

IDEAS

Nothing Can Justify the Attack on Portland

The question of whether these arrests are appropriate has a clear answer—at least in a nation that purports to live under the rule of law.

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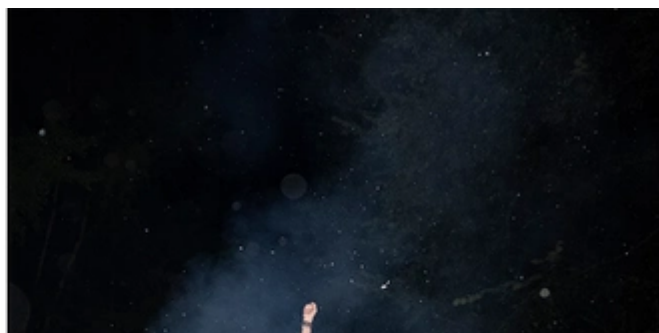
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The Trump administration has faced outrage since reports first surfaced of federal agents in unmarked vehicles picking up and detaining protesters in Portland, Oregon. Rather than backing down, though, President Trump appears to have decided to go all in: In a July 20 interview, he threatened to send “more federal law enforcement” to New York, Chicago, Philadelphia, Detroit, Baltimore, and Oakland—cities run by “liberal Democrats,” he asserted. The question of whether

or not the administration has the legal authority to take such action will be fought out in legal challenges. But the question of whether or not these arrests are appropriate has a clear answer—at least in a nation that purports to live under the rule of law.

Asked on July 17 by an NPR reporter whether the reporting was true, Ken Cuccinelli, a senior Department of Homeland Security official, didn't seem troubled by the department's activities. Yes, he said, at least one person had been arrested in this fashion in Portland—though he wouldn't say whether others had been as well, and if so how many. Cuccinelli added that this was how the Trump administration planned to respond to demonstrations at federal buildings and monuments elsewhere, too. “This is a posture we intend to continue not just in Portland, but in any of the facilities that we're responsible for around the country,” he declared. And days later, he doubled down on CNN, insisting that the government had “intelligence about planned attacks on federal facilities” in Portland: “If we get the same kind of intelligence in other places ... we would respond the same way.”

Reports of unidentified federal law-enforcement officials patrolling areas of Portland—and conducting arrests by scooping suspects up into vans—have generated a lot of anxiety. The *Atlantic* writer Anne Applebaum argued that the government's actions amount to “performative authoritarianism.” Mary McCord, a lawyer who previously oversaw national-security issues at the Justice Department, warned *The New York Times* that manhandling Portland residents in this way “sends the message that these people are terrorists and need to be treated like terrorists.” And Oregon's congressional delegation wrote a letter to the U.S. attorney general stating that the Portland arrests “are more reflective of tactics of a government led by a dictator, not from the government of our constitutional democratic republic.” Portland Mayor Ted Wheeler and Ron Wyden, the senior senator from Oregon, both decried the arrests as unconstitutional.





Left: U.S. Marshals secure the Mark O. Hatfield Federal Courthouse in downtown Portland; Right: A protester chants during clashes with federal police. (Rian Dundon / Economic Hardship Reporting Project)

There will be time to sort out the legalities of the federal government's actions. The attorney general of Oregon has filed suit against various federal agencies and officers involved in one arrest, arguing, "Ordinarily, a person ... who is confronted by anonymous men in military-type fatigues and ordered into an unmarked van can reasonably assume that he is being kidnapped and is the victim of a crime." The American Civil Liberties Union has also sued the Department of Homeland Security and the U.S. Marshals Service. The chairs of three House committees have requested an internal DHS investigation of the matter. Between these varied proceedings, the Trump administration will have to answer legal questions like whether it's really okay for unidentified federal officers and agents to patrol streets, and whether an agency whose mission is to patrol the border is properly used without training for crowd control. The administration will also have to justify the propriety of the individual arrests both in any prosecutions of those detained and in any civil suits filed.

But let's leave the legalities aside for now. Because whether the Trump administration has the technical legal authority to deploy this show of force in this particular matter does not answer the question of whether it should do so. The use of federal officers in this manner is corrosive of democratic culture, it makes for bad and ineffective law enforcement, and it's likely physically dangerous both for the law-enforcement officers and for the protesters in question.

According to *The New York Times*, Homeland Security officers were deployed under the department's authority to protect federal property—including, in this case, the Portland federal courthouse. The deployment of armed forces comes along with increased domestic intelligence operations. Yesterday, *Lawfare* reported that the Department of Homeland Security's little-known intelligence arm had authorized intelligence collection on people connected to threats to monuments and statues, having designated the protection of such monuments a homeland-security mission following President Trump's monument-protection executive order last month.

