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The Case for Requiring Federal Law Enforcement Agents to Wear Identifying Insignias: Progress Made and Next Steps

Josh Gehret

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THE CASE FOR REQUIRING FEDERAL LAW ENFORCEMENT
AGENTS TO WEAR IDENTIFYING INSIGNIAS: PROGRESS
MADE AND NEXT STEPS

*Josh Gehret**

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I. BRIEF OVERVIEW OF RECENT DEVELOPMENTS, CONGRESSIONAL ACTION, AND UNRESOLVED ISSUES

In the wake of George Floyd's murder on May 25th, 2020, thousands took to the streets across each of the fifty states to protest racism and the use of force by police.¹ Mark Pettibone was thrust into the national spotlight when, while walking home from a protest, unknown federal officers threw him into an unmarked van.² Inside the van, the officers held Pettibone's hands over his head and covered his face.³ They took Pettibone to the nearby federal courthouse, where he was photographed, searched, detained, and ultimately released ninety minutes later.⁴ The officers never identified themselves.⁵ In addition to Pettibone's abduction, videos surfaced showing heavily armed—and unidentified—individuals forcibly detaining protesters.⁶ An official from the Department of Homeland Security (DHS) later stated that federal agents used unmarked vehicles for the officers' safety.⁷

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1. Janie Haseman et al., *Tracking Protests Across the USA in the Wake of George Floyd's Death*, USA TODAY, <https://www.usatoday.com/in-depth/graphics/2020/06/03/map-protests-wakegeorge-floyds-death/5310149002/> [https://perma.cc/NT2Z-XVJ4] (June 18, 2020, 6:48 PM).
2. Jonathan Levinson & Conrad Wilson, *Federal Law Enforcement Use Unmarked Vehicles to Grab Protesters off Portland Streets*, OPB, <https://www.opb.org/news/article/federal-law-enforcement-unmarked-vehicles-portland-protesters/> [https://perma.cc/MTJ6-QATA] (July 16, 2020, 7:46 PM); Alex Ward, *The Unmarked Federal Agents Arresting People in Portland, Explained*, VOX (July 20, 2020, 6:30 PM), <https://www.vox.com/2020/7/20/21328387/portland-protests-unmarked-arrest-trump-wold> [https://perma.cc/8JXW-LHTR].
3. Levinson & Wilson, *supra* note 2.
4. *Id.*
5. *Id.*
6. Eleven Films (@Eleven_Films), TWITTER (Jul. 16, 2020, 11:32 PM), https://twitter.com/Eleven_Films/status/1283967750981873670 [https://perma.cc/TAX2-7M38]; Elliott C. McLaughlin, *Portland Protests Remain Largely Peaceful Until Night Falls and Police are Targeted, Authorities Say*, CNN, <https://www.cnn.com/2020/09/27/us/portland-protests-proud-boys-antifa-blm/index.html> [https://perma.cc/6Z4H-4E9V] (Sept. 28, 2020, 3:02 PM).
7. Jonathan Levinson et. al., *Federal Officers Use Unmarked Vehicles to Grab People in Portland, DHS Confirms*, NPR (July 17, 2020, 1:04 PM), <https://www.npr.org/>

The presence of unidentified federal troops was not limited to isolated incidents.⁸ Federal agents in Washington, D.C. were openly hostile when asked by reporters to identify the agency they worked for.⁹ In early June 2020, Department of Justice officials held a press conference to discuss the administration's response to George Floyd's death.¹⁰ When asked whether federal law enforcement agencies had been instructed not to identify themselves, one official stated he was unaware of any such instructions¹¹: "I probably should have done a better job of marking them nationally as [an] agency."¹² Attorney General William Barr explained that federal agents are not legally required to wear identifying insignias that display officer names.¹³ Later that day, Nancy Pelosi sent a letter to President Trump expressing concern about the "increased militarization" and presence of unidentified law enforcement officers.¹⁴

2020/07/17/892277592/federal-officers-use-unmarked-vehicles-to-grab-protesters-in-portland [https://perma.cc/D5YE-S9CV]; McLaughlin, *supra* note 6; *see also* discussion *infra* Part IV.B.

