

# TRUMP ADMINISTRATION ACCOUNTABILITY PROJECT



## Report on the Detention of American Citizens Engaging in Protests by Unmarked Federal Agents

By Hayley Lawrence<sup>1</sup>

### Introduction

In June and July of this year, tens of millions of Americans took to streets across the country to protest endemic racial discrimination and the murder of Black persons by law enforcement.<sup>2</sup> Protests in Washington, D.C., Chicago, Illinois, and Portland, Oregon drew the attention (and ire) of President Trump. As of July 1, 2020, Trump ordered federal law enforcement into major cities around the country, including Portland, under the guise of “protecting federal property”<sup>3</sup> from a “mob” of “violent anarchists.”<sup>4</sup>

Approximately two weeks into the federal occupation of Portland, reports emerged of “Snatch Squads”—unmarked federal customs officials jumping out of unmarked minivans—pursuing and detaining law-abiding protestors.<sup>5</sup> A video of one of these interactions shows two armed men in tactical military fatigues labeled “POLICE,” with faces obscured, jumping out of an unmarked minivan in pursuit of a single protestor simply walking down the street.<sup>6</sup> These officials would later be identified as U.S. Customs and Border Protection (CBP) officers. In the video, the officers then grabbed the man without a word. They did not identify themselves or the legal authority under which they were detaining him, nor did they provide any explanation for his arrest. Onlookers repeatedly questioned the officers, asking “Who are you?” but receiving no response. The unidentifiable officers hauled the civilian away towards the unmarked minivan. They then forced him into the vehicle and disappeared without a word.

Mark Pettibone, a Portland resident, had nearly the same experience.<sup>7</sup> He too was walking down the street one evening when an unmarked minivan sped towards him and his friend.<sup>8</sup> Suddenly, two unidentifiable men in military fatigues jumped out in pursuit of Pettibone. They grabbed him and escorted him into the unmarked minivan. Once inside, Pettibone describes being surrounded by four to five unidentifiable figures in military fatigues. One of the officers then pulled Pettibone’s hat over his eyes to block his vision and the van sped off.<sup>9</sup> Pettibone was held inside a cell at the federal courthouse for several hours.<sup>10</sup> Although two officers read him his *Miranda* rights at the courthouse, they never provided an explanation for his arrest. Pettibone declined to answer questions without a lawyer present. Shortly thereafter, he was released without an arrest record, citation, or even an explanation. At the time of the arrest, Pettibone was neither on nor close to federal property.<sup>11</sup> Later, federal officials would justify his arrest on the grounds that he was suspected of injuring a federal officer, though they provided no evidence to support that position.<sup>12</sup>

At bottom, Pettibone’s story elicits distressing images of authoritarian regimes, where gestapo-like secret police run the streets and abduct citizens expressing dissent with impunity. More troubling still is that Pettibone’s story is but one of many.<sup>13</sup>

In response to reports of the unmarked officers in Portland, Mark Morgan, acting commissioner of Customs and Border Protection, tweeted, “You will not see names on their uniforms [because] these same violent criminals use this information to target them & their families, putting both at risk.”<sup>14</sup> In the same tweet, Morgan alleged that the federal officers “have unique identifiers” on their uniforms.<sup>15</sup> But all other accounts of CBP officers in Portland appear to contradict that statement. In videos, no unique identifying features are visible on their uniforms: no names, no agency affiliation, no helmet numbers. Only “POLICE” in yellow. The total dearth of identifiable markings makes identification of these officials impossible—which effectively insulates them from any liability for wrongdoing. For citizens being detained unlawfully, determining whether a given official was a member of the local police or federal law enforcement, or even a member of law enforcement *at all*, becomes a Herculean task.<sup>16</sup>

As Supreme Court Justice William J. Brennan once noted, “The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.”<sup>17</sup> In Portland, Trump has established a police state. Peeling back the Administration’s veiled attempts at justifying this policy, it becomes clear what is happening in Portland: politically-motivated kidnapping. The Trump Administration employed these snatch squads to intimidate political dissidents; namely, participants in the Black Lives Matter movement. As the *New York Times* Editorial Board astutely put it, “The only reason to wear camouflage in an urban setting—be it federal agents or self-declared militia members—is intimidation. If officers were easily identifiable, it would be harder for them to get away with thrashing unarmed Americans with nightsticks, shattering their bones as the camera phones roll.”<sup>18</sup> Intimidation is exactly the point.

