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## Trump's Insurrection: Pandemic Violence, Presidential Incitement and the Republican Guarantee

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# Trump’s Insurrection: Pandemic Violence, Presidential Incitement and the Republican Guarantee

Elizabeth M. Iglesias\*

*Our own experience has corroborated the lessons taught by the examples of other nations; . . . that seditions and insurrections are, unhappily, maladies as inseparable from the body politic as tumors and eruptions from the natural body; that the idea of governing at all times by the simple force of law (which we have been told is the only admissible principle of republican government), has no place but in the reveries of those political doctors whose sagacity disdains the admonitions of experimental instruction. Should such emergencies at any time happen under the national government, there could be no remedy but force. Hamilton, Federalist Paper 28<sup>1</sup>*

*Hegel says somewhere that great historic facts and personages recur twice. He forgot to add: “Once as tragedy, and again as farce.” Marx, The Eighteenth Brumaire of Louis Bonaparte<sup>2</sup>*

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\* Professor of Law, University of Miami School of Law. AALS Civil Rights Section Chair, 2020. Thanks to the members of Civil Rights Section of the Association of American Law Schools, who accepted my invitation to constitute a Working Group on Civil Rights in a Time of Coronavirus in March of 2020. This essay is fruit of that initiative. Thanks also to my University of Miami colleagues Lili Levi, Vice Dean of Intellectual Life, and Janet Stearns, Dean of Students, who took up the project to connect us with the University of Miami Race and Social Justice Law Review and the Law Review members who contributed both to the success of the online conference and to putting this volume together. Thanks to University of Miami law student Maja Veselinovic for excellent research assistance. Most importantly, thanks to my wife and colleague, Madeleine M. Plasencia for brilliant insights and illimitable exuberance for the defense and promotion of civil rights.

<sup>1</sup> ALEXANDER HAMILTON ET AL., THE FEDERALIST PAPERS 174 (Clinton Rossiter ed., Signet Classics 2003).

<sup>2</sup> KARL MARX, THE EIGHTEENTH BRUMAIRE OF LOUIS BONAPARTE 1 (Mondial 2005).

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## I. INTRODUCTION

When I presented the first iteration of this article at the September 17 Conference on Defending and Promoting Civil Rights in a Time of Coronavirus,<sup>3</sup> the title “Trump’s Insurrection” referred to the President’s threats to invoke the Insurrection Act of 1807 in response to civil rights protests across the nation that were triggered by the public murder of George Floyd in Minneapolis on May 25, 2020.<sup>4</sup> Even then, it was evident that the police power of federal and state governments operated under a double standard. Trump’s June 1<sup>st</sup> threat to escalate the federal response with military force if State governors did not activate their National Guard followed a violent dispersal of Black Lives Matter protesters from the nation’s capital earlier that same day.<sup>5</sup> The tear gas and rubber bullets used to clear lawful protestors from Lafayette Park so Trump could stage a photo-op at St. John’s Episcopal Church contrasted markedly with the affirmative encouragement Trump had given earlier in April to anti-lockdown protesters who targeted Michigan and other State governments in opposition to stay-at-home orders issued to contain the Covid-19 pandemic.<sup>6</sup> The purpose of my presentation was to explore the implications of Trump’s public incitement of violence and specifically his not-so-disguised calls for right wing extremists to “LIBERATE” states from the stay-at-home orders of their elected officials,<sup>7</sup> while the state courts were open and entirely up to the task of determining the validity of such orders.<sup>8</sup>

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<sup>3</sup> See *Defending and Promoting Civil Rights in a Time of Coronavirus*, UNIV. OF MIA. SCH. OF L., <https://www.law.miami.edu/academics/defending-promoting-human-rights-in-time-of-corona-virus> (last visited Mar. 26, 2021).

<sup>4</sup> Bryan Bender, *Trump Threatens to Invoke Insurrection Act*, POLITICO (June 2, 2020), <https://politi.co/3cq7bLg>.

<sup>5</sup> Dalton Bennett et al., *The crackdown before Trump’s photo op: What video and other records show about the clearing of protesters outside the White House*, THE WASH. POST (June 8, 2020), <https://www.washingtonpost.com/investigations/2020/06/08/timeline-trump-church-photo-op/>.

<sup>6</sup> See Michael D. Shear & Sarah Mervosh, *Trump Encourages Protest Against Governors Who Have Imposed Virus Restrictions*, THE N.Y. TIMES (Apr. 17, 2020), <https://www.nytimes.com/2020/04/17/us/politics/trump-coronavirus-governors.html>; Maggie Haberman, *Trump, Head of Government, Leans Into Antigovernment Message*, THE N.Y. TIMES (Apr. 20, 2020), <https://www.nytimes.com/2020/04/20/us/politics/trump-coronavirus.html>.

<sup>7</sup> Aaron Rupar, *Trump’s Dangerous “LIBERATE” Tweets Represent the Views of a Small Minority*, VOX (Apr. 17, 2020), <https://www.vox.com/2020/4/17/21225134/trump-liberate-tweets-minnesota-virginia-michigan-coronavirus-fox-news>.

<sup>8</sup> See, e.g., *In re Certified Questions from U.S. Dist. Ct., W. Dist. of Michigan, S. Div.*, 949 N.W.2d 274 (Mich. 2020); *Wisconsin Legislature v. Palm*, 391 Wis. 2d 497 (Wis. 2020).

The matter of “Trump’s Insurrection” took on a new dimension on January 6, 2021 when Trump openly incited his amassed supporters to walk to the Capitol to protest the ongoing certification of the 2020 presidential election results, which Trump continued falsely to insist he had won in “a sacred landslide election victory.”<sup>9</sup> Inciting the crowd, Trump told them:

The radical left knows exactly what they’re doing. They’re ruthless and it’s time that somebody did something about it . . . . I could go on and on about this fraud that took place in every state . . . . So when you hear, when you hear, ‘While there is no evidence to prove any wrongdoing,’ this is the most fraudulent thing . . . . This is a criminal enterprise . . . .

But now the caravans, they think Biden’s getting in, the caravans are forming again. They want to come in again and rip off our country. Can’t let it happen. As this enormous crowd shows, we have truth and justice on our side. We have a deep and enduring love for America in our hearts. We love our country. We have overwhelming pride in this great country, and we have it deep in our souls. Together we are determined to defend and preserve government of the people, by the people and for the people.

Our brightest days are before us, our greatest achievements still wait. I think one of our great achievements will be election security because nobody, until I came along, had any idea how corrupt our elections were . . . but I said, ‘Something’s wrong here. Something’s really wrong. Can’t have happened.’ And we fight. We fight like Hell and if you don’t fight like Hell, you’re not going to have a country anymore.<sup>10</sup>

After more than an hour attacking the 2020 presidential election results and holding out to his crowd of supporters the possibility that stopping the certification of electoral votes then underway at the Capitol could change the outcome and throw the election to him, Trump called the crowd to action:

So we’re going to, we’re going to walk down Pennsylvania Avenue, I love Pennsylvania Avenue, and we’re going to the Capitol and we’re going to try and give our Republicans, the weak ones, because the strong ones don’t need any of our help, we’re going to try and give them the kind of pride and boldness that they need to take back our country.

So let’s walk down Pennsylvania Avenue.<sup>11</sup>

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<sup>9</sup> Maggie Haberman, *Trump Told Crowd ‘You Will Never Take Back Our Country With Weakness’*, THE N.Y. TIMES (Jan. 6, 2021), <https://www.nytimes.com/2021/01/06/us/politics/trump-speech-capitol.html>.

<sup>10</sup> *Trump’s speech that ‘incited’ Capitol violence: Full transcript*, AL JAZEERA (Jan. 11, 2021), <https://www.aljazeera.com/news/2021/1/11/full-transcript-donald-trump-january-6-incendiary-speech>.

<sup>11</sup> *Id.*

Trump did not accompany the crowd, but even after a mob of his supporters occupied the Capitol, ransacked governmental offices, smashed windows waving Trump and Confederate flags, and left five people dead,<sup>12</sup> Trump embraced the violence as a natural and completely understandable consequence of his false claim of election theft: “I know your pain,” he told the crowd in a subsequent video, “I know your hurt. We had an election that was stolen from us. It was a landslide election. And everyone knows it . . . These are the things and events that happen when a sacred landslide election victory is so unceremoniously and viciously stripped away.”<sup>13</sup>

Since the January 6 insurrection, news reports and commentators have repeatedly noted the stark contrast in law enforcement responses with video footage of “officers letting people calmly walk out the doors of the Capitol despite the rioting and vandalism. Only about a dozen arrests were made in the hours after authorities regained control.”<sup>14</sup> Like the insurrectionists who attacked the Michigan Capitol,<sup>15</sup> the insurrectionists who attacked the United States capitol were not only allowed to go home “in peace,” but were openly embraced and excused by the same President who dispersed the peaceful Black Lives Matter protesters from Lafayette Square on June 1, 2020 with tear gas, rubber bullets and threats to unleash the nation’s military force on protestors and the state and local officials who coddled them.<sup>16</sup>

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<sup>12</sup> Mary Clare Jalonick et al., *Chaos, Violence, Mockery as Pro-Trump Mob Occupies Congress*, AP NEWS (Jan. 7, 2021), <https://apnews.com/article/congress-stormed-us-34417ac51a765e297faf53eb0ad15517>; Jack Healy, *These Are the 5 People Who Died in the Capitol Riot*, THE N.Y. TIMES (Jan. 11, 2021), <https://www.nytimes.com/2021/01/11/us/who-died-in-capitol-building-attack.html>.

<sup>13</sup> Kevin Liptak, *Trump’s Presidency Ends with American Carnage*, CNN (Jan. 6, 2021), <https://www.cnn.com/2021/01/06/politics/donald-trump-capitol-mob/index.html>.

<sup>14</sup> Jalonick et al., *supra* note 12.

<sup>15</sup> Lois Beckett, *Armed Protesters Demonstrate against Covid-19 Lockdown at Michigan Capitol*, THE GUARDIAN (Apr. 30, 2020), <https://www.theguardian.com/us-news/2020/apr/30/michigan-protests-coronavirus-lockdown-armed-capitol>.

<sup>16</sup> Robert Hart, *Figures Show Stark Difference Between Arrests At D.C. Black Lives Matter Protest And Arrests At Capitol Hill*, FORBES (Jan. 8, 2021), <https://www.forbes.com/sites/roberthart/2021/01/07/figures-show-stark-difference-between-arrests-at-dc-black-lives-matter-protest-and-arrests-at-capitol-hill/>; Matt Zapotosky, *Trump White House Vows It Won’t Coddle ‘the Rioter, the Looter, or the Violent Disrupter,’* THE WASH. POST (Jan. 20, 2021), <https://www.washingtonpost.com/news/post-nation/wp/2017/01/20/trump-white-house-vows-to-take-on-the-rioter-the-looter-or-the-violent-disrupter/> (The Trump administration asserting that “[o]ur job is not to make life more comfortable for the rioter, the looter, or the violent disrupter.”).

The January 6 insurrection at the Capitol activated the political will in Congress to once again impeach the 45<sup>th</sup> president,<sup>17</sup> only for the Senate to once again fail to convict him a month later.<sup>18</sup> The insurrection also re-activated and re-energized the political will to enact domestic terrorism legislation at a federal level and anti-protest legislation at state and local levels. In the immediate aftermath of January 6, Florida, Indiana and Mississippi reintroduced anti-protest legislation initially proposed in response to the wave of Black Lives Matter protests during the summer of 2020.<sup>19</sup> The Governor of Florida renewed his push to enact the “Combatting Violence, Disorder and Looting and Law Enforcement Protection Act.”<sup>20</sup> If enacted, this law would substantially increase criminal exposure of persons participating in protests that result in property destruction, injury to persons, obstruction of traffic; immunize anti-protestors for injuries to protestors in a turbocharged reiteration of Florida’s stand your ground; penalize local government budget decisions that reduce or redirect funding previously allocated to police; and subject donors to criminal liability under the state’s racketeering laws.<sup>21</sup>

Opposition to federal enactment of domestic terrorism legislation and harsher anti-protest legislation at the state level is based on predictions that these laws will not prevent right-wing violence but will be used instead to exacerbate traditional police oppression of marginalized communities engaged in protected First Amendment activities.<sup>22</sup> The concern is

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<sup>17</sup> Bill Chappell, *House Impeaches Trump a 2nd Time, Citing Insurrection at U.S. Capitol*, NPR (Jan. 13, 2021), <https://www.npr.org/sections/trump-impeachment-effort-live-updates/2021/01/13/956449072/house-impeaches-trump-a-2nd-time-citing-insurrection-at-u-s-capitol>.

<sup>18</sup> John Wagner et al., *Trump Acquitted by Minority of Senate on Charge of Inciting Jan. 6 Riot at Capitol*, THE WASH. POST (Feb. 13, 2021) <https://www.washingtonpost.com/politics/2021/02/13/trump-impeachment-trial-live-updates>.

<sup>19</sup> Alleen Brown & Akela Lacy, *In Wake of Capitol Riot, GOP Legislatures “Rebrand” Old Anti-BLM Protest Laws*, THE INTERCEPT (Jan. 12, 2021), <https://theintercept.com/2021/01/12/capitol-riot-anti-protest-blm-laws/>.

<sup>20</sup> Gray Rohrer, *Amid Capitol Chaos, Florida Lawmakers File Bill to Crack Down on Protests*, ORLANDO SENTINEL (Jan. 7, 2021), <https://www.orlandosentinel.com/politics/os-desantis-protest-crackdown-bill-legislature-20210107-qn5hq2suybfmvdlovbolyrcxoe-story.html> (With respect to the Capitol riot, Governor Ron DeSantis stated, “I hope maybe now we’ll get even more support for my legislation because it’s something that needs to be done.”).

<sup>21</sup> *Governor Ron DeSantis Announces the “Combatting Violence, Disorder and Looting and Law Enforcement Protection Act,”* FLGOV.COM (Sept. 20, 2021), <https://www.flgov.com/2020/09/21/governor-ron-desantis-announces-the-combatting-violence-disorder-and-looting-and-law-enforcement-protection-act/>.

<sup>22</sup> See *ACLU Statement Opposing H.R. 4192, Confronting the Threat of Domestic Terrorism Act*, AM. C. L. UNION, <https://www.aclu.org/letter/aclu-statement-opposing-hr-4192-confronting-threat-domestic-terrorism-act> (last visited Mar. 26, 2021); Evan Greer,

warranted. Trump is not the only official having trouble distinguishing “thugs” from “patriots.” Shortly after the armed insurrection staged at the nation’s capital, the Governor of Massachusetts declared himself unable to distinguish armed insurrectionists sacking the Capitol intent on taking lawmakers hostage and possibly assassinating them from unarmed protestors rioting in the wake of blatant, brutal and systemically pervasive police violence.<sup>23</sup> Trump appointees at the Pentagon seem equally confused, initially calling the events of January 6 “First Amendment Protests.”<sup>24</sup> Two days later, the Defense Department renamed the event as “January 6, 2021 Violent Attack at the U.S. Capitol” in order “to more appropriately reflect the characterization of the events,” but even its revised memorandum of January 8 omitted reference to facts indicating Trump’s role in inciting the insurrection.<sup>25</sup> More chilling still are reports documenting the lenient treatment courts have been dispensing to the January 6 insurrectionists notwithstanding the gravity of their crimes and the much harsher treatment defendants of color and others protesting police brutality have received for far less.<sup>26</sup> These court proceedings are “more chilling” because they evidence a degree of bias much more

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*You Can’t Fight Fascism by Expanding the Police State*, FAST CO. (Jan. 8, 2021), <https://www.fastcompany.com/90592060/capitol-attack-fascism-surveillance-censorship>; Jake Johnson, “*Oldest Play in the Book*”: Critics Warn New Domestic Terror Laws Aimed at Pro-Trump Mob Would Be Used Against Legitimate Protest, COMMON DREAMS (Jan. 11, 2021), <https://www.commondreams.org/news/2021/01/11/oldest-play-book-critics-warn-new-domestic-terror-laws-aimed-pro-trump-mob-would-be> (last visited Jan. 12, 2021); Desiree Stennett et al., *Florida Protest Laws Could Be Harshest in Nation under DeSantis Proposal*, ORLANDO SENTINEL (Sept. 23, 2020), <https://www.orlandosentinel.com/news/florida/os-ne-desantis-protest-bill-opposition-20200923-ihsipkhwdncorouj4whycypss4-story.html>.

