

In related areas of federal law, the Supreme Court has been reluctant to expand the definition of such nebulous terms as "insurrection." The best example is *Herndon v. Lowry*,<sup>155</sup> a criminal case from 1937. In *Herndon*, the defendant was charged with a violation of a Georgia state law that prohibited the introduction, printing, or circulation of documents "for the purpose of inciting insurrection."<sup>156</sup> He was convicted for communist solicitations, specifically for "uniting, combining, and conspiring to incite riots and to embarrass and impede the orderly processes of the courts and offering combined resistance to, and, by force and violence, overthrowing and defeating the authority of the state . . . by speech and persuasion."<sup>157</sup> The defendant defended his actions by asserting that the cited statute was unconstitutionally vague and unwarrantably invaded his rights under the United States Constitution.<sup>158</sup> Finding for the defendant, the Court held that

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<sup>155</sup> 301 U.S. 242 (1937).

<sup>156</sup> *Id.* at 253.

<sup>157</sup> *Id.* at 245.

<sup>158</sup> *Id.* at 247–48.

“the limitation upon individual liberty must have appropriate relation to the safety of the state. Legislation which goes beyond this need violates the principle of the Constitution.”<sup>159</sup> The Court held that the Georgia statute must, as a matter of federal law, require that the defendant intend to use force and violence towards the state, or intend that others would do so at his bidding, before the state could criminalize the defendant’s exercise of his constitutional rights.<sup>160</sup>

The Court’s holding is significant beyond the specifics of Georgia statutory law because it makes clear the narrow scope of an “insurrection.” The defendant’s conviction for speaking his political beliefs, without proof that he was forcefully trying to overthrow the government, was not an insurrection. This case demonstrates the Court’s recognition of the liberty that protesters are latching onto in Portland. Peaceful protests and movements for political organization, just as in *Herndon*, are not forms of insurrection but speech.

The Court has not always taken such a circumscribed view, however, particularly in cases interpreting the Insurrection Act itself. In *Laird v. Tatum*,<sup>161</sup> decided in 1972, the Justices deviated notably from the Court’s earlier interpretation. The case concerned President Johnson’s order that federal troops assist local authorities with the “civil disorders in Detroit, Michigan, in the summer of 1967 and during the disturbances that followed the assassination of Dr. Martin Luther King.”<sup>162</sup> To assist the federal troops’ coordination with local authorities, the federal government created a data-gathering system that would “permit the Army, when called upon to assist local authorities, to be able to respond effectively with a minimum of force.”<sup>163</sup> The system involved extensive collection of information about public activities that the Army thought had “at least some potential for civil disorder,” including notes from Army Intelligence agents who attended public political organizing meetings.<sup>164</sup> Though the recording system was

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<sup>159</sup> *Id.* at 258.

<sup>160</sup> *Id.*

<sup>161</sup> 408 U.S. 1 (1972).

<sup>162</sup> *Id.* at 4–5.

<sup>163</sup> *Id.* at 5.

<sup>164</sup> *Id.* at 6.

## A NATION JOINS IN TEARS

extensive, the government contended that it was necessary, and that “reports concerning civil disturbances [would] be limited to matters of immediate concern to the Army—that is, reports concerning outbreaks of violence or incidents with a high potential for violence beyond the capability of state and local police and the National Guard to control.”<sup>165</sup> Several individuals brought a class action for declaratory and injunctive relief, asking the courts end the government’s “surveillance of lawful and peaceful civilian political activity.”<sup>166</sup>

Importantly, the Court held that the individuals’ associations and speech could be “chilled” without directly violating their First Amendment rights.<sup>167</sup> Writing for the Majority, Chief Justice Burger held that the petitioners’ claim, “simply stated, is that they disagree with the judgments made by the Executive Branch with respect to the type and amount of information the Army needs and that the very existence of the Army’s data-gathering system produces a constitutionally impermissible chilling effect upon the exercise of their First Amendment rights.”<sup>168</sup> But discomfort caused by the data-gathering system was not an injury redressable by the judiciary, according to the Court.<sup>169</sup> It was “not the role of the judiciary, absent actual present or immediately threatened injury resulting from unlawful government action,” to “probe the Army’s intelligence-gathering activities” to determine “the extent to which those activities may or may not be appropriate to the Army’s mission.”<sup>170</sup> In a nod to the petitioners, Chief Justice Burger wrote that the petitioners’ argument was congruent with the “philosophical underpinnings [which] explain our traditional insistence on limitations on military operations in peacetime.”<sup>171</sup> But despite the “traditional and strong resistance of Americans to any military intrusion into civilian affairs,” the *Laird* Court

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<sup>165</sup> *Id.* at 7–8.