Under the circumstances in Portland, the use of unmarked federal police to snatch law-abiding citizens at night (without probable cause) for participating in a protest is unlawful. First, the use of unidentifiable federal officers to arrest protestors violates their Fourth Amendment right to be free from unreasonable searches and seizures. Second, the use of these officers might also violate Oregon law, depending on whether the officials are enforcing federal or state law. Lastly, setting aside legal arguments, it is simply bad policy to intentionally create a culture of terror and put the lives of officers and civilians at risk. Yet again, the Trump Administration has acted in flagrant disregard of our most fundamental constitutional protections and must be held accountable.

## **I. The Fourth Amendment**

Seizures under the Fourth Amendment<sup>19</sup> must be conducted pursuant to a warrant or “reasonable.”<sup>20</sup> A “seizure” occurs when a law enforcement official stops, detains, or takes custody of an individual. Put differently, if a reasonable person, under the circumstances, would understand that the police presence meant that he was not free to leave, a seizure has occurred.<sup>21</sup> In Mr. Pettibone’s case, there was no warrant. So, in order to withstand constitutional scrutiny, Mr. Pettibone’s detention must have been “reasonable” under the circumstances. Reasonableness is determined on a case-by-case basis.<sup>22</sup> The Supreme Court has used officers’ self-identification

as a factor in its reasonableness calculus<sup>23</sup> and to explain the policy rationale behind the “knock and announce” rule: it helps protect life, limb, and property.<sup>24</sup> Those same concerns apply here, too. Given the heightened tensions between police, protestors, and counter-protestors, and the concomitant risk of violent escalation, the use of unidentifiable federal officials to detain civilians is *per se* unreasonable under these circumstances.

There are specific cases that prove this point. In *Doornbos v. City of Chicago*,<sup>25</sup> a civilian was exiting the Chicago subway when a plainclothes police officer approached him, grabbed him by the arm, and, with the aid of two other plainclothes officers, tackled him to the ground.<sup>26</sup> The civilian, Doornbos, was then arrested and charged with resisting arrest.<sup>27</sup> He testified at trial that the officers never identified themselves as law enforcement and that he thought he was being robbed.<sup>28</sup> Nonetheless, Doornbos was convicted of resisting arrest, which he later appealed.<sup>29</sup>

The Seventh Circuit held that, “[i]n all but the most unusual circumstances, where identification would itself make the situation more dangerous, plainclothes officers must identify themselves [as law enforcement] when they initiate a stop.”<sup>30</sup> A failure to do so renders the seizure “unreasonable” under the Fourth Amendment.<sup>31</sup> A *Terry* stop, otherwise known as “Stop and Frisk” or a “traffic stop,” occurs when an officer temporarily detains a pedestrian or driver under the “reasonable suspicion” that the person being stopped has engaged in or will soon engage in criminal activity.<sup>32</sup> In the example of Mr. Pettibone, law enforcement approaching a civilian walking down the street, grabbing him by the arm, and forcibly escorting him toward a vehicle easily qualifies as a “seizure” or a “stop” under the Fourth Amendment.

