

Federal Troops in the Portland, Oregon Protests: Race, Authoritarianism, and a Posse Comitatus Act Violation

Anne Zimmerman*

ABSTRACT

The use of federal troops in the Portland Oregon protests has a racial element. The motive to disperse the protests could be the disempowerment of those protesting racial injustice cloaked in an innocuous motive like assisting local police in ensuring the safety of civilians and protecting property. The implications for equality, respect, and justice in the US are dire: if federal troops can suppress racial protests in moments of nonviolent protesting, the racist undertones normalize the disparity in other areas like healthcare and access to education and high paying jobs where black people do not experience a level playing field.

Keywords: justice, racial justice, posse comitatus, insurrection act, free speech, military ethics

INTRODUCTION

In Portland, Oregon, federal troops detained protesters placing several into unmarked cars.¹ The authority to use federal trained military, in this case Homeland Security agents,² to enforce laws against citizens likely violates the Posse Comitatus Act³ meant to prevent the use of the military in law enforcement. Under the Insurrection Act,⁴ the federal authority to use the military is extended in certain cases but none applies unequivocally to the Oregon fact pattern.

The Oregon protests are racial protests. Protesters want change that embodies the Black Lives Matter movement, equality, and justice. Police brutality was the impetus for the protests in the wake of the death of George Floyd. The presence of both the police and federal troops escalates the need to protest by those who feel law enforcement is the agitator creating a circular continuous pattern of protest. The use of federal troops in this case has a racial element. The motive to disperse the protests could be the disempowerment of those

* Anne Zimmerman, JD, MS Candidate Columbia University

protesting racial injustice cloaked in an innocuous motive like assisting local police in ensuring the safety of civilians and protecting property. The implications for equality, respect, and justice in the US are dire: if federal troops can suppress racial protests in moments of nonviolent protesting, the racist undertones normalize the disparity in other areas like healthcare and access to education and high paying jobs where black people do not experience a level playing field.

In COVID-19, the president requested that the states skip the CDC and report their data directly to HHS; the EPA is compromising air standards during a pandemic that affects lung capacity; the budget cuts at the NOAA limit the ability to research climate change. The seemingly evenhanded actions have racially disparate affects—HHS will release the data as it sees fit, not according to CDC guidelines; air quality affects those in poorer neighborhoods; climate change and adverse weather events hurt those who are more vulnerable, live in lower quality dwellings, are less insured, or are homeless. In Portland, the use of the military is part of the pattern. The pattern affects the disenfranchised. Even if the actions on their face are neutral, their impact on race can be unconstitutional.⁵

ANALYSIS

I. Application of the Posse Comitatus Act and the Insurrection Act

The Posse Comitatus Act prevents the military from using its force in executing domestic laws.⁶ In Oregon, the federal “help” is anti-constitutional: the purpose of the use of military is to disband legal protests, something the state and city do not want to use federal troops to achieve. The federal forces suppress people from exercising their rights to assembly and free speech. The mayor of Portland and the governor of Oregon explicitly stated that they do not want the federal troops present.⁷ Federal military stepping in to perform local police responsibilities against the will of the mayor is feeding racial tensions.

The principals behind the Posse Comitatus Act are both anti-militarism and the prevention of abuse of power. The military is not an instrument of civilian law enforcement because there is a moral foundation met by ensuring personal freedom and state autonomy. The act is a moral check on presidential use of the powerful military. The Insurrection Act provides exceptions to be used in dire circumstances: when states or localities request help (for example, in riots in LA after police brutality against Rodney King);⁸ absent a request, the case of “necessity” due to an “unlawful” assemblage or rebellion, or when the actions interfere with federal or state law and the government has issued a proclamation to disperse which has been ignored.⁹ Past examples include Civil Rights era uses to enforce desegregation that was ordered by federal courts: Eisenhower in Little Rock, Arkansas 1957; and Kennedy in Mississippi in 1962.¹⁰ In the case of desegregation, the Insurrection Act was invoked because those exercising legal rights were met with people unlawfully standing in the way. The act allowed those presidents to protect the marginalized. The role of the military under the Insurrection Act is to support local law enforcement – the federal government should not direct the actions.