<sup>166</sup> *Id.* at 2.

<sup>167</sup> *See id.* at 13.

<sup>168</sup> *Id.*

<sup>169</sup> *See id.*

<sup>170</sup> *Id.* at 14, 15.

<sup>171</sup> *Id.* at 15.

did not find the federal government's operations in violation of any constitutionally guaranteed rights.<sup>172</sup>

In a strong dissent, Justice Douglas, joined by Justice Marshall, explained why the majority's holding was inconsistent with the liberties afforded to American citizens.<sup>173</sup> He was particularly disturbed by the majority's flippant allowance of the military into the civilian sector. "[A]larm was sounded in the Constitutional Convention about the dangers of the armed services," he noted, which exist "not only in bold acts of usurpation of power, but also in gradual encroachments."<sup>174</sup> He insisted that the American tradition accordingly "reflects a desire for civilian supremacy and subordination of military power."<sup>175</sup> Quoting the late Chief Justice Warren, Justice Douglas noted that while "the military serves the vital function of preserving the existence of the nation, . . . [i]n times of peace, the factors leading to an extraordinary deference to claims of military necessity have naturally not been as weighty."<sup>176</sup> Deployment of the military when the nation was not at war, particularly to surveil American citizens, was therefore "a cancer on our body politic."<sup>177</sup> While "[t]hose who already walk submissively will say there is no cause for alarm," he insisted, "submissiveness is not our heritage."<sup>178</sup> He accordingly would have enjoined the federal government's use of military intelligence against Americans at home, because the Constitution "was designed to allow rebellion to remain as [America's] heritage" and to "keep the precincts of belief and expression . . . [and] of political and social activities free from" government interference.<sup>179</sup> There could be "no influence more paralyzing" than military surveillance of American citizens, he concluded.<sup>180</sup>

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<sup>172</sup> *Id.*

<sup>173</sup> *See id.* at 16–29 (Douglas, J., dissenting).

<sup>174</sup> *Id.* at 18.

<sup>175</sup> *Id.* at 19.

<sup>176</sup> *Id.* at 19–20 (quoting Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 182, 193 (1962)).

<sup>177</sup> *Id.* at 28.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

## A NATION JOINS IN TEARS

Justice Douglas's dissent foreshadowed the present-day conflict in Portland. He insisted that "the exercise of military power, where the rights of the citizen are concerned, [should] never be pushed beyond what the exigency requires."<sup>181</sup> Otherwise, Douglas feared that "[t]he act of turning the military loose on civilians[,] even if sanctioned by an Act of Congress . . . would raise serious and profound constitutional questions. Standing as it does only on brute power and Pentagon policy, it must be repudiated as a usurpation dangerous to the civil liberties on which free men are dependent."<sup>182</sup> His words highlight the dangerous disconnect between the government's use of force and individuals' civil liberties, particularly when the U.S. military was employed to police American citizens at home.

### B. *Due Process Guarantees*

Justice Douglas's dissent in *Laird* expressed repugnance for federal military intrusion on civilian lives.<sup>183</sup> His concern spanned many of the civil liberties included in the Bill of Rights, and he insisted that even exigent circumstances could not validate overbroad governmental action.

One of the civil rights implicated by the use domestically of federal military force is the due process guarantee of the Fifth Amendment.<sup>184</sup> The Supreme Court grappled with this issue in *Hamdi v. Rumsfeld*,<sup>185</sup> decided in the wake of the terrorist attacks of September 11, 2001.<sup>186</sup> The case involved the capture by U.S. military forces of an American citizen, alleged to be an enemy combatant, who was held without any formal charges or the initiation of any formal proceedings on a series of United States Navy brigs.<sup>187</sup> The citizen's father petitioned for a writ of habeas corpus.<sup>188</sup> The United States insisted that it was permitted to hold Hamdi "indefinitely" because "a series

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<sup>181</sup> *Id.* at 24.

<sup>182</sup> *Id.*

<sup>183</sup> *See generally id.* at 16–29.

<sup>184</sup> U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law[.]").

<sup>185</sup> 542 U.S. 507 (2004).