<sup>23</sup> Jodi Reed, *Baker Condemns Protest Violence by Both BLM, MAGA*, WWLP (Jan. 8, 2021), <https://www.wwlp.com/news/state-politics/baker-condemns-protest-violence-by-both-blm-maga/>.

<sup>24</sup> Mark Sumner, *Trump-Appointed Pentagon Officials Rename Assault on Capitol—Prepare to Be Outraged*, DAILY KOS (Jan. 9, 2021), <https://www.dailykos.com/stories/2021/1/9/2007552/-Trump-appointed-Pentagon-officials-provide-timeline-of-assault-on-Capitol-prepare-to-be-outraged>.

<sup>25</sup> Steven Harper, *UPDATED: Insurrection Timeline — First the Coup and Then the Cover-Up*, MOYERS ON DEMOCRACY (Mar. 7, 2021), <https://billmoyers.com/story/insurrection-timeline-first-the-coup-and-then-the-cover-up-updated/>.

<sup>26</sup> Aysha Qamar, *Stealing Pelosi’s Laptop and Invading the Capitol Were Not Enough to Keep this White Woman in Jail*, DAILY KOS (Jan. 21, 2021), <https://www.dailykos.com/story/2021/1/21/2010974/-Federal-judge-releases-woman-who-stole-laptop-from-Speaker-Pelosi-s-office-during-Capitol-riot>; Aysha Qamar, *That Was Fast: ‘Camp Auschwitz Guy’ Arrested, Then Released*, DAILY KOS (Jan. 13, 2021), <https://www.dailykos.com/stories/2021/1/13/2008949/-That-was-fast-Camp-Auschwitz-Guy-arrested-then-released>.



systemic than the partisan obfuscations of known operatives and political hacks.

News of plans to disrupt the January 20 inauguration, to encircle the capital with 10,000 armed insurrectionists, a so called “million militia march,” and additional reports of plans for simultaneous attacks on State capitols throughout the 50 States prompted a massive deployment of over 20,000 National Guard troops to secure the National Capitol for the inauguration.<sup>27</sup> Still, the radical right continues to foment violence and insurrection using highly charged rhetoric to recast the political as a field of combat.<sup>28</sup> In Wisconsin, local Republican Party members are battling over the use of political rhetoric asserting that “If you want peace, prepare for war,” and that it’s time to remove “leftist tyrants” and “stand and be counted as conservative warrior[s] in the on-going fight to preserve our Constitutional Republic.”<sup>29</sup> Armed extremists have been calling for a new civil war, even as protests across the nation feature scenes of real or threatened violence: a guillotine at the Arizona Capitol, a “scalping” in Los Angeles, a makeshift gallows at the national Capitol, and the tarring and feathering in effigy of the governor of Oregon.<sup>30</sup> Unfolding events disclose new evidence of the seriousness of the threat that right-wing violence poses to the American constitutional order, including the February 25 testimony of Acting Capitol Police Chief, Yogananda Pittman, before the House Appropriations subcommittee indicating that enhanced security at the Capitol should continue for the immediate future because, in her own words:

We know that members of the militia groups that were present on Jan. 6 have stated their desire that they want to blow up the Capitol and kill as many members as possible, with a direct nexus to the State of the Union . . . They

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<sup>27</sup> Karina Zaiets et al., *Over 20,000 National Guard Troops to Provide Security against Inauguration Threats in Washington*, USA TODAY (Jan. 15, 2021), <https://www.usatoday.com/in-depth/graphics/2021/01/15/inauguration-threats-20000-national-guard-security-washington-dc-more-troops-in-dc-than-afghanistan/4161940001>; David Neiwert, *Sunday’s ‘Million Militia March’ In DC And State Capitols Disrupted By Chaos On Far Right*, THE NAT’L MEMO (Jan. 16, 2021), <https://www.nationalmemo.com/million-militia-march>.

<sup>28</sup> Neiwert, *supra* note 27.

<sup>29</sup> Daniel Bice, *Bice: St Croix County Republican Party Tells Members to “Prepare for War” and to Remove “Leftist Tyrants” from Local Office*, MILWAUKEE J. SENTINEL (Jan. 11, 2021), <https://www.jsonline.com/story/news/investigations/daniel-bice/2021/01/11/st-croix-republican-party-urges-members-prepare-war/6622950002/>.

<sup>30</sup> Lois Beckett, *Riots, Effigies and a Guillotine: State Capitol Protests Could Be a Glimpse of Violence to Come*, THE GUARDIAN (Jan. 13, 2021), <http://www.theguardian.com/us-news/2021/jan/13/capitol-attack-violence-far-right-trump>.

wanted to send a symbolic message to the nation as to who was in charge of that legislative process . . . .<sup>31</sup>

Political violence and concerns regarding the capacity of law and legal order to secure the conditions of possibility for a civil society and republican form of government in the face of political violence are not new. Eighteenth century understandings of political violence factored prominently in the reasoning by which the Framers of the U.S. Constitution defended the logic of the Constitution's design. Indeed, there are clauses incorporated in the U.S. Constitution that are properly understood only in light of the framers' understanding of the nature of, underlying motives for, and countermeasures necessary to effectively combat, political violence. These clauses include the Militia Clauses of Article I, the Commander-in-Chief Clause of Article II, and the Republican Guarantee Clause of Article IV, which collectively I will refer to as the "republican security clauses."<sup>32</sup>

These republican security clauses and implementing legislation are intricately entangled in an ongoing historical struggle to preserve, expand and transform the meaning of republican government in the face of political violence. The inclusion of these clauses in the Constitution responded to a shared understanding among the framers that republican government is vulnerable to being captured, subverted and/or overthrown by forces both internal and external to the societies that seek to govern themselves through this form. As with other elements of the constitutional design, these clauses divide and allocate power across the branches and levels of government in order to secure a balance of power and mutual

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<sup>31</sup> Leia Idliby, *Acting Capitol Police Chief Reveals Militia Groups Planned to "Blow Up the Capitol" After Jan. 6 Attack: They Wanted to "Kill as Many Members as Possible,"* MEDIAITE (Feb. 25, 2021), <https://www.mediaite.com/tv/acting-capitol-police-chief-reveals-militia-groups-planned-to-blow-up-the-capitol-after-jan-6-attack-they-wanted-to-kill-as-many-members-as-possible/>.

<sup>32</sup> The militia clauses in Article I, Section 8, Clauses 15 and 16 give Congress the power "[t]o provide for the calling forth of militia to execute the Laws of the Union, suppress Insurrections and repel Invasions" and reserve to the States "the Appointment of the Officers, and Authority of training the Militia according to the discipline prescribed by Congress." U.S. CONST. art. I, § 8, cl. 15-16. The Commander in Chief provisions of Article II, Section 2, Clause 1 make the president "Commander in Chief . . . of the Militia of the several States, when called into the actual Service of the United States." U.S. CONST. art. II, § 2, cl. 1. The provisions of Article IV, Section 4, Clause 1 commonly referred to as the Republican Guarantee Clause, provide: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." U.S. CONST. art. IV, § 4, cl. 1. These clauses operate in mutually reinforcing ways to establish a system of checks and balances in the concentration and deployment of armed force.

checks through which their framers hoped to secure republican government against foreseeable threats.

Nevertheless, though political violence is not new, there are elements of the political violence arising in and around the COVID-19 pandemic and the 2020 presidential election that *are new*. These elements involve Donald Trump's actions as occupant of the U.S. presidency, which create a different, indeed unprecedented, threat to the order of legality established by the U.S. Constitution. This unprecedented threat requires unprecedented reconsideration of some basic assumptions and reiterated formulations.

In this essay, I wish to address this unprecedented threat by positing and exploring the thesis that the republican security clauses, especially the Republican Guarantee of Article IV, when read in tandem with the First Amendment, provide a compelling constitutional basis for differentiating the insurrections of April 2020 and January 2021 from the wave of protests—both peaceful and violent—that erupted after the murder of George Floyd. The republican security clauses also provide compelling constitutional authority for Congress to amend the Insurrection Act of 1807 to restrict the President's power to invoke the Act as proposed in the “Curtailing Insurrection Act Violations of Individuals' Liberties Act” (the “CIVIL Act”) introduced by Representative Omar Ilhan on June 8, 2020.<sup>33</sup> However, I will argue that the CIVIL Act does not go far enough to address the abuse of executive power evidenced in Trump's response to the Black Lives Matter protests, once it became clear that the Department of Defense would resist his efforts to invoke the Insurrection Act.<sup>34</sup> Finally, I further argue that the republican security clauses also provide constitutional grounds for holding the president personally liable for property destruction and injury to persons that result from his or her use of speech acts foreseeably likely to, and that do in fact, incite insurrection against state or federal governments, regardless of whether that insurrection in fact succeeds in overthrowing the government.

In Part II, I will identify key elements of the recent episodes of political violence that reveal the unprecedented threat to republican government constituted by the Trump presidency. In Part III.A., I will defend the CIVIL Act as a proper amendment to the Insurrection Act of 1807 pursuant to Congress' power to provide for the terms under which the president may (or may not) call forth the militia and armed forces; but I will also argue that lessons learned from Trump's discriminatory and authoritarian response to the Black Lives Matter protests require a fuller

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<sup>33</sup> CIVIL Act, H.R. 7135, 116th Cong. (2020).

<sup>34</sup> See *infra*, Section “The Insurrection Act of 1807 and its Relationship to the Republican Security Clauses” on the Department of Justice's Operation Legend and Operation Diligent Valor.

response from Congress. In Part III.B., I will argue that the president's unique obligations under the republican security clauses—to protect the States and the people against insurrection by armed factions—provide compelling constitutional grounds for denying First Amendment protection to presidential speech acts that are foreseeably likely, and do in fact incite, insurrectionary violence by the actor's supporters against State or federal governments. The obvious case for denying First Amendment protection to presidential incitement of insurrection has never been articulated precisely because such treasonous actions have not previously issued from any past, nor should ever be again permitted to issue from any future occupant of the Office of the President of the United States.

## II. PANDEMIC VIOLENCE: AN ACT IN THREE PARTS

According to a timeline from the American Journal of Managed Care, the World Health Organization (WHO) first announced the COVID-19 outbreak on January 9, 2020. On January 31, the WHO declared a global health emergency, followed by the United States on February 3. On March 13, the Trump Administration declared COVID-19 a national emergency, and on March 19, California became the first State to issue a statewide stay-at-home order.<sup>35</sup> Over the remaining weeks of March, California's state-wide order was followed by Illinois and New Jersey on March 21; Washington, Oregon, Ohio, Louisiana and Connecticut on March 23; Michigan, Mass, New Mexico, West Virginia, and Delaware on March 24. Florida did not join them until April 3<sup>rd</sup>, with South Carolina holding out until April 7.<sup>36</sup> Statewide, the responses to the national emergency were neither uniform nor uncontroversial. In retrospect, the outbreak and the dynamics of political violence that emerged in response to state actions and presidential provocations with an upcoming election in November expected to turn on the strength of the economy,<sup>37</sup> mark a timeline of pandemic violence in three parts.

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<sup>35</sup> *A Timeline of COVID-19 Developments in 2020*, AJMC (Jan. 1, 2021), <https://www.ajmc.com/view/a-timeline-of-covid19-developments-in-2020>.

<sup>36</sup> *When State Stay-at-Home Orders Due to Coronavirus Went into Effect*, KAISER FAM. FOUND. (Apr. 9, 2020), <https://www.kff.org/other/slide/when-state-stay-at-home-orders-due-to-coronavirus-went-into-effect>.

<sup>37</sup> *See What Happened to the Economy Under Trump Before Covid and After*, WALL ST. J. (Oct. 14, 2020), <https://www.wsj.com/articles/what-happened-to-the-economy-under-trump-before-covid-and-after-11602713077>; Allan Sloan & Cezary Podkul, *Donald Trump Built a National Debt So Big (Even Before the Pandemic) That It'll Weigh Down the Economy for Years*, THE CT MIRROR (Jan. 17, 2021), <https://ctmirror.org/2021/01/17/donald-trump-built-a-national-debt-so-big-even-before-the-pandemic-that-itll-weigh-down-the-economy-for-years>.

## *A. Pandemic Violence Part I: Insurrection Against State Stay at Home Orders*

### 1. Operation Gridlock

On April 15, 2020, the State capital of Michigan, Lansing, was the site of automobile gridlock triggered by a call on Facebook for people to descend upon the capitol to protest what were called excessive quarantine orders from Michigan Governor Gretchen Whitmer.<sup>38</sup> This protest, literally dubbed “Operation Gridlock,” was organized by groups including “Michiganders Against Excessive Quarantine” and the Michigan Conservative Coalition, a group of Trump supporters founded by Republican state representative Matt Maddock.<sup>39</sup> Other supporters included Michigan Freedom Fund, which was created in 2012 to lobby for laws restricting labor’s collective bargaining power<sup>40</sup> and connected to Trump’s Secretary of Education, Betsy DeVos.<sup>41</sup> Operation Gridlock congested the streets around the capitol building. Many of the protesters were wearing red “Make America Great Again” hats; some carried Trump flags; at least one carried a Confederate flag; others wore T-shirts and carried signs reading “Recall Whitmer” and “Freedom is Essential.”<sup>42</sup>

Operation Gridlock organizers asked people to stay in their cars and maintain social distance, and most people did, except for a group of men identifying themselves as members of the Michigan Liberty Militia, who walked up and down the sidewalk outside the capitol building carrying rifles.<sup>43</sup> According to ABC Detroit affiliate WXYZ, one of the armed men

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<sup>38</sup> *Protestors against stay-at-home order block Lansing streets in ‘Operation Gridlock,’* WSBT 22 (Apr. 15, 2020), <https://wsbt.com/news/coronavirus/protesters-against-stay-at-home-order-block-lansing-streets-in-operation-gridlock>.

<sup>39</sup> *Replay: Vehicle Protests at Michigan Capitol over Gov. Whitmer Stay Home Order*, DETROIT FREE PRESS (Apr. 15, 2020), <https://www.freep.com/story/news/local/michigan/2020/04/15/michigan-protest-wednesday-live-video/5137207002>.

<sup>40</sup> Luke Mogelson, *The Militias Against Masks*, THE NEW YORKER (Aug. 17, 2020), <https://www.newyorker.com/magazine/2020/08/24/the-militias-against-masks>.

<sup>41</sup> Edwin Rios, *A DeVos-Linked Group Helped Promote the Right-Wing ‘Operation Gridlock’ Tantrum in Michigan*, MOTHER JONES (Apr. 17, 2020), <https://www.motherjones.com/coronavirus-updates/2020/04/a-devos-linked-group-promoted-the-right-wing-operation-gridlock-tantrum-in-michigan>.

<sup>42</sup> Lee DeVito, *People Protest Whitmer’s Stay-At-Home Order by Creating Traffic Gridlock, Not Adhering to Social Distancing*, DETROIT METRO TIMES (Apr. 15, 2020), <https://www.metrotimes.com/news-hits/archives/2020/04/15/people-protest-whitmers-stay-at-home-order-by-creating-traffic-gridlock-not-adhering-to-social-distancing>; WSBT 22, *supra* note 38; Rios, *supra* note 41.