Of course, it would be untenable to argue that all uses of unmarked or “plainclothes” officers to detain people are *per se* unreasonable under the Fourth Amendment. Indeed, it is perfectly lawful for police to lie to suspects or use undercover agents in investigations.<sup>33</sup> But as the court described in *Doornbos*, being detained by an unmarked officer who fails to identify himself “provokes panic and hostility from confused citizens who have no way of knowing that the stranger who seeks to detain them is an officer. This creates needless risks.”<sup>34</sup> Empirical data supports this reasoning: a 2017 Department of Justice investigation of the Chicago Police Department<sup>35</sup> found that aggressive plainclothes policing practices “result[ed] in needless injuries,” highlighting “jump out[s]” in particular. “Jump outs” involve plainclothes police officers in unmarked vans “driving rapidly toward a street corner and group of individuals and then jumping out and rapidly advancing, often with guns drawn”<sup>36</sup>—exactly what the CBP officials have been doing in Portland.

It is true that these federal officials were not “plainclothes” officers as it is commonly understood. Instead, they donned military fatigues with “POLICE” emblazoned in yellow across the chest. But what *type* of police? Local Portland PD? The U.S. Marshal Service? CBP? How are people to know for sure that these are even law enforcement officials and not members of a local militia? That inquiry becomes all the more complicated by the increasing presence of right-wing, armed counter-protestors at events.<sup>37</sup> And though no reports have emerged of right-wing militia donning military fatigues *in Portland*, right-wing protestors have done so in other cities. The possibility of it happening in Portland is not far-reaching in any sense.<sup>38</sup>

The policy rationale for identification of plainclothes and fatigue-clad officers remains the same: when a law enforcement official is not easily identifiable by what he is wearing and attempts to stop or detain anyone, in the interest of his own safety and the safety of the citizen, he must announce what legal authority empowers him to detain them. Using tactics like “jump outs” risks escalating the situation and increases the likelihood of unnecessarily violent encounters.<sup>39</sup> Failing to identify oneself as law enforcement during a “jump out” in an already volatile situation further increases the likelihood of violence.

Particularly in the context of widespread civil unrest and racially-motivated violence by white supremacist groups, it is *per se* unreasonable for an unmarked law enforcement official to refuse to identify himself when taking custody of an otherwise law-abiding citizen. Without clear distinguishing features on a uniform or an announcement by the arresting officer, how is anyone supposed to know in that moment whether they are being detained by law enforcement or by some right-wing (or left-wing) paramilitary vigilante group? Failing to assert the legal authority under which the officials are acting (i.e., color of state or federal law), those officers increase the risk of violence—to both them and civilians—when conducting a seizure. Taken together, the use of these unidentifiable officers in Portland violates the Fourth Amendment.

## **II. Under State Law**

Oregon Revised Statute § 133.245 permits federal law enforcement to enforce state law.<sup>40</sup> But if the federal official makes an arrest, state law requires the arresting official to “inform the person to be arrested of the federal officer’s authority and reason for the arrest.”<sup>41</sup> That does not mean they have to be visibly identifiable, but rather that they must verbally communicate to the arrestee the source of authority and the cause for his arrest.

In Portland, federal official’s uniforms lack any real identifying features. And based on video evidence, these officers have refused to identify themselves to the person being detained—a clear violation of Oregon state law.<sup>42</sup> Of course, if federal law enforcement officials are enforcing federal law—e.g., destruction of federal property<sup>43</sup> or assaulting a federal officer<sup>44</sup>—the statutory obligation would not apply. But where state law falls short, the Fourth Amendment stands as sentinel.

## **III. As a Matter of Policy**

Setting aside constitutional arguments for a moment, it is simply bad policy to use heavily armed, unidentifiable and unmarked officers to detain people. First and foremost, it increases the risk of unnecessarily violent encounters with law enforcement at a time when tensions between police and protesters are already high. In turn, this further erodes community trust in police, at a time when that trust is especially low. Second, it creates opportunity for self-declared militia members like Kyle Rittenhouse<sup>45</sup> or Travis and Gregory McMichael<sup>46</sup> to take matters into their own hands. And finally, it instills fear in protestors that at any moment while exercising their constitutional rights, they may be picked up off the streets and abducted by their own government, merely for expressing their dissent.