<sup>186</sup> *See id.* at 510.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 511.

of U.S. military screening teams [had] determined that Hamdi met the criteria for enemy combatants, and a subsequent interview of Hamdi . . . supports his classification as an enemy combatant.”<sup>189</sup>

Justice O’Connor’s plurality opinion made clear that a United States citizen—even one detained as an enemy combatant—must be given a meaningful opportunity to contest the factual basis for his detention and exercise due process rights.<sup>190</sup> Justice O’Connor maintained that while the law under which Hamdi had been detained “provided procedures for executive detention, during times of emergency, of individuals deemed likely to engage in espionage or sabotage,”<sup>191</sup> the “serious competing interests” at stake required as a bare constitutional minimum that the government provide notice of the factual basis for its detention and an opportunity to rebut those assertions before an impartial authority.<sup>192</sup> Citizens who are classified as enemy combatants are no less American citizens, after all.<sup>193</sup> Justice O’Connor was furthermore swayed by Congress’s own concern with preventing a “reprise [of] the Japanese-American internment camps of World War II.”<sup>194</sup> The “concentration camp implications” of permitting the U.S. military to detain U.S. citizens without recourse to their constitutional rights is “abhorrent,” as Congress recognized.<sup>195</sup> Justice O’Connor therefore reminded the Executive branch that American citizens cannot be deprived of their due process rights, even in an emergency, merely to serve military interests.<sup>196</sup> The petitioner’s request for a writ of habeas corpus was ultimately granted and his case was remanded so that the lower courts could provide constitutionally-due process of the law.<sup>197</sup>

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<sup>189</sup> *Id.* at 510, 513.

<sup>190</sup> *See id.* at 533.

<sup>191</sup> *Id.* at 517.

<sup>192</sup> *Id.* at 529, 533.

<sup>193</sup> *See id.* at 535 (“[T]he threats to military operations posed by a basic system of independent review are not so weighty as to [prevail over] a citizen’s core rights to challenge meaningfully the Government’s case and to be heard by an impartial adjudicator.”).

<sup>194</sup> *Id.* at 517.

<sup>195</sup> *Id.* (internal quotation omitted).

<sup>196</sup> *See id.* at 532–35.

<sup>197</sup> *Id.* at 539.

## A NATION JOINS IN TEARS

*Hamdi*, though only a plurality opinion, displayed the Court's awareness of the dangers of regression into the federal government's untrammelled military control over civilian lives that the Court had so wrongly approved in *Korematsu v. United States* during the height of World War II.<sup>198</sup> At the core of this danger is the historically-evident likelihood that the federal government will arbitrarily punish citizens and strip them of their fundamental liberties in its zeal to secure domestic tranquility. That Justice O'Connor's opinion in *Hamdi* was written at the height of the George H.W. Bush administration's War on Terror serves as a particularly strong warning against relying on political prejudice or the contemporary fears of American society to create substantive policies that trammel individual, fundamental rights. However, the Court's inability to come to a conscientious in *Hamdi* leaves citizen's due process rights in flux. Though the plurality understands the need to preserve Fifth Amendment protections, the Court did not create binding limits on the Executive branch's ever expanding war powers.

Due process concerns are not only implicated by the federal government's military detention of American citizens, of course. Constitutional violations are just as often hidden under the guise of even-handed law. Accordingly, although no reports indicate that federal personnel deployed by President Trump in Portland arrested American citizens and held them in military custody, their actions included the arrest of numerous civilians, not always clearly related to matters of federal concern.<sup>199</sup>

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<sup>198</sup> *Korematsu v. United States*, 323 U.S. 214 (1944), infamously affirmed the exclusion of American citizens of Japanese ancestry from areas of the United States deemed important to the military, and their imprisonment instead in "relocation centers," based on the opinion of "properly constituted military authorities" that the West Coast of the United States might be invaded during the war with Japan. *See id.* at 223–24. In 2018, the Supreme Court recognized that "*Korematsu* was gravely wrong the day it was decided, and has been overruled in the court of history, and . . . has no place in law under the Constitution." *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (internal quotation omitted).

<sup>199</sup> *See, e.g.*, Amir Vera, Konstantin Toropin & Josh Campbell, *US Attorney Requests DHS Investigation After Video Shows Masked, Camouflaged Federal Authorities Arresting Protestors in Portland*, CNN.COM (updated July 20, 2020, 2:26 PM), <https://www.cnn.com/2020/07/18/us/portland-arrests-federal-authorities/index.html>; Katie Shepherd & Mark Berman, *'It Was Like Being Preyed Upon': Portland Protesters Say Federal Officers in Unmarked Vans are Detaining Them*, WASH. POST (July 17, 2020, 8:24 PM), <https://www.washingtonpost.com/nation/2020/07/17/portland-protests-federal->