<sup>43</sup> Jacqueline Francis, *AG’s Office Concerned about Militia Groups*, WOODTV.COM (July 3, 2020), <https://www.woodtv.com/news/michigan/michigan-liberty-militia-we-preserve-rights-to-peacefully-protest>; Beckett, *supra* note 15.

indicated that their purpose was “to make sure everybody has the right to assemble peacefully.”<sup>44</sup>

Two days later, on April 17, Trump posted several tweets calling on his supporters to LIBERATE the States of Minnesota, Michigan and Virginia. Subsequent events indicate the messages were received.<sup>45</sup> On the same day, organizers of the #LiberateMinnesota protest posted the following: “It is not the governor’s place to restrict free movement of Minnesota citizens!”<sup>46</sup> The President had been “very clear” that the cure can’t be worse than the disease option.<sup>47</sup> Trump’s endorsement, right-wing media coverage, financing by conservative elites concerned that shuttered businesses would cost Republicans elections in November, and ideological supports casting the anti-lockdown protesters as modern day “Rosa Parks” all combined to increase the number of and at anti-lockdown protests across the country.<sup>48</sup>

## 2. The Patriot’s Rally

On April 30, 2020, thirteen days after Trump’s “LIBERATE” tweets, hundreds of protesters again converged upon Michigan’s State capital seeking to block Governor Whitmer’s request to extend emergency powers to combat COVID-19.<sup>49</sup> “American Patriot Rally,” including militia group members carrying firearms and people with pro-Trump signs, were photographed ignoring state physical-distancing guidelines

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<sup>44</sup> Bill Hutchinson, “Operation Gridlock”: Convoy in Michigan’s Capital Protests Stay-at-Home Orders, ABC NEWS (Apr. 15, 2020), <https://abcnews.go.com/US/convoy-protesting-stay-home-orders-targets-michigans-capital/story?id=70138816>; WXYZ-TV Channel 7, WATCH LIVE: WXYZ 7 Action News is live at a protest at the state capitol against Gov. Whitmer’s extended executive order., FACEBOOK (Apr. 15, 2020), <https://www.facebook.com/wxyzdetroit/videos/watch-live-jim-kiertzner-wxyz-7-action-news-is-live-at-a-protest-at-the-state-ca/519947272246646/>.

<sup>45</sup> Ben Collins & Brandy Zadrozny, *In Trump’s “LIBERATE” Tweets, Extremists See a Call to Arms*, NBC NEWS (Apr. 17, 2020), <https://www.nbcnews.com/tech/security/trump-s-liberate-tweets-extremists-see-call-arms-n1186561>.

<sup>46</sup> Diane Sandberg, “Liberate Minnesota” Protest Planned in St. Paul, VALLEY NEWS LIVE (Apr. 17, 2020), <https://www.valleynewslive.com/content/news/Liberate-Minnesota-protest-planned-in-St-Paul-569729621.html>.

<sup>47</sup> David French, *President Trump’s Dangerous and Foolish Impatience on Coronavirus*, TIME (Mar. 24, 2020), <https://time.com/5809260/president-trumps-dangerous-impatience-coronavirus>.

<sup>48</sup> Toluse Olorunnipa et al., *Rallies Against Stay-at-Home Orders Grow as Trump Sides with Protesters*, THE WASH. POST (Apr. 17, 2020), [https://www.washingtonpost.com/national/rallies-against-stay-at-home-orders-grow-as-trump-sides-with-protesters/2020/04/17/1405ba54-7f4e-11ea-8013-1b6da0e4a2b7\\_story.html](https://www.washingtonpost.com/national/rallies-against-stay-at-home-orders-grow-as-trump-sides-with-protesters/2020/04/17/1405ba54-7f4e-11ea-8013-1b6da0e4a2b7_story.html).

<sup>49</sup> *Michigan House Adjourns Without Extending Coronavirus State of Emergency*, MLIVE (Apr. 30, 2020), <https://www.mlive.com/public-interest/2020/04/michigan-house-adjourns-without-extending-coronavirus-state-of-emergency.html>.

mandating six feet of separation and the facemask requirement.<sup>50</sup> Police allowed more than 100 protesters to enter the Michigan Capitol building around 1 p.m., where armed and unevenly masked protesters packed together trying to push into the legislative chambers.<sup>51</sup> According to Ryan Kelley, a thirty-eight year-old real estate broker, he and other organizers of “the Patriot’s Rally” were not part of a formal militia group but represented people harmed by the stay-at-home order.<sup>52</sup> Kelley claimed to have invited the Michigan Liberty Militia to serve as “security.”<sup>53</sup> Armed protesters brought signs that compared Governor Whitmer to Adolf Hitler, displayed nooses and Confederate flags,<sup>54</sup> and carried signs that read “Tyrants Get the Rope.”<sup>55</sup> Kelley further stated that the Patriot’s Rally was intended to pressure Michigan Legislators to reject Governor Whitmer’s plan to continue restrictions on work and travel—an appeal Republican lawmakers had previously rejected.<sup>56</sup> Unlike Operation Gridlock, which occurred two weeks earlier, this armed protest achieved its objective. The Republican-controlled Michigan Senate refused to extend the Governor’s coronavirus emergency declaration.<sup>57</sup>

Michigan was not the only State where armed groups appeared at State legislatures to protest stay-at-home orders.<sup>58</sup> In Wisconsin, men in camouflage, some apparently carrying assault rifles, others with long guns, stood around a guillotine at a protest attended by about 1,500 people.<sup>59</sup> In

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<sup>50</sup> Matt Stopera, *27 Surreal Photos Of The American Patriot Rally At The Michigan State Capitol*, BUZZFEED (May 1, 2020), <https://www.buzzfeed.com/mjs538/surreal-photos-of-the-american-patriot-rally-at-the-signs-from-american-patriot-rally-on-capitol-lawn> in *Lansing Michigan*, MLIVE, <https://www.mlive.com/galleries/C4SV3ECHIJFWLPUEA5JNDVABAA/> (last visited Mar. 26, 2021).

<sup>51</sup> Beckett, *supra* note 15.

<sup>52</sup> Sara Burnett, *Michigan militia puts armed protest in the spotlight*, AP NEWS (May 2, 2020), <https://apnews.com/article/c04cc1df0c958053489bd24bb7fce93f>.

<sup>53</sup> *Id.*

<sup>54</sup> Anna Liz Nichols & Susan J. Demas, *Whitmer Stay Home Order Protest Turns into Trump Celebration with Confederate Flags and Guns*, MICHIGAN ADVANCE (Apr. 15, 2020), <https://www.michiganadvance.com/2020/04/15/whitmer-stay-home-order-protest-turns-into-trump-celebration-with-confederate-flags-and-guns/>.

<sup>55</sup> Anna Liz Nichols, *‘Tyrants Get the Rope’: Small Anti-Whitmer Protest Rocks Capitol, Reporter Hit by Gun*, MICHIGAN ADVANCE (Apr. 30, 2020), <https://www.michiganadvance.com/2020/04/30/tyrants-get-the-rope-small-anti-whitmer-protest-rocks-capitol-reporter-hit-by-gun/>.

<sup>56</sup> Burnett, *supra* note 52.

<sup>57</sup> *Coronavirus: Armed Protesters Enter Michigan Statehouse*, BBC NEWS (May 1, 2020), <https://www.bbc.com/news/world-us-canada-52496514>.

<sup>58</sup> *COVID-19 Anti-Lockdown Protests in the United States*, WIKIPEDIA, [https://en.wikipedia.org/wiki/2020\\_United\\_States\\_anti-lockdown\\_protests](https://en.wikipedia.org/wiki/2020_United_States_anti-lockdown_protests) (last visited Mar. 26, 2021).

<sup>59</sup> Burnett, *supra* note 52.

Arizona, armed men—many carrying pistols—were among hundreds of protesters who demonstrated at the Capitol demanding Republican Governor Doug Ducey lift the State’s stay-at-home order.<sup>60</sup> A Minnesota based gun-rights group also used Facebook to organize protests against State stay-at-home orders targeting Ohio, Pennsylvania, New York and Wisconsin.<sup>61</sup>

It is important to note that the armed protestors providing “security” at the “Patriot’s Rally” and demanding entrance to the Michigan legislative chamber on April 30, may call themselves a “Liberty Militia,” but they are not militia in the constitutional sense referred to by clauses of Article I of the U.S. Constitution.<sup>62</sup> Indeed, the Michigan Liberty Militia is listed as an anti-government group by the Southern Poverty Law Center.<sup>63</sup>

Significantly, when this group of armed protesters entered the Michigan State Capitol on April 30, 2020, rather than assuring the country that the federal government would protect the state government against efforts to overthrow its policies or leadership through violence or the threat of violence, Trump tweeted that Governor Whitmer needed to make a deal with them. “The Governor of Michigan should give a little, and put out the fire,” Trump tweeted. “These are very good people, but they are angry. They want their lives back again, safely! See them, talk to them, make a deal.”<sup>64</sup>

It was not lost on anyone at the time that Trump’s tweets were openly encouraging right-wing protesters – stoking up an angry passion with barely camouflaged provocations to violence.<sup>65</sup> “Liberate” means “to set (someone) free from a situation, especially imprisonment or slavery, in which their liberty is severely restricted;” more specifically “to free (a country, city or people) from enemy occupation,” or “from domination by

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<sup>60</sup> *Id.*

<sup>61</sup> Isaac Stanley-Becker & Tony Romm, *Pro-Gun Activists Using Facebook Groups to Push Anti-Quarantine Protests*, THE WASH. POST (Apr. 19, 2020), <https://www.washingtonpost.com/technology/2020/04/19/pro-gun-activists-using-facebook-groups-push-anti-quarantine-protests/>.

<sup>62</sup> See Sara Rathod, *Why the Law Turns a Blind Eye to Right-Wing Militias*, MOTHER JONES (Oct. 25, 2016), <https://www.motherjones.com/politics/2016/10/paramilitary-militia-laws-training/>.

<sup>63</sup> *Antigovernment Movement*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/ideology/antigovernment> (last visited Mar. 26, 2021).

<sup>64</sup> Craig Mauger, *After Protests, Trump Tweets Whitmer “Should Give a Little.”* THE DETROIT NEWS (May 1, 2020), <https://www.detroitnews.com/story/news/local/michigan/2020/05/01/after-protests-trump-tweets-whitmer-should-give-little/3063523001/>.

<sup>65</sup> Sandberg, *supra* note 46.



a foreign power.”<sup>66</sup> Historically, the term liberate is associated with the liberation of Western Europe from Nazi Germany’s control during World War II. The insinuation in Trump’s #LIBERATE tweets was that Minnesota, Michigan, and Virginia were subject to a hostile enemy power, a meaning reflected in, and responsive to, the message of some protestors that the Governor of Michigan was a reiteration of Hitler.

The spectacle of a President of the United States using his position in office to incite violence against duly elected state governments in the exercise of state police powers, and the fact that his tweeted encouragements were followed by increased incidents and levels of violence throughout the country make the anti-lockdown protests unprecedented and *different in kind* from other instances of political violence. From the beginning, these actions raised serious concerns about how far Trump would be willing to use his position in office to direct violence at established government. Indeed, even before his incendiary call to action at the United States Capitol on January 6, 2021, events in Michigan clearly illuminated just how far Trump was willing to incite insurrection against state governments. After being notified of a conspiracy to kidnap the Governor of Michigan by members of an offshoot of the Michigan Liberty Militia, who allegedly were motivated to stop Governor Whitmer’s “uncontrolled power” and spoke of murdering “tyrants,”<sup>67</sup> Trump continued to agitate against the Governor, alleging during a Fox Business interview that the Michigan Governor “wants to be a dictator in Michigan, and the people can’t stand her,”<sup>68</sup> and encouraging his crowds to “[l]ock them all up!,” a threat rendered all the more sinister in terms of likelihood and imminence of violence by then available evidence that the kidnapping plot was undertaken under the pretense of making a “citizen’s arrest.”<sup>69</sup> These actions ultimately prompted the Governor to accuse Trump of inciting domestic terrorism,<sup>70</sup> stating that the

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<sup>66</sup> *Liberate*, LEXICO, <https://www.lexico.com/en/definition/liberate> (last visited Mar. 26, 2021).

<sup>67</sup> David Eggert & Ed White, *13 charged in plots against Michigan governor, police*, AP NEWS (Oct. 8, 2020), <https://apnews.com/article/michigan-checks-and-balances-archive-gretchen-whitmer-da09ca66cd8d5f36722021d3593425ff>.

<sup>68</sup> Amy Lieu, *Trump’s back to endangering Michigan’s governor after plot to kidnap her*, AM. INDEP. (Oct. 15, 2020), <https://americanindependent.com/donald-trump-michigan-governor-gretchen-whitmer-dictator-right-wing-extremists-kidnapping-plot/>.

<sup>69</sup> Gus Burns, *Citizen’s arrest defense probably won’t fly in Michigan Gov. Whitmer kidnapping case, legal experts say*, MLIVE.COM (Oct. 24, 2020), <https://www.mlive.com/public-interest/2020/10/citizens-arrest-defense-probably-wont-fly-in-michigan-gov-whitmer-kidnapping-case-legal-experts-say.html>.

<sup>70</sup> *Full Whitmer: Trump incites ‘domestic terrorism’* NBC NEWS (Oct. 18, 2020), <https://www.nbcnews.com/meet-the-press/video/full-whitmer-the-president-is-at-it-again-days-after-a-plot-to-kidnap-the-governor-94085701644>.

armed factions Trump was publicly embracing were not militias, but domestic terrorists.<sup>71</sup>

### *B. Pandemic Violence Part II: The Murder of George Floyd*

Pandemic Violence – Part II begins on May 25, 2020. On June 1, 2020, Black Lives Matter protestors in Lafayette Park were violently dispersed by order of Former President Trump and his Attorney General, William Barr. As stated in the second paragraph of a complaint filed by lawyers for the ACLU in the District of Columbia on behalf of those protesters:

[O]n May 25, 2020, George Floyd, a forty-six-year-old father, son, brother, and African American man was accused of a non-violent offense and arrested by the Minneapolis police. In the process of his arrest, Mr. Floyd was handcuffed and fell to the pavement . . . [A] police officer who participated in Mr. Floyd’s arrest placed his knee and the weight of his body on Mr. Floyd’s neck as Mr. Floyd lay on the ground. For eight minutes and forty-six seconds, the officer held his knee on Mr. Floyd’s neck as Mr. Floyd pleaded for relief. Other officers held his legs or stood by and watched while he died. Among Mr. Floyd’s final words were “please, please, please, I can’t breathe.”<sup>72</sup>

Police reactions to the protests that erupted across the nation in reaction to George Floyd’s murder, while significantly not uniform, were nevertheless in important respects quite different from police reactions to the anti-lockdown protests. So was Former President Trump’s. On May 28, 2020, just three days after Floyd’s murder and five days before the attack on Lafayette Park protestors, Twitter was prompted to superimpose a “public interest notice” indicating that the president’s tweet “violated the Twitter Rules about glorifying violence,” when Trump tweeted:

These THUGS are dishonoring the memory of George Floyd, and I won’t let that happen . . . Any

<sup>71</sup> William Cummings, *‘They’re domestic terrorists’: Michigan governor objects to calling men charged in kidnapping plot ‘militias,’* USA TODAY (Oct. 9, 2020), <https://www.usatoday.com/story/news/politics/2020/10/09/gretchen-whitmer-terrorists-not-militias-charged-kidnap-plot/5935651002/>.