These are the scare tactics of an authoritarian regime, the likes of which have been observed under Chile’s Pinochet, Spain’s Franco, and Iraq’s Hussein—all dictators who jailed or “disappear” dissidents to foment fear and silence political opposition. At a time when we are confronting our country’s deeply entrenched history of racial violence, we must not forget our own history of homegrown terrorism. Picking people up off the streets and absconding with them in the night is reminiscent of the Klan era, where frenzied mobs would hunt Black people for sport without any due process. In 2020, we have a presidential administration kidnapping its own citizens, effectively engaging in state-sponsored terror, and further emboldening mob violence at the hands of self-declared vigilantes and militia. The parallels could not be clearer.

But what should we expect from a President who once said, “Real power is — I don’t even want to use the word — fear.”<sup>47</sup> The very point of the conduct is intimidation. The rest of us need not accept this. There is simply no place for such a policy in democratic society.

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<sup>2</sup> Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html>. Based on nationwide surveys, the most conservative estimate of BLM demonstrators nationwide is 15 million people. *Id.*

<sup>3</sup> @realDonaldTrump, TWITTER (July 27, 2020), <https://twitter.com/realDonaldTrump/status/1287748921956208640?s=20> (“In Portland, we are protecting Federal property, including the Courthouse, which wouldn’t last a day!”). *See also* Marty Johnson, *DHS deploying new task force to protect monuments ahead of July 4*, THE HILL (July 1, 2020), <https://thehill.com/homenews/administration/505381-dhs-deploying-new-task-force-to-protect-monuments-ahead-of-july-4>.

<sup>4</sup> Press Release, United States Department of Homeland Security, Acting Secretary Wolf Condemns The Rampant Long-Lasting Violence In Portland (July 16, 2020), <https://www.dhs.gov/news/2020/07/16/acting-secretary-wolf-condemns-rampant-long-lasting-violence-portland>.

<sup>5</sup> Jonathan Levinson and Conrad Wilson, *Federal Law Enforcement Use Unmarked Vehicles To Grab Protesters Off Portland Streets*, OR. PUB. BROAD. (July 16, 2020 5:45 p.m.), [https://www.opb.org/news/article/federal-law-enforcement-unmarked-vehicles-portland-protesters/#.XxD9y\\_CwH4w.twitter](https://www.opb.org/news/article/federal-law-enforcement-unmarked-vehicles-portland-protesters/#.XxD9y_CwH4w.twitter).

<sup>6</sup> @TomJChicago, TWITTER (July 17, 2020 7:51 a.m.), <https://twitter.com/TomJChicago/status/1284093431497854976?s=20> (original video of the encounter); *see also* *Mysterious arrest video with unidentified police raises questions*, CNN (July 17, 2020), <https://www.cnn.com/videos/politics/2020/07/17/unidentified-police-arrests-oregon-lead-vpx.cnn> (describing original video of the encounter).

<sup>7</sup> Levinson & Wilson, *supra* note 5; *see also* Mark Pettibone, *I Was Abducted By Federal Agents In Portland*, BUZZFEED NEWS (Aug. 26, 2020 4:06 p.m.), <https://www.buzzfeednews.com/article/markpettibone/i-was-abducted-by-federal-agents-in-portland>.

<sup>8</sup> Pettibone, *supra* note 7.

<sup>9</sup> Levinson & Wilson, *supra* note 5; *see also* Pettibone, *supra* note 7.

<sup>10</sup> Levinson & Wilson, *supra* note 5.

<sup>11</sup> Pettibone, *supra* note 7.

<sup>12</sup> *Mysterious arrest video with unidentified police raises questions*, *supra* note 6.

<sup>13</sup> Jonathan Levinson et al., *Federal Officers Use Unmarked Vehicles To Grab People In Portland, DHS Confirms*, NPR (July 17, 2020 1:04 p.m.), <https://www.npr.org/2020/07/17/892277592/federal-officers-use-unmarked-vehicles-to-grab-protesters-in-portland> (noting that “multiple videos posted online show the officers driving up to people, detaining individuals with no explanation about why they are being arrested, and driving off”).