The idea that authorities might be overly vigilant about enforcing vaguely defined laws is not new to the courts, and also implicates due process concerns. In some instances, laws are too broad and allow for law enforcement to be the arbitrators of the law's application. One example is *City of Chicago v. Morales*,<sup>200</sup> in which the Supreme Court invalidated a Chicago ordinance as unconstitutionally vague.<sup>201</sup> The ordinance provided that police who observed "a person whom [police] reasonably believes to be a criminal street gang member loitering in any public place with one or more persons" must "order all such persons to disperse and remove themselves from the area."<sup>202</sup> Anyone who did not "promptly obey" was guilty of a criminal offense.<sup>203</sup> Because the ordinance did not proscribe in any particular activity, giving police officers little guidance to determine who they would cite under the law, the Court determined the statute wrongfully "entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat."<sup>204</sup> The Court was particularly concerned with giving the police the power "to decide arbitrarily which members of the public they will order to disperse" because the ordinance prevented a "substantial amount of innocent conduct."<sup>205</sup> The "right to remove from one place to another according to inclination," for example, is "an attribute of personal liberty protected by the Constitution."<sup>206</sup> Therefore, if "the loitering is in fact harmless and innocent, the dispersal order itself [would be] an unjustified impairment of liberty."<sup>207</sup>

The overly vague ordinance in *Morales* is reminiscent of the lack of procedure present in *Hamdi*, as well as the actions of federal authorities in

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arrests/. Cf. also Ryan Lucas, *Review of Federal Charges in Portland Unrest Shows Most Are Misdemeanors*, NPR.ORG (Sept. 5, 2020, 7:00 AM), <https://www.npr.org/2020/09/05/909245646/review-of-federal-charges-in-portland-unrest-show-most-are-misdemeanors>.

<sup>200</sup> 527 U.S. 41 (1999).

<sup>201</sup> *Id.* at 51.

<sup>202</sup> *Id.* at 65 (O'Connor, J., concurring in part and concurring in the judgment) (quoting CHIC. MUN. CODE § 8-4-015 (1992)).

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 60, 64 (quoting *Kolender v. Lawson*, 461 U.S. 352, 360 (1983)).

<sup>205</sup> *Id.* at 58, 60.

<sup>206</sup> *Id.* at 53 (quoting *Williams v. Fears*, 179 U.S. 270, 274 (1900)).

<sup>207</sup> *Id.* at 58.

## A NATION JOINS IN TEARS

Portland during the Summer of 2020. Whether by arbitrarily enforcing laws so vague that individuals cannot understand in advance what conduct is prohibited, as in *Morales*, or detaining individuals indefinitely without any evidentiary or judicial proceedings, as in *Hamdi*, or arresting Americans for petty misdemeanors outside the scope of the President’s Executive Order,<sup>208</sup> as in Portland in 2020, the government violates Americans’ due process rights and abdicates the rule of law.

The fear that the government might harm innocent individuals, and that due process is necessary to safeguard the American people, is in the very DNA of the United States. William Blackstone, the foremost authority on the common law at the time of the ratification of the United States Constitution, wrote that it was “better that ten guilty persons escape, than that one innocent suffer.”<sup>209</sup> America’s Benjamin Franklin went further, suggesting it better that “a hundred guilty persons should escape than one innocent person should suffer.”<sup>210</sup>

### C. *The Fourth Amendment, Warrants, and the Use of Force against Civilians*

The deployment of federal troops in Portland also implicates rights guaranteed to the people under the Fourth Amendment to the Constitution. One of those rights is the protection against warrantless arrests.<sup>211</sup> After reports surfaced that federal officers were using “unmarked vehicles to drive around Portland, detain protesters, and place them into the officers’ unmarked

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<sup>208</sup> Compare Lucas, *supra* note 199 (noting that the vast majority of citations issued by federal authorities in Portland were for “what could be considered minor offenses,” mostly citations and misdemeanors), with Exec. Order No. 13933, 85 Fed. Reg. 40081, 40082–83 (ordering the Attorney General to “take all appropriate enforcement action” against individuals who violate federal laws including 18 U.S.C. §§ 247, 1369, 1952, 2101, 2339A, all of which are felonies).

<sup>209</sup> Alexander Volokh, *Aside: n Guilty Men*, 146 U. PENN. L. REV. 173, 174 (1997) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES \*352).

<sup>210</sup> *Id.* (quoting Letter from Benjamin Franklin to Benjamin Vaughn (Mar. 14, 1785), in 11 THE WORKS OF BENJAMIN FRANKLIN 11, 13 (John Bigelow ed., fed. ed. 1904)).