<sup>72</sup> Complaint at 3, *Black Lives Matter D.C. v. TRUMP*, No. 1:20-cv-01469 (D.D.C. June 4, 2020), [https://www.acludc.org/sites/default/files/field\\_documents/blmdc\\_v\\_trump\\_complaint.pdf](https://www.acludc.org/sites/default/files/field_documents/blmdc_v_trump_complaint.pdf).

difficulty and we will assume control but, when the looting starts, the shooting starts. Thank you!<sup>73</sup>

The next day, Business Insider reported that Former President Donald Trump had said he might send in the National Guard in response to the protests.<sup>74</sup> The protests continued to spread and on May 31, 2020, the New York Times reported that recent protests in the district had caused Trump to retreat into a White House bunker.<sup>75</sup> In tweets from, or in the vicinity of, his bunker, Trump called the civil rights protesters “ANARCHISTS” and commanded someone “Call in Our National Guard. NOW.”<sup>76</sup> Reportedly, “cranky” about news reports covering his bunker retreat,<sup>77</sup> the next day, Trump ordered protesters at Lafayette Square be cleared so that he could stage a public walk from the White House to St. John’s Episcopal Church for a photo-op.<sup>78</sup> As alleged in the complaint on behalf of Black Lives Matter D.C.:

Without provocation, Defendants directed their agents in the U.S. Secret Service, U.S. Park Police, D.C. National Guard, and U.S. Military Police to fire tear gas, pepper spray capsules, rubber bullets and flash bombs into the crowd to shatter the peaceful gathering, forcing demonstrators to flee the area. Many peaceful demonstrators were injured, some severely, by this unprovoked attack.<sup>79</sup>

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<sup>73</sup> Jamie Knodel, *Twitter places warning on Trump post, saying tweet glorifies violence*, NBC NEWS (May 29, 2020), <https://www.nbcnews.com/politics/donald-trump/twitter-says-trump-violated-rules-against-glorifying-violence-places-public-n1217591>.

<sup>74</sup> Charles Davis, *‘Any difficulty and we will assume control but, when the looting starts, the shooting starts’: Trump threatens to send in National Guard in response to protests over George Floyd’s death*, BUSINESS INSIDER (May 29, 2020), <https://www.businessinsider.com/trump-tweets-looting-shooting-george-floyd-protests-minnesota-2020-5>.

<sup>75</sup> Peter Baker & Maggie Haberman, *As Protests and Violence Spill Over, Trump Shrinks Back*, N.Y. TIMES (May 31, 2020), <https://www.nytimes.com/2020/05/31/us/politics/trump-protests-george-floyd.html>.

<sup>76</sup> *Id.*

<sup>77</sup> Adam K. Raymond, *All the Absurd Details We’ve Learned About Trump’s Church Photo Op*, INTELLIGENCER (June 3, 2020), <https://nymag.com/intelligencer/2020/06/trumps-church-photo-op-all-the-absurd-details.html>.

<sup>78</sup> Dalton Bennett et al., *The crackdown before Trump’s photo op*, WASH. POST (June 8, 2020), <https://www.washingtonpost.com/investigations/2020/06/08/timeline-trump-church-photo-op/>.

<sup>79</sup> Complaint, *supra* note 72, at 4.

### 1. The Insurrection Act of 1807 and its Relationship to the Republican Security Clauses

On June 2, 2020, Trump threatened to invoke the Insurrection Act of 1807<sup>80</sup> against any city or state that failed to deploy “National Guard in sufficient numbers that w[ould] dominate the streets.”<sup>81</sup> The Insurrection Act of 1807 is one of a collection of statutes that implement the republican security clauses. A brief review of the statutory framework, the history that produced it, and the history of its use by prior U.S. presidents is necessary to understand the unprecedented nature of Trump’s threat to invoke the Insurrection Act to deploy active military troops *against* (rather than in support of) predominantly peaceful civil rights protesters in cities and states across the country.<sup>82</sup> This threat was made all the more unprecedented by the express opposition of the mayors and governors of the targeted cities and states.<sup>83</sup>

The Insurrection Act of 1807 and its various amendments mark a complex history of congressional efforts to effectuate the purposes of the republican security clauses at key moments when armed insurrection has threatened the constitutional order.<sup>84</sup> Thomas Jefferson signed the Insurrection Act of 1807, which expanded the authorities Congress had previously delegated to the president in the Calling Forth Act of 1792 and had made permanent in the Militia Act of 1795. The Militia Act of 1795 indefinitely extended the authorities provided by the 1792 Act, which empowered the president to call out the militia of the several states in three instances:

- (1) whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe;
- (2) in case of an insurrection in any state, against the government thereof . . . on application of the legislature

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<sup>80</sup> Bender, *supra* note 4.

<sup>81</sup> *Trump vows to ‘dominate the streets’ by calling in military*, IRISH NEWS (June 2, 2020), <http://www.irishnews.com/news/worldnews/2020/06/02/news/trump-vows-to-dominate-the-streets-by-calling-in-military-1960591/>.

<sup>82</sup> Davis, *supra* note 74.

<sup>83</sup> Matt Zaptosky & Annie Gowen, *Trump’s ‘Operation Legend’ Was Supposed to Combat Crime. It’s Produced One Arrest, and Some See a Political Stunt.*, WASH. POST, (July 23, 2020), [https://www.washingtonpost.com/national-security/trumps-operation-legend-was-supposed-to-combat-crime-its-produced-one-arrest-and-some-see-a-political-stunt/2020/07/23/cf03eba6-cd09-11ea-91f1-28aca4d833a0\\_story.html](https://www.washingtonpost.com/national-security/trumps-operation-legend-was-supposed-to-combat-crime-its-produced-one-arrest-and-some-see-a-political-stunt/2020/07/23/cf03eba6-cd09-11ea-91f1-28aca4d833a0_story.html).

<sup>84</sup> 10 U.S.C. §§ 251–255.

of such state, or of the executive, (when the legislature cannot be convened); and

(3) whenever the laws of the United States shall be opposed or the execution thereof obstructed, in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act.<sup>85</sup>

The authorities delegated to the president by the 1792 Act responded to threats that were the original concerns of the republican security clauses. These threats include *the external threat* of foreign invasion, which was addressed by the first authority provided for in the 1792 Act. However, the republican security clauses are also concerned with *internal threats* to the republic and seek to establish a system of checks and balances to manage the danger of political violence from the different positions in society from which it might foreseeably arise.

Understanding the United States as a republic of republics, the framers were particularly concerned to counteract three foreseeable kinds of internal threats. The first is the risk of armed insurrection by factions within a state whose intent is overthrowing a state's government from within—in Hamilton's words, "the ferments and outrages of faction and sedition in the community."<sup>86</sup> The 1792 Act responded to this threat by empowering the president to call out the militia to respond to such threats *at the request of the proper State officials (legislative or executive)*. The second anticipated threat was the risk of "the usurpations of rulers," that is, a despotic leader using control of a State to establish a dictatorship in a part of the union—thus denying the people of that State a republican form of government and threatening the stability of the republican form in sister States.<sup>87</sup> The 1792 Act responded to this threat by empowering the president to call forth the militia in case of rebellion against the laws of the United States. The third is the risk of "tyrants" at the federal level using federal control of the States' militia or country's armed forces to subjugate the States and their people to a national dictatorship.<sup>88</sup>

This third is the risk of what, in light of the lessons of the Trump presidency, we might properly call "presidential insurrection." This risk was *not* provided for by the 1792 Act or any of its subsequent amendments, though the republican security clauses most certainly were designed to avert the foreseeable danger of presidential abuse of

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<sup>85</sup> Act of Feb. 28, 1795, ch. 36, 1 Stat. 424.

<sup>86</sup> THE FEDERALIST No. 21 (Alexander Hamilton).

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

<sup>88</sup> THE FEDERALIST No. 29 (Alexander Hamilton).

unchecked military power in the federal executive. The clauses do this in two ways: first, by locating *in Congress (not the President)* the power to determine and, as appropriate, expand or contract the conditions under which the president may (or may not) call forth the militia and armed forces of the United States;<sup>89</sup> and second, by reserving to the States sufficient control over the appointment of officers and training of the militia to fend off presidential abuse of the States' militia "for the purposes of riveting the chains of slavery upon a part of their countrymen."<sup>90</sup>

Against this backdrop, it is worth noting that while the republican security clauses and the political logic of mutual checks and balances reflected in their carefully crafted allocations of power reflect a design intent to protect the republican form against threats that might foreseeably emanate from a despotic spirit gaining hold of the presidency, my point in this essay is to note that the CIVIL Act proposed in response to Trump's threat to invoke the Insurrection Act, along with several other bills, like the Preventing Authoritarian Policing Tactics on America's Streets Act,<sup>91</sup> if enacted would be the first time Congress has acted affirmatively to address this original and constitutionally recognized danger of presidential despotism, which amendments to the first Militia Act of 1792 have exacerbated in ways that undermine the political logic of checks and balances inscribed in the republican security clauses. This can most clearly be seen by examining the structure of power constituted by these amendments.

The authorities initially delegated to the president by the 1792 Act were temporary but were made permanent by the Militia Act of 1795, which was thereafter amended by the Insurrection Act of 1807. The Insurrection Act of 1807 expanded the president's power by authorizing deployment of active military troops. Jefferson asked Congress to delegate this additional power after Madison advised him that federal troops could not be used domestically under the 1795 Militia Act. Jefferson wanted to stop Aaron Burr, who had served as Jefferson's Vice President, from executing a conspiracy to raise an army and establish an independent country in what was then the recently purchased Louisiana Territory or in

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<sup>89</sup> See U.S. CONST., art I, § 8, cl. 15 -16 (granting Congress the power "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrection and repel Invasion; [and t] provide for organizing . . . and for governing such Part of them as may be employed in the Service of the United States."). See also Stephen I. Vladeck, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 152–53 n. 9 (2004) (The president's power to federalize the militia is not an inherent power of Article II, but a statutory delegation of Congress' Section 8, Clause 15 power "to provide for the calling forth of militia").

<sup>90</sup> See U.S. CONST., art I, § 8, cl. 16; THE FEDERALIST No. 29, *supra* note 88, at 182–83.

<sup>91</sup> *Oregon Lawmakers Intro Bill to Block 'Shadowy Paramilitary,'* KOIN.COM, <https://www.koin.com/news/protests/oregon-lawmakers-intro-bill-to-block-shadowy-paramilitary/> (last updated July 20, 2020).

Mexico.<sup>92</sup> Though the precise details of Burr's plan remain subject of controversy, one iteration involved invading Mexico under pretense of war with Spain then establishing an independent country or keeping the land for himself. Burr concocted his plans with the assistance of a U.S. Army Commander, who Burr had persuaded Jefferson to appoint as the first governor of the Louisiana Territory and who ultimately revealed the conspiracy to Jefferson. When Madison advised Jefferson that the Militia Acts did not authorize the president to deploy federal troops to stop a domestic rebellion, Jefferson asked Congress for this power, which Congress obliged by enacting the Insurrection Act of 1807. The Insurrection Act of 1807 combines authorities granted under the Militia Acts of 1792 & 1795 as well as delegating the additional authorities to use federal troops and naval power, as Jefferson requested. These combined authorities are currently codified at 10 U.S.C. § 251 and §252. 10 U.S.C. § 251, *Federal Aid for State Governments*, provides:

Whenever there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection.<sup>93</sup>

Section 251 carries forward the authorities granted by the 1792 Militia Act, and again reflects fidelity to the terms of the Republican Guarantee of Article IV, Section 4 of the Constitution, which makes federal assistance against domestic violence depend on application by the legislature or the executive of the state. The requirement of application by the state's legislature or executive is not only required by the plain text of the Guarantee Clause, but reflected as well in heated debates where efforts to remove the requirement of legislative request prompted attacks on the Guarantee Clause until the restriction was reinstated.<sup>94</sup> The fact that Trump's threat to invoke the Insurrection Act and his subsequent deployment of an irregular assortment of armed federal agents were against the expressed will of the governors and mayors of the targeted States makes it impossible to justify Trump's actions under this Section of the Insurrection Act, nor the Republican Guarantee Clause itself.

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<sup>92</sup> Dave Roos, *Thomas Jefferson Signed the Insurrection Act in 1807 to Foil a Plot by Aaron Burr*, HISTORY (June 3, 2020), <https://www.history.com/news/insurrection-act-thomas-jefferson-aaron-burr> (last visited Feb. 14, 2021).

<sup>93</sup> 10 U.S.C. § 251.

<sup>94</sup> See Jonathan Toren, *Protecting Republican Government from Itself: The Guarantee Clause of Article IV, Section 4*, 2 N.Y.U. J.L. & LIBERTY 371, 382–83 (2007).

The powers delegated by the Militia Acts and the Insurrection Act of 1807 were further extended in 1861 when Congress enacted the Suppression of Rebellion Act.<sup>95</sup> Today, the provisions of the Suppression of Rebellion Act are codified at 10 U.S.C. § 252, and provide for the use of militia and armed forces to enforce federal authority.<sup>96</sup> The 1861 Act expanded the President's authority under the Militia Act of 1795 to use the militia and armed forces when unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States make it, in the president's view, *impracticable* to enforce the laws of the United States by the ordinary course of judicial proceeding. President Eisenhower used the power delegated by the Suppression of Rebellion Act in 1957 to enforce the school integration orders in Little Rock Arkansas, using both National Guard units and federal armed forces.<sup>97</sup> In 1962, President Kennedy invoked these delegated powers to enforce integration orders of the United States District Court for the Southern District of Mississippi to assist James Meredith, a black student and Air Force veteran to enroll at the University of Mississippi at Oxford.<sup>98</sup> In 1963, Kennedy twice invoked his powers under the Suppression of Rebellion Act of 1861 to enforce a federal district court order integrating the University of Alabama against conspiracies aimed at preventing integration of the public schools and University of Alabama.<sup>99</sup> And in 1965, President Johnson invoked it to protect civil rights marchers from Selma to Montgomery.

The language and history of presidential invocation demonstrate that this section of the Insurrection Act implements the political logic of the republican security clauses by giving the president the power to address the risk of despotic leaders using control of a State to impose dictatorship in a part of the union or denying to the people of that state a republican form of government. The language and history of presidential invocations also demonstrate how incongruous Trump's threats to invoke this section against the Black Lives Matter protesters against racially motivated police brutality would be given the purpose of the section and its historical applications. This is especially so given that, unlike the invocations by Presidents Eisenhower, Kennedy and Johnson, which were in support of the enforcement of federal court orders to integrate racially segregated schools, Trump's orders to deploy federal agents to "dominate the streets"

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<sup>95</sup> Act of July 29, 1861, ch. 25, 12 Stat. 281.

<sup>96</sup> 10 U.S.C. § 252.

<sup>97</sup> Exec. Order No. 10,730, Sept. 24, 1957, 22 F.R. 7628 (1957).

<sup>98</sup> Exec. Order No. 11,053, 27 Fed. Reg. 9681 (1962). See *1962: Mississippi Race Riots over First Black Student*, BBC, [http://news.bbc.co.uk/onthisday/hi/dates/stories/october/1/newsid\\_2538000/2538169.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/october/1/newsid_2538000/2538169.stm) (last visited Mar. 25, 2021).

<sup>99</sup> Exec. Order No 11,111, 28 Fed. Reg. 5709 (1963).



were not in support of any federal court order, and indeed, unleashed violence which prompted temporary restraining orders from federal courts in Portland and Seattle.<sup>100</sup>

The president's powers to call forth militia and deploy federal armed forces again expanded when Congress enacted the Ku Klux Klan Act of 1871 (otherwise known as the Third Enforcement Act), delegating to the president the authority to use militia and federal troops to enforce the 14th Amendment and the terms of Reconstruction in the South.<sup>101</sup> President Grant invoked the Act to declare martial law and suspend habeas corpus in areas of South Carolina in response to the terrorist attacks and assassinations Klan members executed against Black and White Republicans in order to disrupt elections and obstruct voting.<sup>102</sup> Today, the provisions of this Act are codified at 10 U.S.C. § 253 Interference with State and Federal law, which provides:

The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it—

(1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or

(2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.

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<sup>100</sup> Index Newspapers LLC v. City of Portland, 474 F. Supp. 3d 1113 (D. Or. 2020) (granting a temporary restraining order enjoining federal defendants); *Federal Court Issues Restraining Order on Federal Agents in Portland*, ACLU (July 23, 2020) [hereinafter *TRO on Federal Agents in Portland*], <https://www.aclu.org/press-releases/federal-court-issues-restraining-order-federal-agents-portland>; Black Lives Matter Seattle-King Cnty. v. City of Seattle, 466 F. Supp. 3d 1206 (W.D. Wash. 2020).