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<sup>14</sup> @CBPMarkMorgan, TWITTER (July 17, 2020 3:21 PM), <https://twitter.com/CBPMarkMorgan/status/1284206664913215491>.

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

<sup>16</sup> Contrary to acting commissioner Morgan’s insistence that “Our personnel are clearly marked as federal [law enforcement officials.]” *Id.*

<sup>17</sup> *City of Houston, Tex. v. Hill*, 482 U.S. 451, 462–63 (1987).

<sup>18</sup> N.Y. Times Editorial Bd., *Federal Agents Don’t Need Army Fatigues*, N.Y. TIMES (July 31, 2020), <https://www.nytimes.com/2020/07/31/opinion/federal-agents-trump-uniforms.html>.

<sup>19</sup> U.S. CONST. amend. IV (“The right of the people to be secure in their persons, . . . against unreasonable searches and seizures, shall not be violated . . .”).

<sup>20</sup> *United States v. Sharpe*, 470 U.S. 675, 682 (1985) (“The Fourth Amendment is not, of course, a guarantee against all searches and seizures, but only against *unreasonable* searches and seizures.”).

<sup>21</sup> *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (plurality opinion).

<sup>22</sup> *Mapp v. Ohio*, 367 U.S. 643, 653 (“Because there can be no fixed formula [for determining reasonableness], we are admittedly met with ‘recurring questions of the reasonableness of searches,’ but less is not to be expected when dealing with a Constitution, and, at any rate, ‘[r]easonableness is in the first instance for the [trial court] . . . to determine.’” (quoting *United States v. Rabinowitz*, 339 U. S. 56, 63 (1950)) (latter two modifications in original)).

<sup>23</sup> *Wilson v. Arkansas*, 514 US 927, 934 (1995) (holding that reasonableness depends on whether officers knock and identify themselves as law enforcement before entering a home to conduct a search).

<sup>24</sup> *Hudson v. Michigan*, 547 US 586, 594 (2006).

<sup>25</sup> 868 F.3d 572 (7th Cir. 2017).

<sup>26</sup> *Id.* at 577.

<sup>27</sup> *Id.* at 575.

<sup>28</sup> *Id.* at 576.

<sup>29</sup> *Id.* at 575.

<sup>30</sup> *Id.* at 575.

<sup>31</sup> *Id.* at 588.

<sup>32</sup> *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

<sup>33</sup> *Lewis v. United States*, 385 U.S. 206, 208–09 (1966).

<sup>34</sup> *Doornbos*, 868 F.3d at 584–85.

<sup>35</sup> U.S. Dep’t of Justice, Civil Rights Div. & U.S. Attorney’s Office N.D. Ill., Investigation of the Chicago Police Dep’t (Jan. 13, 2017), <https://www.justice.gov/opa/file/925846/download> [hereinafter DOJ Investigation of the Chicago Police Dep’t].

<sup>36</sup> *Id.* at 31.

<sup>37</sup> Ryan Haas et al., *Protesters fight using pepper spray, baseball bats in Portland on Saturday*, OR. PUB. BROAD. (Aug. 22, 2020 7:56 p.m.), <https://www.opb.org/article/2020/08/22/conservative-protesters-plan-rallies-in-downtown-portland/>.

<sup>38</sup> *Federal Agents Don’t Need Army Fatigues*, *supra* note 18.

<sup>39</sup> See DOJ Investigation of the Chicago Police Dep’t, *supra* note 32, at 31.

<sup>40</sup> OR. REV. STAT. § 133.254(1)(a) (2020) (“A federal officer may arrest a person: For any crime committed in the federal officer's presence if the federal officer has probable cause to believe the person committed the crime.”).