<sup>211</sup> See U.S. CONST. amend. XIV. Federal statutory law also makes clear that “no citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.” 18 U.S.C. § 4001(a).

vehicles, removing them from public without either [formally] arresting them or stating the basis for an arrest,” Oregon Attorney General Ellen Rosenblum filed a complaint against the Department of Homeland Security and other federal agencies, alleging unlawful detainment of demonstrators without probable cause.<sup>212</sup> Rosenblum sought a restraining order to prevent agents employed by several Executive agencies from making any further warrantless arrests.<sup>213</sup>

The federal courts have denounced warrantless arrests and other unreasonable searches and seizures in countless cases.<sup>214</sup> Significantly for the situation in Portland, the Supreme Court has also held that the use of deadly force can constitute a seizure, such that unreasonable use of deadly force by law enforcement can violate the Fourth Amendment.<sup>215</sup> In *Tennessee v. Garner*,<sup>216</sup> for example, the Court held that law enforcement’s use of deadly force against an unarmed burglar violated the Fourth Amendment, regardless of whether police had probable cause to believe that the individual was engaged in criminal activity.<sup>217</sup> The Court was “not convinced that the use of deadly force is a sufficiently productive means of accomplishing [the police’s goal of encouraging peaceful submission by suspects] to justify the killing of nonviolent suspects.”<sup>218</sup> Unfortunately, stories of Portland protesters like Nat West and his 16-year-old daughter prove that neither innocence nor nonviolence was a factor for the federal troops who arrived in American cities following President Trump’s Executive Order.<sup>219</sup> Both West and his daughter

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<sup>212</sup> Lauren Egan, *Oregon Attorney General Sues DHS Amid Reports of Unlawful Detainment of Portland Protesters*, NBC NEWS (July 18, 2020, 4:26 PM), <https://www.nbcnews.com/politics/politics-news/oregon-attorney-general-sues-dhs-amid-reports-unlawful-detainment-portland-n1234297>.

<sup>213</sup> *Id.*

<sup>214</sup> See generally 68 AM. JUR. 2D *Searches and Seizures* §§ 1, 12, Westlaw (database updated Feb. 2021).

<sup>215</sup> *Tennessee v. Garner*, 471 U.S. 1, 7 (1985).

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 9–10.

<sup>218</sup> *Id.* at 10.

<sup>219</sup> See Jemima McEvoy, *Moms, Children Among Portland Protestors Sustaining Gruesome Injuries*, FORBES (July 29, 2020, 4:29 PM),

## A NATION JOINS IN TEARS

were peacefully protesting when federal troops engaged the crowd with tear gas, “less-than-lethal munition,” and flash bangs.<sup>220</sup> West’s daughter “partially lost hearing after a device exploded next to [her] left ear;” preliminary tests showed her hearing loss was “moderate to severe” and effected ninety percent of her hearing in her left ear.<sup>221</sup>

Courts have been particularly hesitant about excessive use of force that amounts to an unreasonable seizure by military personnel engaged in domestic law-enforcement activities.<sup>222</sup> In *Bissonette v. Haig*,<sup>223</sup> the Eighth Circuit considered a case brought by residents of Pine Ridge Indian Reservation against federal officials and military personnel, in which the plaintiffs sought damages for the military’s use of force to seize and confine them within an “armed perimeter.”<sup>224</sup> Plaintiffs contended that agents of the federal government violated the Fourth Amendment by deploying federal military forces without lawful authority.<sup>225</sup> The court agreed that the plaintiffs had stated a valid cause of action because federal military forces “directly restrained [the] plaintiffs’ freedom of movement,” apparently exceeding any statutory grant of authority by Congress.<sup>226</sup>

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<https://www.forbes.com/sites/jemimamcevoy/2020/07/29/moms-children-among-portland-protesters-sustaining-gruesome-injuries>.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> See *Bissonette v. Haig*, 776 F.2d 1384, 1389 (8th Cir. 1985).

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 1385. In a particularly twisted turn of history, these events took place in the village of Wounded Knee, South Dakota, *id.*, the same approximate location of the Wounded Knee Massacre nearly eighty years before, where a brutal exchange between the United States Army and a group of Lakota people resulted in more than 250 deaths and at least 51 serious injuries in December 1890. See John E. Carter, *Wounded Knee Massacre*, ENCYCLOPEDIA OF THE GREAT PLAINS (David J. Wishart ed.), <http://plainshumanities.unl.edu/encyclopedia/doc/egp.war.056>.

<sup>225</sup> *Bissonette*, 776 F.2d at 1385.