<sup>101</sup> *Ku Klux Klan Act*, L. LIBR. - AM. L. AND LEGAL INFO., <https://law.jrank.org/pages/8020/Ku-Klux-Klan-Act.html> (last visited Feb. 19, 2021).

<sup>102</sup> *Oct. 17, 1871: Violence by KKK in South Carolina Forces Pres. Grant to Declare Martial Law*, EJI, <https://calendar.eji.org/racial-injustice/oct/17> (last visited Feb. 19, 2021).

In any situation covered by clause (1), the State shall be considered to have denied the equal protection of the laws secured by the Constitution.<sup>103</sup>

Section 253 gives effect to the concern reflected in the republican security clauses to protect republican government from the abuses and usurpations of power State officials might foreseeably use to oppress the people of their state. The fourth section, 10 U.S.C. § 254 also derived from the Suppression of Rebellion Act of 1861 provides that the president shall by proclamation order the insurgents to disperse, presumably giving them a reasonable time to disperse prior to the deployment of militia or armed forces against them.<sup>104</sup> The last of the five sections extends the president's authorities under the prior provisions to Guam and the Virgin Islands.<sup>105</sup>

Prior to Trump's threatened invocation, President George H.W. Bush was the last president to invoke the Insurrection Act in 1992, after Peter Wilson, then-governor of California, requested help quelling widespread riots that erupted after four police officers charged in the beating of Rodney King were acquitted.<sup>106</sup> Unlike the situation in Trump's case, where state and local officials objected to Trump's threats to invoke the Act, the Governor of California asked President Bush to send troops to assist after forty people had been killed, 1,500 injured, 3,700 fires reported and 3,000 arrest had been made.<sup>107</sup>

In 2005, after Hurricane Katrina devastated Louisiana and the Gulf Coast, President George W. Bush explored expanding the Insurrection Act to place command of the region's National Guard under federal control. Ultimately, Bush declined to invoke the act. It was amended in 2006 to allow "natural disasters, epidemics, or other serious public health

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<sup>103</sup> 10 U.S.C. § 253.

<sup>104</sup> *Id.* §254 ("Whenever the President considers it necessary to use the militia or the armed forces under this chapter, he shall, by proclamation, immediately order the insurgents to disperse and retire peaceably to their abodes within a limited time."). See Proclamation No. 3204, 22 Fed. Reg. 7628 (Sept. 23, 1957) (ordering dispersal of mob at Central High School, Little Rock, Arkansas); Proclamation No. 3497, 27 Fed. Reg. 9681 (Sep. 30, 1962) (ordering dispersal of mobs obstructing the orders of federal courts in Mississippi); Proclamation No. 3542, 28 Fed. Reg. 5707 (June 11, 1963) (ordering the dispersal of mob denying entrance of African Americans to University of Alabama); Proclamation No. 3554, 28 Fed. Reg. 9,861 (Sept. 10, 1963) (ordering dispersal of mob preventing African American students from attending public schools in Alabama); Proclamation No. 3795, 32 Fed. Reg. 10905 (July 27, 1967) (ordering dispersal of rioters in Detroit).

<sup>105</sup> 10 U.S.C. § 255.

<sup>106</sup> See Paul Taylor & Carlos Sanchez, *BUSH ORDERS TROOPS INTO LOS ANGELES*, WASH. POST (May 2, 1992), <https://www.washingtonpost.com/archive/politics/1992/05/02/bush-orders-troops-into-los-angeles/4c4711a6-f18c-41ed-b796-6a8a50d6120d/>.

<sup>107</sup> *Id.*

emergencies, terrorist attacks or incidents or other conditions”<sup>108</sup> but this expansion was repealed the following year after the state governors attacked it as a presidential power grab.<sup>109</sup> Again, this history and the purpose of the Insurrection Act make incongruous Trump’s threat to use it to deploy active troops against the Black Lives Matter protestors.

## 2. Trump Circumvents Insurrection Act Defeat through “Operation Diligent Valor”

Trump’s June 1st threats to invoke the Insurrection Act against the Black Lives Matter protests erupting across the country were not well received. Although National Guard troops from nine states and some 1,700 active-duty military troops were deployed to stations just outside D.C.,<sup>110</sup> on June 3, Trump’s former Secretary of Defense, James Mattis, as well as his then-current Secretary of Defense, Mark Esper, both publicly announced their opposition to invoking the Insurrection Act. According to Mattis, militarizing the response to civil rights protests as was done in clearing Lafayette Square:

[S]ets up a conflict—a false conflict—between the military and civilian society. It erodes the moral ground that ensures a trusted bond between men and women in uniform and the society they are sworn to protect, and of which they themselves are a part. Keeping public order rests with civilian state and local leaders who best understand their communities and are answerable to them.<sup>111</sup>

According to then Secretary of Defense, Mark Esper, “the option to use active-duty forces in a law enforcement role should only be used as a matter of last resort, and only in the most urgent and dire of situations . . .

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<sup>108</sup> 10 U.S.C. § 333 (2007).

<sup>109</sup> MARK M. BECKLER, U.S. ARMY NATIONAL GUARD, INSURRECTION ACT RESTORED: STATES LIKELY TO MAINTAIN AUTHORITY OVER NATIONAL GUARD IN DOMESTIC EMERGENCIES 1 (2008). Eric Alterman & George Zornick, *The Invisible Battle Over Posse Comitatus*, CTR. FOR AM. PROGRESS (Oct. 23, 2008), <https://www.americanprogress.org/issues/security/news/2008/10/23/5081/think-again-the-invisible-battle-over-posse-comitatus/>.

<sup>110</sup> Anthony Capaccio, *Federal Plan to Control D.C. Protests Taps 7,600 Personnel*, BLOOMBERG, <https://www.bloomberg.com/news/articles/2020-06-05/federal-plan-to-control-d-c-protests-has-7-600-personnel-tapped> (last updated June 5, 2020).

<sup>111</sup> Jeffrey Goldberg, *James Mattis Denounces President Trump, Describes Him as a Threat to the Constitution*, ATLANTIC (June 3, 2020), <https://www.theatlantic.com/politics/archive/2020/06/james-mattis-denounces-trump-protests-militarization/612640/> (last visited Feb. 22, 2021).

We are not in one of those situations now.”<sup>112</sup> Esper at the time was under intense criticism both for his appearance as part of Trump’s entourage in the infamous walk across Lafayette Square escorting Trump to his photo-op in front of St. John’s Episcopal church on June 1,<sup>113</sup> but also for his remarks in a conference call earlier that same day regarding the George Floyd protests in which Esper urged state governors that “the sooner that [the governors] mass and dominate the battlespace, the quicker this dissipates, and we can get back to the right normal.”<sup>114</sup> Although public opposition by the Secretary of Defense did derail Trump’s efforts to deploy active military troops against the American people, Trump not only insisted on his “sole authority” to invoke the Insurrection Act,<sup>115</sup> but thereafter circumvented the Pentagon’s refusal to support a military deployment by turning to the Department of Justice.<sup>116</sup>

On July 9, then Attorney General William Barr announced a new initiative to deploy teams of federal agents cobbled together from a variety of federal enforcement agencies to cities across the country experiencing a “surge” in violent crime.<sup>117</sup> The teams would include agents from the FBI, the U.S. Marshals, U.S. Bureau of Prisons, the Department of Homeland Security, the Drug Enforcement Agency (DEA), the Bureau of Alcohol, Tobacco and Firearms (ATF), U.S. Immigration and Custom Enforcement (ICE) and the Border Patrol Tactical Unit (BORTAC) of the U.S. Border Patrol. The initiative was called “Operation Legend,” and its first deployment was to Kansas City, Missouri.<sup>118</sup> Although the first deployment to Kansas City was reportedly at the request of Missouri Governor Mike Parson, the Mayor of Kansas City was not consulted.<sup>119</sup>

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<sup>112</sup> Julian Borger, *Pentagon Chief Opposes Trump Threat to Deploy Military at Protests*, GUARDIAN, <http://www.theguardian.com/us-news/2020/jun/03/george-floyd-mark-esper-opposes-trump-threat-deploy-military> (last visited Mar. 6, 2021).

<sup>113</sup> *Traitors: Esper, Milley Claim They Didn’t Know Trump Was Attacking Americans for Their “Walk,”* DAILY KOS (June 2, 2020), <https://www.dailykos.com/story/2020/6/2/1949791/-Traitors-Esper-Milley-claim-they-didn-t-know-Trump-was-attacking-Americans-for-their-walk>.

<sup>114</sup> Borger, *supra* note 112.

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

<sup>116</sup> Alexander Mallin, *AG Barr Announces New Initiative “Operation Legend” to Tackle Violent Crime*, ABC NEWS (July 9, 2020), <https://abcnews.go.com/Politics/ag-barr-announces-initiative-operation-legend-tackle-violent/story?id=71695453>.

<sup>117</sup> *Id.*

<sup>118</sup> *Attorney General William P. Barr Announces Launch of Operation Legend*, U.S. DEP’T OF JUST., OFF. OF PUB. AFFAIRS (July 8, 2020), <https://www.justice.gov/opa/pr/attorney-general-william-p-barr-announces-launch-operation-legend>.

<sup>119</sup> Brock Wilbur, *Trump Administration Announces “Operation Legend” to Send Federal Investigators to the Streets of KC; Lucas Responds*, PITCH (July 8, 2020), <https://www.thepitchkc.com/trump-administration-announces-operation-legend-to-send-federal-investigators-to-the-streets-of-kc-lucas-responds/>.

More importantly, Trump thereafter began deploying teams of federal agents to Portland, Oregon and Seattle, Washington<sup>120</sup> and publicly threatened to deploy additional teams to Chicago, New York and other U.S. cities led by democrats, which according to Trump were “[a]ll run by very liberal Democrats. All run, really, by the radical left.”<sup>121</sup> Although the operations in Kansas City were technically distinct from the operations in Oregon and Seattle,<sup>122</sup> all the operations reflect a pattern of circumventing institutional checks to organize irregular teams from an assortment of enforcement agencies under the control of unconfirmed senior officials willing to send unidentified militarized units into cities and states against the will of local elected authorities.

By July 17, the presence of unidentified federal agents on the streets of Portland became a national scandal focused on Trump’s escalation of civil unrest by deploying militarized secret agents who were videotaped indiscriminately attacking protestors with tear gas, rubber bullets, and other crowd control weapons, while refusing to distinguish journalists and legal observers, and forcibly grabbing people off the streets and taking them away in unmarked cars.<sup>123</sup> The tactic of unidentified agents in military outfits grabbing people off the streets was particularly inflammatory, as noted by a former CIA counterintelligence agent speaking with the Nation:

All it takes is one of these similar[] kitted out militiamen groups to start grabbing folks off the street as well, but then having their way with them, for there to be huge, possibly violent pushback for these tactics. This hurts the police, and the citizenry . . . . We’re quickly entering

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<sup>120</sup> Jeet Heer, *Trump Unleashes His Secret Police in Portland* (July 17, 2020), <https://www.thenation.com/article/politics/trump-secret-police-portland>; Zolan Kanno-Youngs et al., *Feds Sending Tactical Team to Seattle, Expanding Presence Beyond Portland*, N.Y. TIMES, <https://www.nytimes.com/2020/07/23/us/seattle-protests-feds.html> (last updated July 25, 2020).

<sup>121</sup> Nick Miroff & Mark Berman, *Trump Threatens to Deploy Federal Agents to Chicago and Other U.S. Cities Led by Democrats*, WASH. POST (July 20, 2020), [https://www.washingtonpost.com/national/defending-portland-crackdown-trump-pledges-to-deploys-feds-to-chicago-and-other-us-cities-led-by-democrats/2020/07/20/fda42b8a-caaa-11ea-89ce-ac7d5e4a5a38\\_story.html](https://www.washingtonpost.com/national/defending-portland-crackdown-trump-pledges-to-deploys-feds-to-chicago-and-other-us-cities-led-by-democrats/2020/07/20/fda42b8a-caaa-11ea-89ce-ac7d5e4a5a38_story.html).

<sup>122</sup> Gabriella Borter, *Court Documents Reveal Secretive Federal Unit Deployed for “Operation Diligent Valor” in Oregon*, REUTERS (July 22, 2020), <https://www.reuters.com/article/us-global-race-portland-valor-idUSKCN24N2SH>; Marissa J. Lang et al., *Operation Diligent Valor: Trump Showcased Federal Power in Portland, Making a Culture War Campaign Pitch*, WASH. POST (July 24, 2020), [https://www.washingtonpost.com/national/portland-protests-operation-diligent-valor/2020/07/24/95f21ede-ccc9-11ea-89ce-ac7d5e4a5a38\\_story.html](https://www.washingtonpost.com/national/portland-protests-operation-diligent-valor/2020/07/24/95f21ede-ccc9-11ea-89ce-ac7d5e4a5a38_story.html).

<sup>123</sup> Kanno-Youngs et al., *supra* note 120.

secret police territory now. DHS is becoming Trump's Mukhābarāt.<sup>124</sup>

On July 18, 2020, the Governor of Oregon responded to the unwanted deployment of federal agents in Portland.<sup>125</sup> The agents were deployed in military camouflage, inciting violent confrontations with protestors, and abducting them in unmarked cars.<sup>126</sup> The Oregon Governor's public objections accused Trump and his acting homeland security secretary, Chad Wolf, of provoking violence in order to cast the overwhelmingly peaceful protestors as violent and destructive, thus distorting the image of the protests for political advantage with the president's base of "law and order" and white supremacists. The Governor accused the president of "adding gasoline to a fire," and insisted that de-escalation and dialogue were needed.<sup>127</sup> When the Portland Mayor insisted that Trump officials were escalating the situation with completely abhorrent and unconstitutional tactics and needed to withdraw, the acting Homeland Security Secretary, Chad Wolf, the acting Customs and Border Protection Commissioner, Mark Morgan, and the acting deputy secretary of Homeland Security, Ken Cuccinelli, all publicly disputed the Mayor's characterization of the protests and the protestors. Wolf insisted the protestors were "violent anarchists and extremists." Morgan described them as "criminals," and Cuccinelli insisted that "locally generated" intelligence had tipped them that the protestors planned to attack federal facilities. None of these three senior security officials had been confirmed by the Senate.<sup>128</sup>

On July 21, Steny Hoyer, Majority Leader of the House of Representatives, condemned Trump's deployment of federal agents, asserting it was designed to "perpetuate[] a myth of disorder and mob violence—which is not occurring—to justify his deployment of heavily armed, anonymous, military-style agents into our communities who pull

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<sup>124</sup> Heer, *supra* note 120 (explaining that mukhābarāt is an Arabic word referring to secret intelligence police).

<sup>125</sup> Emily Singer, *Oregon Governor: Trump Seeking To Provoke Violence With Portland Arrests*, NAT'L MEMO (July 18, 2020), <https://www.nationalmemo.com/oregon-governor-trump-seeking-to-provoke-violence-in-portland-abduct>.

<sup>126</sup> 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), <https://www.washingtonpost.com/nation/2020/07/17/portland-protests-federal-arrests/>.

<sup>127</sup> Michael Martin, *Oregon Gov. Kate Brown: Federal Officers Are 'Adding Gasoline To A Fire'*, NPR (JULY 19, 2020), <https://www.npr.org/2020/07/19/892855753/oregon-gov-kate-brown-federal-officers-are-adding-gasoline-to-a-fire>.