<sup>41</sup> *Id.* § 133.254(2). Similarly, in 2018, New York City enacted the “Right to Know Act,” which requires officers to disclose “their name, rank, command, and shield number” at the beginning of any interaction with civilians. See *What is the Right to Know Act?*, New York City (Oct. 16, 2018), [https://www1.nyc.gov/site/ccrb/complaints/right-to-know-](https://www1.nyc.gov/site/ccrb/complaints/right-to-know-act.page#:~:text=The%20Right%20to%20Know%20Act%2C%20in%20effect%20as%20of%20October,the%20beginning%20of%20certain%20interactions.)

[act.page#:~:text=The%20Right%20to%20Know%20Act%2C%20in%20effect%20as%20of%20October,the%20beginning%20of%20certain%20interactions.](https://www1.nyc.gov/site/ccrb/complaints/right-to-know-act.page#:~:text=The%20Right%20to%20Know%20Act%2C%20in%20effect%20as%20of%20October,the%20beginning%20of%20certain%20interactions.) The District of Columbia also requires the Metropolitan Police Department to “ensure that all uniformed officers assigned to police First Amendment assemblies are equipped with the enhanced identification and may be identified even if wearing riot gear.” To ensure compliance, MPD must “modify[] the manner in which those officers’ names or badge numbers are affixed to the officers’ uniforms or helmets” where necessary. D.C. Code § 5-331.09 (2020).

<sup>42</sup> See @TomJChicago, *supra* note 6.

<sup>43</sup> 18 U.S.C. § 1361.

<sup>44</sup> 18 U.S.C. § 111.

<sup>45</sup> Kyle Rittenhouse, a self-declared militia member, has been charged with the first-degree intentional homicide of two people in Kenosha, Wisconsin. Self-reportedly, Rittenhouse had gone to Kenosha to protecting property that

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was not his. Though details are still developing, videos show him shooting into a group of several people who had been following him. For videos of the incident, see Haley Willis et al., *Tracking the Suspect in the Fatal Kenosha Shootings*, N.Y. TIMES (Aug. 28, 2020), <https://www.nytimes.com/2020/08/27/us/kyle-rittenhouse-kenosha-shooting-video.html>. Trump has also appeared to defend Rittenhouse. For that full story, see Aaron Blake, *Trump's illuminating defense of Kyle Rittenhouse*, WASH. POST (Sept. 1, 2020), <https://www.washingtonpost.com/politics/2020/08/31/trumps-illuminating-defense-kyle-rittenhouse/>.

<sup>46</sup> The McMichaels, a father and son pair, have been charged with the murder of Ahmaud Arbery. According to a video of the incident, Arbery was on a run in a Georgia neighborhood when the McMichaels attempted to stop him. Both were visibly armed. Arbery was not. When Arbery attempted to continue running, one of the McMichaels engaged in a physical altercation with him. The video then shows the other McMichael shooting Arbery repeatedly as he attempted to flee. Arbery then collapsed to the ground, motionless. An accomplice of the McMichaels who had been following Arbery in a separate vehicle captured the entire incident on video. In statements to police, the McMichaels claimed that they believed Arbery to be a suspect in a string of robberies in the neighborhood. Yet another example of racial violence at the hands of civilians attempting to engage in law enforcement: Georgia law provides that “A private person may arrest an offender if the offense is committed in his presence or within his immediate knowledge.” The merits of such a defense in these circumstances will certainly be litigated at trial. For the full story, see *Richard Fausset*, *What We Know About the Shooting Death of Ahmaud Arbery*, N.Y. TIMES (June 24, 2020), <https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html>; see also *Richard Fausset & Rick Rojas*, *Man Who Filmed the Arbery Killing Faces Calls for Arrest*, N.Y. TIMES (June 24, 2020), <https://www.nytimes.com/2020/05/18/us/ahmaud-arbery-william-bryan.html>.

<sup>47</sup> *Transcript: Donald Trump interview with Bob Woodward and Robert Costa*, WASH. POST (Apr. 2, 2016 6:53 p.m.), <https://www.washingtonpost.com/news/post-politics/wp/2016/04/02/transcript-donald-trump-interview-with-bob-woodward-and-robert-costa/>.