The existence of the department's authority to protect federal property is uncontroversial. The federal government has the power to defend federal buildings and facilities from civil unrest, and a variety of federal laws protect federal property from attack and vandalism and federal officials from interference with their discharge of the government's business.

While this authority certainly extends to the power to investigate federal crimes and arrest those suspected of them, it is not some general authority to patrol the downtowns of major cities and pick up and detain protesters merely because a federal building may be in the neighborhood.

Likewise, federal law-enforcement officers should conceal their identities only under highly specific circumstances—none of which involves crowd control at a protest or policing a public area. Officers might reasonably go undercover in an effort to infiltrate a criminal organization, for example. Federal air marshals are generally unidentified so they can blend in with passengers on commercial flights—preventing would-be hijackers from knowing which flights are patrolled. But it should be quite unthinkable for armed officers exercising coercive arrest powers in the streets of an American city to not identify themselves by name and affiliation.

A similar situation to the one in Portland arose in Washington, D.C., last month, when the president deployed National Guard units and a smorgasbord of federal law-enforcement agencies, including officers from the Department of Homeland Security, during protests over the killing of George Floyd. The deployment of anonymized federal muscle in various locations in the district angered many people, and rightly so. These recent actions in Portland are more jarring still.

For better or worse, residents of D.C. are used to a significant federal law-enforcement presence in their daily lives—albeit one that's quite open and overt. A

significant area of the city is patrolled by the United States Capitol Police, for example; uniformed Secret Service officers protect embassies; the United States Park Police has jurisdiction over national parkland, which is abundant in the city. And one or more unmarked dark SUVs accompanying some official-looking car is a pretty normal affair. But even a certain baseline comfort with a heavy federal presence didn't prepare D.C. for an invasion of little green men. How much more shocking it must be for people in Portland, who lack that general familiarity, to suddenly have unidentified officers snatching people off the street and hustling them into unmarked vehicles.

There are additional concerns. The tactical divisions of the Homeland Security Department from which the officers in Portland appear to hail—Customs and Border Protection (CBP) and Immigrations and Customs Enforcement (ICE)—are not typically deployed at protests, but charged with enforcing immigration law and guarding the U.S. border. And as an internal department memo obtained by *The New York Times* shows, the officers sent into Portland's streets were not trained to handle crowds. "If this type of response is going to be the norm," the memo cautions, "specialized training and standardized equipment should be deployed to responding agencies."

All of which brings us to the dangers—for everyone involved—of protecting federal buildings in this particular fashion. Sending out officers untrained for demonstrations risks violence if the agents end up in situations they don't know how to handle. Recall that some of the protests in the wake of Floyd's death swung out of control in large part because of ill-considered police actions. This anonymized deployment risks compounding that problem. Because if, as Oregon's attorney general hypothesizes, a protester "confronted by anonymous men in military-type fatigues and ordered into an unmarked van" were to "reasonably assume that he is being kidnapped and is the victim of a crime," he might plausibly resort to violence in self-defense. This may be a particular risk if the person in question happens to be suspicious of police authority in the first place. And the risk may be further heightened by the fact that various militia groups have been known to organize armed groups in defense of supposed law-enforcement interests. Ambiguity about an officer's identity or power to make an arrest serves the interests of neither law enforcement nor protesters.

U.S. Marshals retreat into the Mark O. Hatfield federal courthouse after making arrests at a Black Lives Matter demonstration. (Rian Dundon / Economic Hardship Reporting Project)

So why is the Trump administration sending into American cities officers who aren't appropriately trained for the mission, are acting on legal authority that will require litigation to defend, and are being deployed to address a problem that the federal government could address by means far less provocative and in a fashion far less likely to escalate disorder?

The answer is unfortunately obvious. Having given up on controlling the pandemic that has now killed more than 140,000 Americans, and faced with dimming reelection prospects, Trump is doing his best to substantiate the tough-guy vision of the presidency that has always appealed to him. During earlier stages of his administration, he played out this fantasy along the southern border of the United States by deploying troops to the American Southwest and warning about "caravans" of travelers illegally entering the country. Now, as officers typically tasked with enforcing the border have been deployed into Portland, Trump's apocalyptic warnings about the need for a brutal response to any perceived threat have also moved from the edge of the country into American cities.

The message is as simple as it is ugly: The caravan isn't just coming north through Mexico. It is already here—in the efforts to take down statues, in the protests, in

the pockets of disorder in American urban areas and in the gatherings of people exercising their First Amendment rights to object to police misconduct. The caravan, in fact, is the city. And only Trump can protect you from it—whether it is what you see when you look south or what you see when you look downtown.

Fortunately, it doesn't seem to be working. Last night in Portland, as happened last month in Washington, D.C., peaceful protests only grew in response to the federal show of force. If Trump follows through on his promise to export the federal muscle to other cities, the anonymous agents may be met with more large crowds defying Trump's efforts at vilification and coercion.

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