<sup>226</sup> *Id.* at 1391. In particular, the Court held that the plaintiffs had stated a cause of action under the Fourth Amendment because, as use of military forces in violation of the Posse Comitatus Act, 18 U.S.C. § 1385, the use of force was necessarily unreasonable. *Bissonette*, 776 F.2d 1392.

*Bissonette* is an important acknowledgment of the “special threats to constitutional government inherent in military enforcement of civilian law.”<sup>227</sup> The Eighth Circuit clearly laid out country’s “long tradition” of limiting military involvement in civilian affairs “beginning with the Declaration of Independence and continued in the Constitution.”<sup>228</sup> Delegates to the Constitutional Convention, for instance, had recognized that “when a government wishes to deprive its citizens of freedom, and reduce them to slavery, it generally makes use of a standing army.”<sup>229</sup> The Eight Circuit accordingly held that “if the use of military personnel is both unauthorized by statute, and contrary to a specific criminal prohibition, and if citizens are seized or searched by military means in such a case . . . such searches and seizures are constitutionally ‘unreasonable.’”<sup>230</sup> There are “limits established by Congress on the use of the military for civilian law enforcement,” and those limits cannot be flippantly disregarded consistent with the Fourth Amendment.<sup>231</sup> These observations are especially relevant in the context Portland’s protests, where unbridled violence by federal agents was pervasive.

Despite this recognition of the particular danger of military policing of civilians, the federal courts have repeatedly upheld state-sponsored violence. Recently, in *Hernandez v. Mesa*,<sup>232</sup> the Supreme Court declined to recognize a federal cause of action for Mexican parents whose child was fatally shot by a United States Border Patrol Agent.<sup>233</sup> The case involved two Mexican children who were “playing a game, running across the [U.S.-Mexico border], touching the fence on the U.S. side, and then running back across the border” to Mexico.<sup>234</sup> A Border Patrol Agent detained one of the kids and

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<sup>227</sup> *Id.* at 1387.

<sup>228</sup> *Id.* at 1387, 1388.

<sup>229</sup> *Id.* at 1387 (quoting 3 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 209 (1911)).

<sup>230</sup> *Id.* at 1389.

<sup>231</sup> *Id.*

<sup>232</sup> 140 S. Ct. 735 (2020).

<sup>233</sup> *Id.* at 740, 749.

<sup>234</sup> *Id.* at 740.

## A NATION JOINS IN TEARS

fired two shots at the second boy's back as he ran away.<sup>235</sup> One of the bullets struck and killed him on the Mexican side of the border.<sup>236</sup> The Court held that no existing constitutional remedy applied to the case, and declined to “fashion” one to address the situation.<sup>237</sup> Even more disturbingly, the majority wrote that it “presume[d] that Border Patrol policy and training incorporate both the Executive’s understanding of the Fourth Amendment’s prohibition of unreasonable seizures and the Executive’s assessment of circumstances at the border.”<sup>238</sup> Because the Executive had thus decided the Border Patrol Agent’s behavior was “reasonable conduct . . . under the circumstances,” the Court not only abdicated its duty to determine when actions by federal officials violate the Constitution, it affirmatively suggested that “respect for the separation of powers” counseled against its weighing in at all.<sup>239</sup>

These judicial decisions demonstrate that while courts have in theory recognized that military policing of civilian matters is a grave threat to civil liberties, some lives are valued over others. While the use of excessive force and violence to control nonviolent citizens is unreasonable,<sup>240</sup> and the use of the military for civilian law enforcement poses special problems for Americans’ civil liberties,<sup>241</sup> a federal agent’s use of deadly force against an unarmed Mexican child remains unassailable in the highest court of the United States.<sup>242</sup> That blatant inequality which plagues the justice system is the foundation of movements like Black Lives Matter and the widespread Portland protests of 2020, which seek to call attention to the ways in which the government, including both courts and law enforcement, consistently and apply constitutional protections unequally based on the biases of people in

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<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at 749.

<sup>238</sup> *Id.* at 744.

<sup>239</sup> *Id.* at 744, 749.

<sup>240</sup> *See supra* notes 215–18 and accompanying text (discussing *Tennessee v. Garner*, 471 U.S. 1 (1985)).

<sup>241</sup> *See supra* notes 222–31 and accompanying text (discussing *Bissonette v. Haig*, 776 F.2d 1384 (8th Cir. 1985)).