<sup>128</sup> Quint Forgey, *Trump Law Enforcement Officials Brush off Pleas to Butt out of Portland*, POLITICO, <https://www.politico.com/news/2020/07/20/ken-cuccinelli-federal-law-enforcement-portland-372570> (last updated July 20, 2020, 07:25 PM).

peaceful citizens into unmarked vehicles and detain them without lawful cause . . . .” Hoyer warned that these types of actions destroy democracy and bring “fascists into dictatorial power,” insisting that “[a]s a nation, we must reject such tactics emphatically.”<sup>129</sup> That same day, Secretary of Defense, Mark Esper, publicly expressed concern that the federal enforcement agents Trump was deploying to Portland were wearing military style outfits without identifying marks. The concern was that the federal agents would be mistaken for members of the U.S. military creating the false impression that the military was executing Trump’s authoritarian crackdown.<sup>130</sup>

Two days after the House Majority Leader and the Secretary of Defense publicly stated their separate concerns, U.S. District Judge Michael Simon issued a temporary restraining order, specifically naming the Department of Homeland Security and U.S. Marshals Service and enjoining them from arresting, threatening to arrest or using physical force against journalists and legal observers for failure to disperse in response to a dispersal order directed at protestors.<sup>131</sup> According to the Order, “such persons shall not be subject to arrest for not dispersing following the issuance of an order to disperse.”<sup>132</sup> The Order went on to specify further restrictions against the seizure of media equipment, press passes and affirmative obligations to document and return property seized in the course of arrest.

Four days after that, mayors of six of the cities targeted by Trump, appealed to Congress to make it illegal for the federal government to deploy militarized federal agents without consent of local authorities.<sup>133</sup> The mayors objected to the impunity with which the federal agents were engaging in “crowd control” operations in their cities, where concerned Americans responding to the murders of George Floyd and others by police, were again experiencing police brutality:

We are encouraged that so many of our residents are exercising their First Amendment rights to stand up

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<sup>129</sup> *Hoyer Statement on President Trump Deploying Federal Law Enforcement to U.S. Cities*, OFF. OF MAJORITY LEADER STENY HOYER (July 21, 2020), <https://www.majorityleader.gov/content/hoyer-statement-president-trump-deploying-federal-law-enforcement-us-cities>.

<sup>130</sup> Paul D. Shinkman, *Pentagon Troubled By Overly Militarized Federal Agents in Portland*, U.S. NEWS (July 21, 2020), <https://www.usnews.com/news/national-news/articles/2020-07-21/pentagon-troubled-by-overly-militarized-federal-agents-in-portland>.

<sup>131</sup> *TRO on Federal Agents in Portland*, *supra* note 100.

<sup>132</sup> *Index Newspapers LLC v. City of Portland*, 480 F.Supp.3d 1113, 1126 (D. Or. 2020).

<sup>133</sup> *Mayors Ask Congress to Ban Deployment of Militarized Federal Agents in Cities as Trump Mulls Sending in More*, POLITICO (July 27, 2020), <https://www.politico.com/news/2020/07/27/mayors-congress-ban-federal-agents-383019>.

against these injustices. At the same time, we are outraged that the administration has responded to these First Amendment-protected gatherings by authorizing the deployment of riot-gear clad forces to Washington, D.C., Portland, Seattle and other communities across the country without the consent of local authorities.<sup>134</sup>

The message from Trump's unconfirmed security officials mirrored Trump's very own original and repeated references to the Black Lives Matter protestors as "thugs,"<sup>135</sup> "terrorists," and "anarchists," even though repeated studies show that ninety-five percent of the Black Lives Matter protests have been peaceful.<sup>136</sup> Widely available evidence also shows that Black Lives Matter protests were infiltrated by members of white supremacist groups with specific intent to incite riot and discredit the protests.<sup>137</sup> At the same time, Trump has had a history of encouraging and excusing acts of violence by his own supporters against not only Black Lives Matter protestors, but against elected governors of states executing stay-at-home orders Trump and his supporters opposed<sup>138</sup> and most recently against the nation's elected lawmakers executing their constitutional obligation to certify the 2020 presidential election on January 6.<sup>139</sup> Indeed, it is worth noting that there were no threats to invoke the Insurrection Act in April against the anti-lockdown protestors—who Trump instead called "very good, but angry, people" and urged the Governor of Michigan to listen to and make a deal with. Like his own

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<sup>134</sup> Alana Wise, *Mayors Demand Congress Block Trump From Deploying Federal Agents To Cities*, NPR (July 27, 2020), <https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/07/27/895904023/mayors-demand-congress-block-trump-from-deploying-federal-agents-to-cities>.

<sup>135</sup> "When the Looting Starts, the Shooting Starts": Trump Tweet Flagged by Twitter for "Glorifying Violence," CBS (May 29, 2020), <https://www.cbsnews.com/news/trump-minneapolis-protesters-thugs-flagged-twitter/>.

<sup>136</sup> Julian Routh, *Trump Calls Protesters Who Confronted Pittsburgh Diners 'Thugs!'*, PITTSBURGH POST-GAZETTE (Sept. 8, 2020), <https://www.post-gazette.com/news/politics-nation/2020/09/08/Trump-tweet-reaction-viral-video-pittsburgh-protesters-diners/stories/202009080069>.

<sup>137</sup> See, e.g., Jany Libor, *Police: "Umbrella Man" Was a White Supremacist Trying to Incite Floyd Rioting*, STARTRIBUNE (July 28, 2020), <https://www.startribune.com/police-umbrella-man-was-a-white-supremacist-trying-to-incite-floyd-rioting/571932272/>.

<sup>138</sup> Jemima McEvoy, *Michigan Gov. Blames Kidnapping Plot On White House's 'Comfort And Support' For Domestic Terrorists*, FORBES (Oct. 11, 2020), <https://www.forbes.com/sites/jemimamcevoy/2020/10/11/michigan-gov-blames-kidnapping-plot-on-white-houses-comfort-and-support-for-domestic-terrorists/>.

<sup>139</sup> Tommy Beer, *Trump Called BLM Protesters 'Thugs' But Capitol-Storming Supporters 'Very Special'*, FORBES (Jan. 6, 2021), <https://www.forbes.com/sites/tommybeer/2021/01/06/trump-called-blm-protesters-thugs-but-capitol-storming-supporters-very-special/>.



supporters, Trump's actions and public discourse reflect a pattern of disinformation that operates specifically by attributing to his opponents, the actions and intentions that he incites and excuses from his supporters.<sup>140</sup>

### *C. Pandemic Violence Part III: Presidential Accusations in a Mirror*

This brings us full circle to the insurrection of January 6 at the United States Capitol, the third and most recent episode of pandemic violence in the era of Trump. Reflecting back on Trump's incendiary January 6 speech urging his supporters to "stop the steal,"<sup>141</sup> Trump's claim of winning "a landslide election" is quite remarkable given that Joseph Biden defeated Trump by more than 7 million votes and won the electoral college 306 to Trump's 232, notwithstanding Trump's repeated unsuccessful efforts to challenge the results.<sup>142</sup> Many public commentators and scholars have noted Trump's affinity for, and attempted replication of tactics and strategies drawn from current and historical dictators,<sup>143</sup> and it is worth noting the similarities between Trump's incredible claim that the 2020 election was a stolen "landslide" and the Nazi propaganda tactic known as "accusations in a mirror," which constructs propaganda out of the simple inversion of truth.<sup>144</sup>

It is true, as Trump claimed in his speech to the insurrectionists, that "this was a landslide election, and the other side knows it."<sup>145</sup> What is not

<sup>140</sup> Court Records, *FBI Contradict Trump's Claims of Organized "antifa-Led" Riots in Minneapolis after George Floyd's Death*, STARTRIBUNE (Dec. 20, 2020), <https://www.startribune.com/court-records-fbi-contradict-trump-s-claims-of-organized-antifa-led-riots-in-minneapolis-after-georg/573438811/>.

<sup>141</sup> Brian Naylor, *Read Trump's Jan. 6 Speech, A Key Part Of Impeachment Trial*, NPR (Feb. 10, 2021), <https://www.npr.org/2021/02/10/966396848/read-trumps-jan-6-speech-a-key-part-of-impeachment-trial>.

<sup>142</sup> Cummings et al., *By the Numbers: President Donald Trump's Failed Efforts to Overturn the Election*, USA TODAY (Jan. 6, 2021), <https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001/>.

<sup>143</sup> Elizabeth M. Iglesias, *Against Fascism: Toward a LatCritical Legal Genealogy*, 23 HARV. LATINX L. REV. 233 (2020).

<sup>144</sup> Kenneth L. Marcus, *Accusation in a Mirror*, 43 LOY. UNI. CHI. L.J. 357; Cassie Miller, *Accusations in a Mirror: How the Radical Right Blames Rising Political Violence on the Left*, S. POVERTY L. CTR., (June 11, 2019), <https://www.splcenter.org/hatewatch/2019/06/11/accusations-mirror-how-radical-right-balmes-rising-political-violence-left>; Leah Owen, *False, historical, 'accusations in a mirror'? The Tutsi Colonisation Plan, conspiracy, and genocide in Rwanda*, INT'L CONF. ON GENOCIDE, (Sept. 2020), <https://commons.erau.edu/cgi/viewcontent.cgi?article=1066&context=genocide-conference>.

<sup>145</sup> Naylor, *supra* note 141.

true is that the landslide election was for Trump. It was for Biden, but that is precisely the strategy of accusation in the mirror. It is to take a truth and make it a half-truth favoring the propagandist agenda, and then use intimidation and violence, so as to bully everyone into reiterating the half-truth as the truth. The tactic was used most notably as part of genocidal campaigns by the Nazis and more recently by the Hutus in Rwanda—both campaigns generating antipathy toward their victims by accusing the victims of intending or doing precisely what the propagandists had done or intended to do.<sup>146</sup> Today, this tactic of accusation in the mirror is being used by right-wing extremists in a manner designed to generate fear and hatred toward democrats and progressives by blaming the left for increasing political violence,<sup>147</sup> even though all evidence shows that right-wing extremists are responsible for the vast majority of domestic terrorism in the United States.<sup>148</sup>

Indeed, within hours of the January 6 insurrection, a posting on Parler from an account associated with QAnon announced plans for a “Million Militia March” in D.C. on January 20, 2021.<sup>149</sup> The post is worth quoting at length because the propaganda reflects this same accusation in the mirror strategy of asserting a truth, but distorting it by simple inversion:

Millions of American Militia will meet in Washington, D.C., on January 20, 2021 for the purpose of preventing any attempt by the treasonous domestic enemy Joe Biden, or any other member of the Communist Organized Crime Organization known as the Democratic Party, from entering the White House belonging to We [t]he People.

In the event that justice is miraculously served and our Re-Elected President Donald J. Trump is sworn in: The President, the capital and our National Monuments will be protected from the proven-violent Leftist insurgents who have declared war on the United States of America and have been committing a massive insurrection in the United States of America.<sup>150</sup>

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<sup>146</sup> Marcus, *supra* note 144; Owen, *supra* note 144.

<sup>147</sup> Miller, *supra* note 144.

<sup>148</sup> Jenny Gross, *Far-Right Groups Are Behind Most U.S. Terrorist Attacks, Report Finds*, N.Y. TIMES, <https://www.nytimes.com/2020/10/24/us/domestic-terrorist-groups.html> (last updated Jan. 20, 2021).

<sup>149</sup> David Neiwert, *‘Million Militia March’ leads far right’s plan for a ‘second round’ Sunday in D.C., but chaos reigns*, DAILY KOS (Jan. 16, 2021), <https://www.dailykos.com/stories/2021/1/15/2009542/-Far-right-plans-Million-Militia-March-in-D-C-Sunday-but-confusion-over-strategy-raises-doubts>.

<sup>150</sup> *Id.*

The fact that Trump used the Office of the President to incite armed insurrection against State and local governments during the anti-lockdown protests by encouraging and excusing the threats of violence and actual violence through which right-wing militia groups effectively cowed State legislators into changing state health and safety policy in the midst of a pandemic; the fact that Trump used the congressionally delegated powers of the Office of the President to threaten invocation of the Insurrection Act to deploy military units against State and local governments as well as peaceful civil rights protesters despite state objections that the armed intervention of irregular paramilitary federal agents was inflaming violence and violating states' rights and the civil rights of their residents; the fact that an electorally defeated lame duck Trump used the powers of the Office of the President to incite insurrection by right-wing militia groups against the Federal government—these facts make political violence in the era of Trump *different in kind* from prior instances of political violence in the United States.

These unprecedented abuses require affirmative protective action from Congress and a rethinking of the framework of First Amendment incitement doctrine. In the next part, I will sketch out some reasons why the Republican Guarantee of Article IV, Section 4 of the U.S. Constitution offers an overlooked but compelling constitutional basis upon which to ground both initiatives.

### III. ENSURING REPUBLICAN SECURITY: CONGRESS' POWER & THE PRESIDENT'S OBLIGATION

The Republican Guarantee involves two clauses.<sup>151</sup> The first clause imposes as an affirmative duty on the federal government the obligation to guarantee every State a republican form of government and to protect each State against invasion. The second clause establishes a duty for the federal government to respond to requests from State government (legislative or executive) to protect them against domestic violence.

The Framers' generation believed that republican government, more than any other form of government, provides the conditions for its own stability insofar as it is a form of government in which political power is grounded in the will of the majority. Since power is in the hands of the majority, the government will, in theory, lack the power to oppress the

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<sup>151</sup> The Republican Guarantee Clause provides:

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion;  
and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

people, who in theory can throw them out of office in the next election. The problem Framers like Madison and Hamilton recognized is that “fact and experience” had demonstrated that majority will can be overpowered by a well-organized minority.

The Federalist Papers repeatedly reference many ways the rage of faction can threaten republican government,<sup>152</sup> but the threat underwriting calls for a Republican Guarantee is different in kind. It is the threat posed by factions, who not only appeal to force to impose their will, but also possess “the skill and habits of military life.”<sup>153</sup> In other words, the threat of an armed insurrection by persons with military experience against duly elected government, or usurpations coordinated by persons with control of a State’s military resources against the freedom and security of the people, constitute unique threats that are different in kind from the political machinations of conniving factions or the “occasional mob” whose spontaneous acts of violence in response to momentary passions can be countered, in the first instance, by the logic of separated power and, in the second, by ordinary police power of the local authorities. Against these risks, the republican security clauses exhibit a design intent to secure the force of law against seditions and insurrections by rogue officials and armed factions by distributing organized martial power across federal and state governments, subject to overlapping constitutional authorities.

The republican guarantee has been interpreted as largely non-justiciable based on an early Supreme Court decision holding that whether a particular form of government is republican is a political question to be resolved by Congress.<sup>154</sup> I am interested in revisiting this question. There are strong reasons to challenge the idea that the republican guarantee is a non-justiciable political question—both as a matter of original understanding and as a matter of minimal content for the words to have meaning.

With respect to original understandings, the Guarantee Clause tells us something foundational and critical to the issue at hand. In *Federalist 21*, Hamilton explained that State constitutions confronted foreseeable dangers, both usurpations from above might trample the liberties of the people, or an armed faction from within might seek to erect a tyranny. The Guarantee Clause enabled the Union to assist the people in repelling threats to their liberty from either direction for in Hamilton’s own words,

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<sup>152</sup> Alexander Hamilton, *Federalist 9*, in THE FEDERALIST PAPERS 9 (Clinton Rossiter ed., Signet Classic 1961); James Madison, *Federalist 10*, in THE FEDERALIST PAPERS (Clinton Rossiter ed., Signet Classic 1961); James Madison, *Federalist 51*, in THE FEDERALIST PAPERS 317 (Clinton Rossiter ed., Signet Classic 1961).

<sup>153</sup> James Madison, *Notes on the Confederacy*, in WRITINGS OF MADISON 320–22 (J.P. Lippincott & Co. 1865).

<sup>154</sup> *Luther v. Borden*, 1849 U.S. LEXIS 337 (1849).

“[a] guaranty by the national authority would be as much levelled against the usurpations of rulers as against the ferments and outrages of faction and sedition in the community.”<sup>155</sup> The framers contemplated, as well, the foreseeability of a despotic spirit taking hold of the Office of the President.<sup>156</sup> They defended the structure of power established through the republican security clauses by noting Congress’ power to determine the conditions for the calling forth of the militia and military forces of the national government and arguing that the States’ control over career appointments advancement and training of the militia would give them the power to resist tyrannical initiatives by the federal executive.<sup>157</sup> These aspects point to how the Framers intended the political logic of the structure of power to secure the Guarantee Clause, but the minimal content of the words of the Guarantee Clause establish judicially enforceable standards, and the placement of the obligation in Article IV secures the jurisdiction of the Court.