In Oregon, the protesters who have been arrested were exercising protected First Amendment rights. The use of the Insurrection Act, while arguably to promote public safety and the protection of federal property, could have the effect of quieting protesters based on their message rather than behavior. The Los Angeles riots in 1992 included numerous deaths, the burning down of buildings, and significant violence. The danger was clear and the destruction was significant. The relationship between people and police has changed. Some argue to allow federal troops to intervene would interfere with the relationship between the community and the police, using a heavy hand of government to quiet the marginalized.¹¹ While cities in the US have experienced looting, whether “looting justifies[y] shooting”¹² is settled law. Federal troops must obey “standing rules for the use of

force.”¹³ Had police followed appropriate local use of force guidelines, the very thing being protested would not have occurred.

Nonetheless, the argument that troops can help, especially when cloaked as law and order style assistance considering looting in some cities, parallels the norms of many who value law and order. Those envisioning fairness as a system of punishment for crime rather than fairness as a level playing field for all may support the president’s decision to invoke the Insurrection Act. While it is a stretch to apply the act to the Oregon fact pattern because the help was not requested by the state, the ethics behind the decision reflect public safety despite indifference toward quieting the peaceful demonstrations. The police force in Portland is not necessarily against the federal presence and appears to be joining forces with them in some circumstances.¹⁴

The federal government argues that the troops are there to diffuse the situation. Weeks ago, the local police used tear gas, stun grenades, and acoustic weapons. Now, federal troops use similar instruments. The mayor and the citizen organization that oversees the Portland police moved to control police behavior and to ban tear gas.¹⁵ The bigger issue is the racism, not the protests. The federal government insists they are there to protect Portland from “violent anarchists.”¹⁶ The government asserts that rather than peaceful protesters, they are detaining those who target federal buildings. The portrayal of protesters as anarchists is unsettling – it could lead people to believe those wanting justice and equality are anti-American when really the values they are protecting by protesting are long held core American principles.

Wyden and Merkley, the two Oregon senators, introduced an amendment to the National Defense Authorization Act called the Preventing Authoritarian Policing Tactics on America’s Streets Act.¹⁷ The bill would require visible identification on federal troops, disclosure of how many troops would be sent and why, and would limit their authority to participate in crowd control not requested by the state or locality but would still allow the federal government to protect federal property. The amendment addresses prevention of authoritarian tactics and ensures people’s constitutional rights are not violated by federal orders.

II. Relationship to Racism

A racial motive to invoke the Insurrection Act and use it against protesters is a flagrant abuse of power. Using military force in this manner furthers racial tension—why these protests? Why now? Since 2014, racial protests over the New York City death of Eric Garner, the Ferguson, Missouri death of Michael Brown, the Baltimore, Maryland death of Freddy Gray, and the Minnesota deaths of Philando Castile and George Floyd all took place in the city of the police brutality as well as in other cities around the country.¹⁸ The protests following the killing of George Floyd by a police officer represent a steady progression of increasing awareness of police brutality against black people. If the federal government steps in now to quash the voice of the people, it would cement a federal government relationship pitted against those fighting for racial justice.

With all actions, there is an opportunity cost—a different action was foregone to allow the funding for the action taken. In COVID-19, black Americans die at a disproportionate rate. To help states manage COVID-19, the federal government could use its power to manufacture PPE, develop a vaccine or better treatments, and support states’ efforts to supply the best care to the most people. Tax revenue is being diverted to suppress people’s rights with a backdrop of racial unrest.

When viewed in the context of federal government power, of deaths of black people from COVID-19, and from a historical perspective of ascriptive Americanism, a theory that the liberal calculus that fed American development and moral backdrop operated alongside racist policies,¹⁹ the use of federal troops is a continuation of racist traditions. The thing in need of repair is the relationship between black Americans and

the police. The federal government should be taking stronger action against police brutality rather than stepping in where local leaders sense federal troops escalate the tension. The small issue of potential looting should not cloud the large issue of racism.

CONCLUSION

Legal means to prevent the abuse of power should complement ethical concerns driving how the US addresses racism. If a Posse Comitatus Act exception is made when the state does not want federal help, the protests fall within First Amendment rights rather than unlawful rebellions or assemblages, and there is not an urgent or immediate danger accompanied by notice and a proclamation to disperse, racism begins to emerge as not only a *result of* but as a *precursor to* the federal deployment. In a country with ethics and laws that require equality and justice, the federal action underpins more than a military overreach. Like federal decisions in healthcare, mass incarceration, public education, and the environment, placing federal troops in Portland is a continuation of seemingly neutral decisions that disproportionately affect people based on their race.