<sup>242</sup> *See supra* notes 232–39 and accompanying text (discussing *Hernandez*, 140 S. Ct. at 735).

positions of power and privilege. The inequality should be self-evident. The United States' failure to recognize it is the reason that protesters use their voices to fight for equality in the form of protests and demonstrations. As the next section demonstrates, however, freedom of speech is no longer free for those who wish to speak against the state.

#### D. *Deterioration of the First Amendment*

Ultimately, regardless of President Trump's reasoning for sending troops to Portland, their presence effectively quashed protesters' First Amendment rights to speak, peacefully organize, and demonstrate in the name of political change. In addition to threats to individuals' Fourth and Fifth Amendment rights, protestors and journalists in Portland were subject to federal government actions that limited their exercising of protected free speech.

The Free Speech Clause of the First Amendment<sup>243</sup> exists "principally to protect discourse on public matters."<sup>244</sup> It reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."<sup>245</sup> It is "[p]remised on mistrust of governmental power," including against governmental attempts to "disfavor certain subjects or viewpoints."<sup>246</sup> It is also "essential to our democratic form of government" and "furthers the search for truth."<sup>247</sup> By protecting the "free discussion of governmental affairs," the First Amendment "ensure[s] that . . . individual citizen[s] can effectively participate in and contribute to our republican system of self-government."<sup>248</sup>

Despite these platitudes from the Supreme Court, federal agents acting under the Executive's control engaged in violent and suppressive tactics that threatened Americans' First Amendment rights throughout the protests of

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<sup>243</sup> U.S. CONST. amend. I.

<sup>244</sup> *Brown v. Ent. Merch. Ass'n*, 564 U.S. 786, 790 (2011).

<sup>245</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

<sup>246</sup> *Citizens United v. FEC*, 558 U.S. 310, 340 (2010).

<sup>247</sup> *Janus v. Am. Fed'n State, Cnty., & Mun. Emps.*, 138 S. Ct. 2448, 2464 (2018).

<sup>248</sup> *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 604 (1982).

## A NATION JOINS IN TEARS

2020. Many violent acts targeted journalists, including those who wore press badges to distinguish themselves within crowds as observers committed to reporting the news as it unfolded.<sup>249</sup> Others were arrested, apparently without probable cause.<sup>250</sup> Some journalists sought judicial intervention, securing a temporary restraining order from a federal court in Oregon that blocked federal agents from using physical force or detaining clearly marked journalists in Portland.<sup>251</sup> The order was based in part on video documenting federal officers shooting and macing reporters and legal observers.<sup>252</sup>

Protestors were also targeted. After resisting demonstrations of violence that enflamed rather than calmed the demonstrations in Portland's streets,<sup>253</sup> many who were arrested were faced with a choice between continued detainment or abandoning their First Amendment right to protest.<sup>254</sup> After several protestors were charged with committing relatively minor federal offenses for "failure to obey a lawful order" or "disorderly conduct," they were released only when a federal Magistrate Judge added, as a condition of

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<sup>249</sup> See Zoe Tillman, *Videos Appear to Show Federal Officers Shooting and Macing Reporters and Legal Observers, Despite a Judge's Order*, BUZZFEED NEWS (July 28, 2020, 4:31 PM), <https://www.buzzfeednews.com/article/zoetillman/federal-officers-shoot-mace-reporters-portland-lawsuit>. See also Ed Pilkington, *US homeland security surveilling journalists covering Portland protests*, GUARDIAN (July 31, 2020, 10:53 AM), <https://www.theguardian.com/us-news/2020/jul/31/dhs-intelligence-reports-journalists-portland-protests>.

<sup>250</sup> See, e.g., *Black CNN Reporter Arrested On Air at Protests Over George Floyd Killing*, GUARDIAN (May 29, 2020, 10:34 AM), <https://www.theguardian.com/us-news/2020/may/29/black-cnn-reporter-arrested-on-air-minneapolis-protests-george-floyd-killing>.

<sup>251</sup> Temporary Restraining Order Enjoining Federal Defendants, Index Newspapers LLC v. City of Portland, No. 3:20-cv-1035-SI (D. Or. July 23, 2020). See also Tillman, *supra* note 249.

<sup>252</sup> Tillman, *supra* note 249.

<sup>253</sup> See Kavanaugh, *supra* note 16 (describing how, just when "raucous demonstrations had nearly wound down in Portland . . . President Donald Trump sent in federal forces. The protests against police violence and systemic racism quickly grew bigger and louder.").