With respect to the minimal content necessary for the words of the Guarantee Clause to have meaning, the issue in the case of Trump’s inciting his armed supporters to “#Liberate” the States of Michigan, Minnesota and Virginia from established government is not whether the form of government in these states is republican, nor whether Trump’s conduct is somehow protected speech under the First Amendment.<sup>158</sup> The issue is whether such conduct on the part of a sitting president is consistent with the obligation of the federal government to protect the state against domestic violence, and the minimal content of the words provides judicial standards for the Guarantee Clause’s enforcement. Indeed, the placement of the Guarantee Clause in Article IV, rather than in Articles I, II or III, powerfully indicates that the obligation binds *all three branches* of the federal government and requires them each within their respective sphere to effectuate the Guarantee Clause, as the occasion may warrant.

Accordingly, even if the republican character of a State government were properly held a non-justiciable political question, which I do not concede,<sup>159</sup> it does not follow that the meaning of the obligation to *guarantee* is non-justiciable. Wherever the further reaches of the obligation may lie, in terms the president’s obligation to deploy or refrain from deploying armed forces in support of established state government,

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<sup>155</sup> Hamilton, *supra* note 86.

<sup>156</sup> Hamilton, *supra* note 88, at 181 (state militias cast as security against a standing federal army and state power to appoint officers as structural protection against abuse of militia by despotic president).

<sup>157</sup> See, e.g., Hamilton, *supra* note 88.

<sup>158</sup> Collins & Zadrozny, *supra* note 45.

<sup>159</sup> See, e.g., Kerr v. Hickenlooper, 744 F.2d 1156, 10th Cir. (Colo.) (2014) *vacated and remanded*, 576 U.S. 1079 (2015).

at a bare minimum, the Guarantee Clause is certainly violated when the president *himself* advocates insurrection against the government of a State or against the United States.

In the next two sections, I address Trump's abuse of the powers of the Office of the President from two perspectives informed by and grounded on the unique duties and affirmative obligations established by the Republican Guarantee of Article IV. Section A examines the various congressional bills introduced in the wake of Trump's June 1 threats to invoke the Insurrection Act against the Black Lives Matters protests that erupted across the country in response initially to the public murder of George Floyd on May 25, 2020. These protests escalated thereafter in no small part because of the intervention of irregular teams of militarized federal agents Trump deployed over the objections of state and local officials. I argue that the republican security clauses generally, and the republican guarantee in particular, provide ample authority for Congress to restrict the conditions under which the president may call forth the state militia and federal armed forces, and more importantly provide the constitutional grounds for Congress to authorize judicial enforcement of the restrictions by establishing a statutory cause of action for damages, declaratory relief and injunction by state officials and private persons injured by presidential abuse of congressional restrictions. In Section B, I draw on the republican guarantee to rebut claims that Trump's incitement to insurrection is protected speech under the First Amendment. Unlike other citizens, the occupant of the Office of President has access to a national and international "bully pulpit" of extreme reach and power. Although this power and reach is available to the occupant of the office, it is the accumulated fruit of 200 years of work and effort by the Americans who designed the constitution, inhabited, preserved and extended its structures through the vicissitudes of the historical life of the nation and its people. The power and reach of the office *belong to office*, the constitution that created it and the people it serves, *not to the occupant* who is temporarily entrusted with it and subject to the oath of office. This is to say that just as the Office of the President comes with extraordinary power, it comes as well with affirmative obligations not binding on other members of American society. These obligations, including specifically the obligations of the republican guarantee, provide constitutional grounds for differentiating, for First Amendment purposes, the scope of immunity afforded for acts of incitement to violence and insurrection by a president from the scope of immunity afforded for acts of incitement to violence and insurrection by an ordinary private person.

### A. Congressional Power to Address Presidential Insurrections

After Trump threatened to invoke the Insurrection Act against the Black Lives Matter protests erupting across the country and specifically threatened to target cities and states led by elected Democrats, members of Congress introduced a series of bills to curtail abuse of the authorities delegated by the Insurrection Act. On June 8, Representative Omar of Minnesota introduced Curtailing Insurrection Act Violations of Individuals' Liberties Act (*CIVIL Act*),<sup>160</sup> Representative Brown of Maryland introduced Limitations on the Insurrection Act including Mechanisms for Invoking its Termination Act (*Limit Act*),<sup>161</sup> and Representative Cicilline of Rhode Island introduced the Stop Using Military Force Against Civilians Act.<sup>162</sup> Following the introduction of these three bills, Representative Keating of Massachusetts introduced Civil Deployment Notification Act of 2020<sup>163</sup> on June 15<sup>th</sup>, and on July 20, 2020, Jeff Merkley, the junior Senator from Oregon, introduced Preventing Authoritarian Policing Tactics in America's Streets Act [hereinafter *Preventing Authoritarian Policing Act*].<sup>164</sup>

None of these five bills were enacted in the 116<sup>th</sup> Congress, but each provides a valuable lens through which to approach the challenges presented to the American constitutional legal order by an occupant of the Office of the President, who uses formal powers of the office to deploy armed force, and informal powers of the office to incite violence, against his political opponents and insurrection against constitutional government at State and federal levels. While the untoward concentration of powers of the U.S. Presidency is an artifact of decades of jurisprudential distortion, infiltration, and overreach that needs to be corrected,<sup>165</sup> the republican security clauses provide ample authority for Congress to amend the Insurrection Act to restrict the exercise of its delegated authorities and to recognize causes of action, both statutory and constitutional, by which to

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<sup>160</sup> CIVIL Act, H.R. 7135, 116th Cong. (2020), <https://www.congress.gov/bill/116th-congress/house-bill/7135/text?r=2&s=1>.

<sup>161</sup> LIMIT Act, H.R. 7124, 116th Cong. (2020), <https://www.congress.gov/bill/116th-congress/house-bill/7124/text> (last visited Oct. 20, 2020).

<sup>162</sup> *Stop Using Military Force Against Civilians Act (2020 - H.R. 7129)*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/116/hr7129> (last visited Mar. 12, 2021).

<sup>163</sup> Civil Deployment Notification Act of 2020, H.R. 7215, 116th Cong. (2020), <https://www.congress.gov/bill/116th-congress/house-bill/7215> (last visited Mar. 12, 2021).

<sup>164</sup> S. 4220 — 116th Congress: *Preventing Authoritarian Policing Tactics on America's Streets Act*, GOVTRACK (July 20, 2020), <https://www.govtrack.us/congress/bills/116/s4220> (last visited Oct. 20, 2020).

<sup>165</sup> See, e.g., Elizabeth M. Iglesias, *When Impunity and Corruption Embrace: How the Past Becomes the Future in the Struggle against Torture and Genocide*, 25 U.C. DAVIS J. INT'L L. & POL'Y 1 (2018–2019); Iglesias, *supra* note 143.

enforce the added restrictions and to remedy injuries caused by their violation. The question is whether and which of these proposed bills provides an appropriate response to the threats to constitutional legal order revealed by Trump's abuse of the powers of the presidency.

The Civil Act would amend §§ 251, 252 and 253, in each case, by conditioning the President's authority to activate militia or deploy armed forces on a certification by the President, the secretary of defense and the attorney general that the predicates for each authority have been met. Thus, as amended, § 251 would require certification that the governor of the state has requested assistance to suppress an insurrection.<sup>166</sup> The amendment to § 252 would require certification and demonstrable evidence that a state is unable or unwilling to suppress a combination or conspiracy obstructing judicial enforcement of federal law through ordinary legal process.<sup>167</sup> The amendment to § 253, otherwise known as the third enforcement act or KKK Act, would require certification and demonstrable evidence that the state is unable or unwilling to suppress a combination or conspiracy within the state to deprive any part or class of its people a constitutional right, privilege or immunity or protection, in which case the state is considered to have denied the equal protection of the laws.<sup>168</sup> In each case, the certification would have to provide a description of the circumstances and of the mission, scope, and duration of the use of the militia or armed forces.

The addition of the Secretary of Defense and Attorney General as necessary parties to the certification restricts the ability of the President to unilaterally invoke the delegated authorities, at least formally. Due to historical departures from original intent reflected, for example, in *Federalist 77*,<sup>169</sup> both the Secretary of Defense and the Attorney General serve at the pleasure of the President, who can fire them at will. Thus, the requirement of certification by the Secretary of Defense and Attorney General provides very little check on the President, particularly in instances when a despotic occupant appoints only obsequious "yes-men" to positions held at his or her pleasure.<sup>170</sup> While it is undeniable that Secretary Esper's unexpected opposition to Trump's call for invocation of the Insurrection Act against the Black Lives Matter protesters was an important—perhaps even a dispositive—factor in Trump's turn to alternative authorities, Trump immediately threatened Esper with removal

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<sup>166</sup> 10 U.S.C. § 251.

<sup>167</sup> 10 U.S.C. § 252.

<sup>168</sup> 10 U.S.C. § 253.

<sup>169</sup> Alexander Hamilton, *Federalist 77*, in *THE FEDERALIST PAPERS* 458 (Clinton Rossiter ed., Signet Classic 1961) (noting that the Senate's consent in removal as well as appointment would preserve stability in government).

<sup>170</sup> *Definition of Yes-Man | Dictionary.Com*, [WWW.DICTIONARY.COM](http://WWW.DICTIONARY.COM), <https://www.dictionary.com/browse/yes-man> (last visited Mar. 13, 2021).



and later unceremoniously removed him in retaliation for Esper's opposition. A lesser person might have very well capitulated. Indeed, while Trump's efforts to call out the militia and armed forces was stymied by opposition of the Secretary of Defense, Trump's efforts to circumvent this obstacle was facilitated by the Attorney General, who cobbled together the alternative authorities pursuant to which Trump was able to launch "Operation Legend" and thereafter "Operation Diligent Valor" to deploy irregular teams in military outfits to dominate the protests in Portland and Seattle. Nevertheless, requiring the participation of both the Secretary of Defense and the Attorney General in the certification offers potentially valuable check on presidential abuse, particularly so when these offices are occupied by persons of sufficient virtue and institutional fidelity to fulfill this intended obligation.

In addition to the certification requirements added to §§ 251, 252 and 253, the *CIVIL Act* would add three new sections to the Insurrection Act. A new § 256 would require the President—in every possible instance—to consult with Congress before invoking authorities under §§ 251, 252, and 253. Section 257 would provide the structure for Congressional enforcement of the intended restrictions on the President's invocation of these authorities. If neither the Secretary of Defense or the Attorney General under the new certification requirements of §§ 251, 252, and 253, nor Congress under the new consultation requirements of § 256 were successful in dissuading an unwarranted invocation of the Insurrection Act, § 257 would limit the duration of any invocation of §§ 251, 252, and 253 to a fourteen day period, after which the authority would terminate automatically unless, by joint resolution or enactment of law, the authority were extended to a period to be determined by Congress. If Congress failed to extend the authority, the President would not be allowed to re-invoke the authority unless there were a material and significant change in the factual circumstances and such change is certified to Congress in a new certification. The *CIVIL Act* also adds a new § 258, which confers expedited jurisdiction in the federal district courts with direct appeal to the Supreme Court to hear actions for declaratory or injunctive relief by any individual or entity including State or local government that is injured by or has credible fear of injury from the use of members of the armed forces, including challenges to the legal basis for using members of the armed forces. Finally, the *CIVIL Act* would also amend § 275 to affirmatively prohibit the armed services from direct participation in search, seizure, arrest or other similar activity unless such participation is otherwise expressly authorized by law.

Of the three other bills introduced to amend the Insurrection Act, the *CIVIL Act* is by far the best, though the other bills have elements that would improve the *CIVIL Act*. The *LIMIT Act* would add a new § 256 to

the Insurrection Act requiring the President to declare a national emergency under the National Emergencies Act before he or she could invoke the authorities of §§ 251, 252 or 253 and further providing that these authorities may not be invoked if the national emergency has terminated. As a protection against presidential abuse of the authorities delegated by the Insurrection Act, the *CIVIL Act* is superior to the *LIMIT Act* because the President's invocation of the Insurrection Act under the *CIVIL Act* will automatically terminate after fourteen days unless affirmatively extended by Congress. By contrast, tying invocation of the Insurrection Act to the National Emergencies Act would require Congress to enact a law (over presidential veto) to terminate an improper invocation of the Insurrection Act.

The *CIVIL Act* is also superior to both Cicilline's Stop Using Military Force Against Civilians Act and Keating's Civil Deployment Notification Act although both of these bills have elements that could be incorporated to improve the *CIVIL Act*. Cicilline's bill would limit the duration of presidential authority under the Insurrection Act to not more than three days and expressly requires the president to withdraw any militia or armed forces called into federal service unless Congress enacts a law to extend the authority for a period of not more than fourteen days. Cicilline's proposal to restrict the duration of the president's initial invocation to not more than three days subject to congressional action to extend is a welcome alternative to the *CIVIL Act's* proposed fourteen-day duration for the president's initial invocation. The domestic deployment of armed forces can do extensive damage in a short period. While three days is likely sufficient for the militia and armed forces to suppress a domestic insurrection, fourteen days is likely too long a period to which to subject the American people to presidential abuse of the authority to call these forces into action. The *CIVIL Act* should incorporate Cicilline's approach and shorten the timeframe in which the authorities terminate. On the other hand, Cicilline's bill slips in a natural disaster exception, which presupposes an authority that is not delegated by the Insurrection Act and was expressly repudiated when added during George W. Bush's administration. His bill would also arbitrarily limit Congress' authority to extend the authorities of §§ 251, 252, and 253 for not more than fourteen days and not more than twice for "any one set of events." The *CIVIL Act* correctly leaves to Congress the discretion to determine the duration of the authority to be extended after the president's initial invocation.

Like the *CIVIL Act*, Keating's bill adds a notification requirement to §§ 251, 252, and 253. It also adds a new § 256 which provides for termination of the invoked authority after fourteen days unless Congress extends it by joint resolution or enactment of law. Keating's bill adds order to the notification requirement by expressly specifying that the president

must notify the chair and ranking member of the House and Senate committees on Armed Services, Homeland Security and Judiciary, as well as the majority and minority leaders in the House and Senate, and whoever else among the congressional leadership the president might wish to notify. The sponsors of the *CIVIL Act* should consider adding more specificity to the consultation with Congress requirements of § 256 in § 5 of the bill.

Each of these proposed bills, including the *CIVIL Act*, addresses only part of the danger revealed by Trump's abuse of federal powers and enforcement resources. This is the danger that an occupant of the office of the president might abuse the authorities delegated to that office to call militia and federal armed forces into service and deploy these forces against the American people. Each bill seeks to address that danger by restricting the conditions under which the President may invoke the Insurrection Act and providing new frameworks for the termination of these authorities. But Trump's actions in response to the Black Lives Matter protests revealed other ways in which the powers of the presidency can be abused by a temporary occupant of the office. These other means of abuse include abuse of the President's power to repurpose and deploy agents from any one of the increasingly militarized federal enforcement agencies.<sup>171</sup> Curtailing these kinds of abuse requires a different approach, not limited to restricting the conditions and providing for the termination of presidential deployments under the Insurrection Act. The *Preventing Authoritarian Policing Act* is a good start in this direction.

On July 20, 2020, in response to Trump's deploying an irregular assortment of federal agents in military outfits in violation of state rights and civil rights,<sup>172</sup> Jeff Merkley, the junior Senator from Oregon introduced the *Preventing Authoritarian Policing Act*.<sup>173</sup> The Act would do four things. It would require the uniforms of federal enforcement agents and members of an armed force engaged in any form of crowd control, riot control, or arrest or detention of individuals engaged in an act of civil disobedience, protest or riot to display identifying information in clearly visible fashion. The required identification would display the name of the agency and the name, or other "unique identifier," of the individual agent wearing the uniform as well as the rank of any member of an armed force. In addition, the Act would affirmatively prohibit any covering over the identification that obscures or conceals the identifying information while

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<sup>171</sup> See *supra* discussion of federal agents assembled and deployed by operation legend and operation diligent valor.