¹ NPR, All Things Considered, July 17, 2020. <https://www.npr.org/2020/07/17/892277592/federal-officers-use-unmarked-vehicles-to-grab-protesters-in-portland>

² They are Customs and Border Patrol agents and US Marshals Special Operations Group.

³ Posse Comitatus Act, 18 U.S.C. Section 1385, in 1878.

⁴ 10 U.S.C. §§ 251–255; prior to 2016, 10 U.S.C. §§ 331–335; amended 2006, 2007.

⁵ Yick Wo v. Hopkins, 118 U.S. 356 (1886)

⁶ Congressional Research Service, “The Posse Comitatus Act and Related Matters: The Use of the Military to Execute Civilian Law,” Updated November 6, 2018. <https://fas.org/sgp/crs/natsec/R42659.pdf>

⁷ Interview of Gov. Kate Brown <https://www.koin.com/news/oregon/gov-kate-brown-on-covid-potential-rollback-protesters-1-on-1-07172020/>; Associated Press, “Mayor of Portland to Trump: Get your troops out of the city,” July 17, 2020. <https://www.tampabay.com/news/nation-world/2020/07/17/oregon-officials-decry-portland-arrests-by-federal-agents-dressed-in-camouflage/>

⁸ Congressional Research Service, “Defense Primer: Legal Authorities for the Use of Military Forces,” Updated January 3, 2020. <https://fas.org/sgp/crs/natsec/IF10539.pdf>

⁹ Congressional Research Service, “The Posse Comitatus Act and Related Matters: The Use of the Military to Execute Civilian Law,” Updated November 6, 2018. <https://fas.org/sgp/crs/natsec/R42659.pdf>

¹⁰ The National Guard is a state-run successor to the militia and is usually used first in help with natural disasters or to assist police in managing protests and keeping civilians safe. The National Guard is not subject to Posse Comitatus – it is permitted to help with civilian law enforcement. National Guard is commonly used in riots although the federal military has been called in when the riots are outside the scope of the National Guard’s training or effectiveness. Mark F. Cancian, Senior Adviser, International Security Program, Center for Strategic and International Studies, “Use of Military Forces in the COVID-19 Emergency,” March 17, 2020.

<https://www.csis.org/analysis/use-military-forces-covid-19-emergency>

¹¹ Alicia Victoria Lozano, “The Insurrection Act was last used in the 1992 Los Angeles riots. Invoking it again could undo years of police reform, some warn.” NBC News, June 4, 2020.

<https://www.nbcnews.com/news/us-news/insurrection-act-was-last-used-1992-los-angeles-riots-invoking-n1224356>

¹² Mark Nevitt, “The President and the Domestic Deployment of the Military: Answers to Five Key Questions,” Just Security, June 2, 2020. <https://www.iustsecurity.org/70482/the-president-the-military-and-minneapolis-what-you-need-to-know/>

¹³ Nevitt.

¹⁴ <https://www.oregonlive.com/news/2020/07/evidence-shows-portland-police-working-with-federal-officers-at-protests-contradicting-city-officials.html>

¹⁵ Oregon Governor Kate Brown banned tear gas unless there is a declared riot and the use of tear gas is announced first. Police did not respect the ban. <https://www.wweek.com/news/2020/07/01/hours-after-gov-kate-brown-signs-tear-gas-ban-into-law-portland-police-deploy-more-gas-onto-protesters/#:~:text=On%20June%2030%2C%20Oregon%20Gov,is%20imminent%20before%20deploying%20it>.

¹⁶ Morgan Phillips, "DHS pushes back against claim federal agents detaining Portland protesters aren't identifying themselves," Fox News, July 17, 2020. <https://www.foxnews.com/politics/dhs-pushes-back-against-claim-federal-agents-detaining-portland-protesters-arent-identifying-themselves> Quoting Chad Wolf, Acting Secretary, Department of Homeland Security.

¹⁷ <https://www.merkley.senate.gov/imo/media/doc/NDAA%20Crowd%20Control%202020.7.20.pdf>

¹⁸ Linda Poon and Marie Patino, "CityLab University: A Timeline of U.S. Police Protests," Bloomberg News, Bloomberg CityLab, June 9, 2020.

<https://www.bloomberg.com/news/articles/2020-06-09/a-history-of-protests-against-police-brutality>

¹⁹ Rogers M. Smith, "Beyond Tocqueville, Myrdal, and Hartz: The Multiple Traditions in America," *The American Political Science Review*, Vol. 87, No. 3 (Sep., 1993), pp. 549-566