<sup>254</sup> Dara Lind, *"Defendant Shall Not Attend Protests": In Portland, Getting Out of Jail Requires Relinquishing Constitutional Rights*, PROPUBLICA (July 28, 2020, 4:13 PM), <https://www.propublica.org/article/defendant-shall-not-attend-protests-in-portland-getting-out-of-jail-requires-relinquishing-constitutional-rights>.

release, terms under which protestors forfeited their constitutional rights.<sup>255</sup> The conditional release orders have included indefinite permeations of First Amendment limitations. One release order mandated that the defendant “not attend any other protests, rallies, assemblies or public gathering in the state of Oregon.”<sup>256</sup> Another release order contained a similar term, handwritten by United States Magistrate Judge V. Acosta on a pre-typed document, which prohibited a protestor from attending protests, assemblies, demonstrations, or public gatherings in the state of Oregon.<sup>257</sup> Ramya Krishnan, an attorney at Columbia University’s Knight First Amendment Institute, had no difficulty concluded that the conditions were likely unconstitutional infringements of the protestors’ constitutional right to free assembly, because the “blanket ban on attending future protests” seriously infringed the individuals’ rights without being “reasonably related to any legitimate goal of pretrial release.”<sup>258</sup> This is a sad state for Americans’ most cherished civil rights, as the Supreme Court has historically given great deference to the protections of the First Amendment.

#### CONCLUSION

President Trump’s decision to unilaterally deploy federal troops to police the political protests in Portland raises several constitutional issues of monumental import. His use of Executive power demonstrated an unchecked, expansive view of Article II that threatens principles of both federalism and the separation of powers. Additionally, by openly considering invoking the Insurrection Act, President Trump once again drew attention to a too powerful tool in the Executive’s toolkit—one that has been expanded over the course of American History and increasingly seems to have no meaningful limits. While amendments to the Insurrection Act were brought to the floor of the House of Representatives, Congress failed to meet the urgency of the moment, and has left the President’s powers almost

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<sup>255</sup> Rachel Treisman, *For Some Arrested at Portland Protests, Release is Conditioned on Not Attending More*, KPBS.ORG (July 29, 2020), <https://www.kpbs.org/news/2020/jul/29/for-some-arrested-at-portland-protests-release-is/>.

<sup>256</sup> Lind, *supra* note 254.

<sup>257</sup> *Id.*

<sup>258</sup> Treisman, *supra* note 255.

## A NATION JOINS IN TEARS

completely unchecked. That leaves only the courts to protect Americans' civil rights and liberties. Yet the courts, too, have a checkered record of reining in the Executive, particularly when the individuals affected are minorities—including people like George Floyd whose untimely death spurred the protests of Summer 2020, as well as President Trump's belligerent response. The Executive's power to deploy the militia, armed forces, and other federal agents to act as police in American neighborhoods cannot remain an unlimited power. If such unilateral actions remain unchecked, the civil rights guaranteed to Americans by the U.S. Constitution lie in jeopardy.

Political ambivalence, evidenced by less than half of the eligible voting population casting a vote in the 2016 general election, is also part of the problem. Despite the change in leadership caused by the 2020 election of Joe Biden to the Presidency, issues plaguing the nation cannot be solved merely by voting into power a different political party. Instead, "We the People" must decide if giving the federal government unfettered power to deploy military troops on American soil to put down protests is consistent with our American identity and values. Recall that at the conclusion of the Constitutional Convention in 1787, a group of citizens asked Benjamin Franklin what type of government the Founders had proposed; his response was "a republic, *if you can keep it*."<sup>259</sup> Franklin's statement made clear that it is the people's duty—our duty—to uphold our system of government, not just our representatives'. Chief Justice Roberts echoed this sentiment not long before the first impeachment of President Trump, writing that "each generation . . . has an obligation to pass on to the next, not only a fully functioning government responsive to the needs of the people, but the tools to understand and improve it."<sup>260</sup>

President Trump's use of military force to respond to the protests in Portland made clear that all of our unalienable rights can still be encroached

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<sup>259</sup> Richard R. Beeman, *Perspectives on the Constitution: A Republic, If You Can Keep It*, NAT'L CONSTITUTION CTR., <https://constitutioncenter.org/learn/educational-resources/historical-documents/perspectives-on-the-constitution-a-republic-if-you-can-keep-it> (emphasis added).

<sup>260</sup> Adam J. White, *A Republic, If We Can Keep It*, THE ATLANTIC (Feb. 4, 2020), <https://www.theatlantic.com/ideas/archive/2020/02/a-republic-if-we-can-keep-it/605887/>

upon. Our ambivalence could mean the extinction of our democracy. To prevent the Constitution becoming an evanescent memory we must actively preserve the values we hold dear and heal the lacerations of division across this nation in tears.