<sup>172</sup> See *supra* notes 117-130 and accompanying text.

<sup>173</sup> S. 4220 — 116th Congress: *Preventing Authoritarian Policing Tactics on America's Streets Act*, GOVTRACK (July 20, 2020), <https://www.govtrack.us/congress/bills/116/s4220> (last visited Oct. 20, 2020).

the agent is engaged in any of the delineated enforcement activities. The Act would also prohibit use of unmarked vehicles in the arrest, apprehension or detention of civilians while the agent is engaged in the delineated law enforcement activities.

Importantly, given that protection of federal facilities and monuments against violent protestors was the stated justification for deploying the irregular teams of federal agents in paramilitary outfits over the objection of state and local officials, the *Preventing Authoritarian Policing Act* would limit federal agents' crowd control activities to areas *on* federal property and its immediate vicinity, unless federal law enforcement's presence in the locality is otherwise specifically requested *jointly and in writing* by the governor of the state *and* the head of the local unit of government, such as the mayor. The Act would also make it unlawful for a federal agent or member of an armed force to arrest an individual in the United States if the federal agent obscures or otherwise fails to display the required identification, uses an unmarked car in the course of apprehension, arrest or detention or makes the arrest beyond the geographical limits of the federal property or its immediate vicinity. Sponsors of the *Preventing Authoritarian Policing Act* should consider expanding this section to provide an express cause of action for damages, and federal district court jurisdiction to hear actions for declaratory and injunctive relief, by any person or entity injured or having credible fear of injury, including challenges to the legal basis for deploying the agents or members to the situation and in the manner in which they have been deployed. The *Preventing Authoritarian Policing Act* would also require disclosure on an agency website within 24 hours of deployments specifying the number of personnel and purposes of deployment, as well as the location of civilians being detained and the agency with custody.

Two days after Senator Merkley introduced the bill in the Senate, Representative Blumenauer of Oregon introduced an identical bill in the House.<sup>174</sup> Pursuant to a House rule requiring a statement identifying "as specifically as practicable the power or powers granted to Congress in the Constitution to enact the bill," Representative Blumenauer grounded Congress' power to enact the bill on § 8 of Article 1. Section 8 enumerates the legislative powers of Congress.<sup>175</sup>

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<sup>174</sup> Preventing Authoritarian Policing Tactics on America's Street Act, H.R. 7719, 116th Cong. (2020), <https://www.congress.gov/bill/116th-congress/house-bill/7719> (last visited Oct. 20, 2020).

<sup>175</sup> Earl Blumenauer, *All Information (Except Text) for H.R.7719 - Preventing Authoritarian Policing Tactics on America's Streets Act*, CONGRESS.GOV (2020), <https://www.congress.gov/bill/116th-congress/house-bill/7719/all-info> (last visited Oct. 20, 2020).

The *Preventing Authoritarian Policing Act* and the *CIVIL Act* should be combined and enacted pursuant to Congress' obligation under the Republican Guarantee of Article IV. Each bill is a necessary and proper response to the evident vulnerabilities of republican government revealed by the abuses Trump effectuated and attempted to effectuate using powers delegated to the office of president by Congress. Neither bill is sufficient without the other, but both together provide a good start toward securing the republican guarantee. Unlike the *Preventing Authoritarian Policing Act*, the *CIVIL Act* does nothing to respond to presidential abuse of federal enforcement resources. Trump revealed the country's vulnerability to an occupant of the presidency repurposing the resources of federal enforcement agencies to constitute an extralegal paramilitary enforcement capability. While the *CIVIL Act* fails to address this vulnerability, the *Preventing Authoritarian Policing Act* begins to do so. Conversely, while the *Preventing Authoritarian Policing Act* does nothing to restrict the conditions on or to secure termination of the president's invocation of the Insurrection Act, the *CIVIL Act* creates several checks beginning with the requirement that the Secretary of Defense and Attorney General both join the President in certifying and providing demonstrable evidence that the predicates for invoking an authority under the Insurrection Act have been met, by requiring the President to consult with Congress prior to invoking an Insurrection Act authority, and by providing for the automatic termination of authority under the Insurrection Act if not affirmatively extended by Congress. Each bill supplements the other and both together (especially with the changes recommended above) would provide a necessary and proper means of effectuating the republican guarantee by securing the people and the states against the danger that a temporary occupant of the presidency could abuse of the vast powers of the office.

*B. Assessing Presidential Incitement to Insurrection under the Republican Security Clauses: Beyond the Folly of Turning the First Amendment into a Suicide Pact*<sup>176</sup>

Trump's practice of inciting his supporters to violence predated his calls for them to "LIBERATE" the States of Michigan, Minnesota and Virginia on April 17, 2020<sup>177</sup> and thereafter to "Stop the Steal" on January 6, 2021.<sup>178</sup> In *Nwanguma v. Trump*,<sup>179</sup> the Sixth Circuit U.S. Court of Appeals reversed a federal district court decision denying Trump's motion

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<sup>176</sup> Linda Greenhouse, *The Nation*; "Suicide Pact", THE N.Y. TIMES (Sept. 22, 2002), <https://www.nytimes.com/2002/09/22/weekinreview/the-nation-suicide-pact.html>.

<sup>177</sup> In *Trump's "LIBERATE" Tweets, Extremists See a Call to Arms*, *supra* note 45.

<sup>178</sup> Naylor, *supra* note 141.

<sup>179</sup> *Kashiya Nwanguma v. Donald Trump*, 903 F.3d 604 (6th Cir. 2018).

to dismiss an action by protesters injured at a presidential campaign rally in Louisville, Kentucky, where they were attacked by Trump supporters after then-candidate-Trump urged the crowd to “Get ‘em out of here,” followed closely (in the Sixth Circuit’s account) by “Don’t hurt ‘em—if I say go ‘get ‘em,’ I get in trouble with the press.” The district court refused to dismiss the plaintiffs’ incitement to riot claim against candidate Trump.<sup>180</sup> On interlocutory appeal, the 6th Circuit reversed. The appeals court concluded that the plaintiffs’ own allegation that Trump’s “get ‘em out of here” statement was closely followed by his admonition “[d]on’t hurt ‘em” negates a finding that Trump “by words or actions, incited tumultuous and violent conduct posing grave danger of personal injury,” as required to satisfy the five elements of Kentucky’s criminal statute defining the crime of incitement to riot.

The Sixth Circuit grounded its reversal of the district court’s finding that Trump’s words and actions might plausibly be understood as a call to his supporters to attack the protesters (as his supporters did in fact do) by noting that Trump’s own contemporaneous words “don’t hurt ‘em” negate the possibility that Trump’s statement to “get ‘em out of here” could reasonably be construed as inciting tumultuous and violent conduct. Indeed, the Sixth Circuit concluded that the notion that Trump’s directive to remove the protestors could be interpreted as a call to violent and tumultuous conduct *was not plausible*—“especially where any implication of incitement to riotous violence is explicitly negated by the accompanying words, “don’t hurt ‘em.”<sup>181</sup> “If words have meaning,” the Sixth Circuit insisted, “the admonition “don’t hurt ‘em” cannot be reasonably construed as an urging to “hurt ‘em.”<sup>182</sup> Because the district court’s construction of Trump’s statements as a call to violence against the protesters depended on a reading contradicted by the words’ plain meaning, the plaintiffs had failed to make out an incitement-to-riot claim under Kentucky statutes.

More significantly, the Sixth Circuit went on to opine, that if the Kentucky statute did reach Trump’s conduct, it would violate the First Amendment. Quoting from the foundational framework established by Supreme Court’s decision in *Brandenburg v. Ohio*, the Sixth Circuit noted that:

[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such

<sup>180</sup> *Nwanguma v. Trump*, 273 F. Supp. 3d 719, CASETEXT, <https://casetext.com/case/nwanguma-v-trump-2> (last visited Mar. 14, 2021).

<sup>181</sup> *Kashiya Nwanguma v. Donald Trump*, 903 F.3d 604 (6th Cir. 2018).

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

advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.<sup>183</sup>

The Sixth Circuit took this quoted language to mean that “[u]nder the Brandenburg test, only speech that explicitly or implicitly encourages the imminent use of violence or lawless action is outside the protection of the First Amendment.” According to the appeals court, this constitutional test comes with “an illustrative body of case law,” including the Sixth Circuit’s own *en banc* decision in *Bible Believers v. Wayne Cty., Mich.*,<sup>184</sup> in which the *en banc* court held that even when uttered in an obviously explosive context, speech may not be labeled incitement to riot when it “does not include ‘a single word’ that could be perceived as encouraging, explicitly or implicitly, violence or lawlessness.” Moreover, neither the hostile reaction of a crowd, nor the subjective reaction of any particular listener may transform protected speech into incitement, even if the speech actually triggered a predictably violent reaction.

Applying these standards to the claims against Trump, the court concluded that because Trump’s speech did not include a single word encouraging violence, the fact that his supporters reacted by attacking the protestors he targeted for removal did not transform his directive into unprotected speech, notwithstanding the district court’s finding that Trump’s statements at least implicitly encouraged the use of violence or lawlessness, and its further finding plausible the plaintiffs’ allegations that Trump knew his words were likely to result in violence and intended violence to occur.<sup>185</sup>

According to the Sixth Circuit, the district court’s reliance on the speaker’s intent and likely result was precluded by the Supreme Court’s decision in *Hess v. Indiana*, where it had held that the speaker’s words must specifically advocate the use of violence, whether explicitly or implicitly, and neither evidence of speaker’s intent or the tendency of the speech to result in violence are sufficient to forfeit First Amendment protection.<sup>186</sup> The district court erred by placing too much weight on the Brandenburg factors relating to the speaker’s intent and the tendency of the speech to produce violence, neglecting to ensure that the speech itself met the requirement of specifically advocating the use of violence.

In addition, while the Sixth Circuit conceded that under *Snyder v. Phelps*, context is relevant to interpreting the meaning of uttered words, in

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<sup>183</sup> *Id.* (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447).

<sup>184</sup> *Bible Believers v. Wayne County, Mich.*, 805 F.3d 228 (Court of Appeals, 6th Circuit 2015).

<sup>185</sup> *Kashiya Nwanguma v. Donald Trump*, 903 F.3d 604, 610-11 (6th Cir. 2018).

<sup>186</sup> *Hess v. Indiana*, 414 U.S. 105 (1973).

the case of Trump's directive, the words "get 'em out of here" were, in the Sixth Circuit's view, "self-evidently said in order to quell the disturbances by removing the protestors," and the fact that the words may have had a tendency to elicit a physical response among some of Trump's supporters did not change the fact that the words themselves did not "specifically advocate such a response."<sup>187</sup>

The Sixth Circuit's reversal of the district court's findings unfortunately fails to recognize the readily evident differences between the words uttered in *Bible Believers*, and Trump's directive to his supporters at the Louisville rally. Unlike Trump's directive to "get em out of here," which is a direct call to action to the crowd to remove the identified individuals and thus directed the crowd at a specific target that the crowd did foreseeably—and in fact—attack, the words the Sixth Circuit found analogous in the *Bible Believers* message are manifestly different. In the *Bible Believers*, the words at issue were the speakers' words to a large gathering of Muslims at the Arab International Festival in Dearborn Michigan, asserting that "Islam is a Religion of Blood and Murder," "Turn or Burn," and "Your prophet is a pedophile." Although foreseeably likely to incite the crowd to anger, these words were not a direct command or request that the crowd turn on any specific target. In addition to this manifest difference in the content of the words, the Sixth Circuit's analysis of Trump's speech is incomplete insofar as it characterizes the utterances "get 'em out of here" and "but don't hurt 'em" as "two short statements" constituting "[t]he entire universe of Trump's actions." But the Sixth Circuit's own recitation of the facts conceded another utterance by Trump, though the Court failed to incorporate this third statement in its analysis of the plausible, in fact likely, meaning of Trump's message to his supporters at the rally.

The statement I am referring to is Trump's statement to his supporters, "if I say, 'go get 'em,' I get in trouble with the press." As the Sixth Circuit noted, Trump uttered this third statement after he said, "don't hurt 'em." This third statement tends entirely to negate the second statement's negation of Trump's first statement directing his supporters to "get 'em out of here." Even if Trump's second statement, "don't hurt 'em," arguably negates the reasonable inference that his first statement "get 'em out of here" is a call to remove the protesters physically—whether it hurts them or not, Trump's third statement "if I say 'go get 'em,' I get in trouble" negates the "don't hurt 'em" negation of the first statement by letting the crowd know that Trump's reason for adding the second statement caveat not to "hurt 'em" is *not* because Trump doesn't want his supporters to "hurt 'em," but because Trump doesn't want to get in trouble for saying so. In

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<sup>187</sup> See Kashiya Nwanguma, 903 F.3d at 612.



this way, Trump’s first statement directs his supporters to “get ‘em out of here,” his second statement purports to negate any directive to hurt the protestors in the process of removing them, while his third statement negates his negation. The message is clear: Trump wants his supporters to know that Trump actually wants them to “hurt ‘em” but doesn’t want to “get in trouble” for telling the crowd to “go get ‘em.”

The Sixth Circuit’s failure to incorporate all of Trump’s statements in its analysis of Trump’s speech compounds the error of its failure to recognize the relevant differences between the *Bible Believers’* speech and Trump’s. But neither of these cases should determine the scope of Trump’s liability for inciting insurrection against State governments that in the exercise of their police powers implemented stay-at-home orders to stop the spread of the pandemic or for injuries and property damage caused by Trump’s speech and actions inciting insurrection at the Nation’s Capital on January 6. Trump’s actions in these situations occurred while he occupied the Office of the President. Trump was no longer a private citizen, no longer a candidate. He was the President of the United States—vested with all the powers and responsibilities of the office—and his targets were not private citizens protesting at a political rally, but elected officials constituting the government of the States he targeted and members of Congress. The scope and reach of the formal and de-facto powers of the Office of the President as well as the President’s unique obligations under the republican guarantee make the significance of actions and words of incitement by an occupant of this office fundamentally different in kind from the actions and words of a private person, or even any other elected official. Accordingly, the immunity for speech by private persons intended and likely to incite violence is inapposite in the case of presidential incitement.

#### IV. CONCLUSION

Three episodes of political violence mark the Trump era—the irregular paramilitary responses to the Black Lives Matter protests and the insurrections incited against state governments executing stay-at-home orders and against the Congress certification of the results of the 2020 presidential election. In these three contexts, the words and actions of the occupant of the U.S. Presidency demonstrated the country’s untenable vulnerability to presidential despotism. This vulnerability is a function of the current structure of executive power delegated by Congress and the inapposite immunity afforded under the First Amendment to the speech of private persons that is intended and foreseeably likely to incite violence. I argued that neither the structure of congressionally delegated power under the Insurrection Act of 1807, nor any pretended immunity for presidential

incitement to insurrection under the First Amendment is constitutionally mandated. To the contrary, both the Insurrection Act and First Amendment interpretations must be repeatedly reevaluated in light of unfolding experience to ensure that the guarantee of republican government is secured and that each branch of government exercises its proper power to ensure that the obligations of the Guarantee Clause are fulfilled.

In light of the learning opportunity presented by the experience of Trump's actions and words during his term in the office of president, this essay argues that Congress should enact the combined provisions of the *CIVIL Act* and the *Preventing Authoritarian Policing Act* in order to secure the republican guarantee against future abuses. Certainly, preventing unidentified paramilitary agents from arresting people, throwing them into unmarked cars, and doing so in state jurisdictions without permission and in opposition to the lawfully established government of the state is central to securing republican government. Additionally, the president's obligations under the republican guarantee make the immunity for speech by private persons intended and likely to incite violence inapposite in the case of presidential incitement.