8. Matt Ford, *America Has a Secret Police Problem*, THE NEW REPUBLIC (June 27, 2020), <https://newrepublic.com/article/158322/america-secret-police-problem> [https://perma.cc/Q5FT-MU28]; Steve Almasy, *Some Law Enforcement Officers at Protests Have No Badges and Some Have Covered Them. City Officials Say that is Unacceptable*, CNN, <https://www.cnn.com/2020/06/05/politics/law-enforcement-badges-protests/index.html> [https://perma.cc/VM26-9HPN] (June 5, 2020, 10:38 PM); *see* Eleven Films, *supra* note 6.
9. Ford, *supra* note 8; Almasy, *supra* note 8.
10. William Barr & Chris Wray, Dep't of Just., Remarks on George Floyd's Death and Civil Unrest (June 4, 2020), *transcribed at* <https://www.rev.com/blog/transcripts/william-barr-chris-wray-doj-press-conference-transcript-on-george-floyd-death> [https://perma.cc/5BTU-8FKD].
11. *Id.*
12. *Id.* (referring to Bureau of Prisons personnel).
13. *Id.* At the press conference, Barr stated,

Now, in the federal system, we don't wear badges with our name. I mean, the agents don't wear badges and their names . . . which many civilian police agents, I mean, non-federal police agencies, do. And I could understand why some of these individuals simply wouldn't want to talk to people about who they are
14. Press Release, Nancy Pelosi, Speaker, House of Representatives, Pelosi Sends Letter to President Trump on Deployment of Troops & Unidentified Law Enforcement Personnel in Nation's Capital (June 4, 2020), <https://www.speaker.gov/newsroom/6420-0> [https://perma.cc/HC2B-CWEC].

The lack of transparency regarding the unidentified agents sparked criticism.¹⁵ Their presence raised questions about distinguishing between state-sanctioned actors and private vigilantes.¹⁶ Similar concerns were raised about state interference with those exercising their First Amendment rights.¹⁷ Congress took these concerns seriously¹⁸ by adding an amendment to the National Defense Authorization Act (NDAA) that required federal law enforcement to wear identifying insignias when policing civil disturbances.¹⁹ The NDAA passed on New Year's Day 2021 over a veto by President Trump.²⁰

The legislation requires that whenever members of the armed forces, National Guard, or other federal law enforcement personnel “provide support to Federal authorities to respond to a civil disturbance,” they must “visibly display” the identity of the individual and the name of the federal agency they serve.²¹ There is an exception for undercover agents.²² The badge requirement only applies when agents “respond to a civil disturbance.”²³ The statute

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15. E.g., Kimberly Wehle, *Anonymous Police Threaten People's Freedom to Assemble*, THE HILL (June 12, 2020, 10:30 AM), <https://thehill.com/opinion/judiciary/502419-anonymous-police-threatens-peoples-freedom-to-assemble> [https://perma.cc/ME73-NSWL].
 16. See Andrew Clevenger, *Issues Linger After House Armed Services' Smooth NDAA Markup*, ROLL CALL (July 6, 2020, 6:32 AM), <https://www.rollcall.com/2020/07/06/issues-linger-after-house-armed-services-smooth-ndaa-markup/> [https://perma.cc/7C7C-EBWN].
 17. See, e.g., Wehle, *supra* note 15.
 18. See Catie Edmondson, *House Passes Defense Bill Overwhelmingly, Defying Trump's Veto Threat*, N.Y. TIMES (Dec. 8, 2020), <https://www.nytimes.com/2020/12/08/us/politics/house-military-bill-confederate-base-names-trump.html> [https://perma.cc/Q4GG-9TXC].
 19. H.R. REP. NO. 116-457, at 224 (2020); William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, 134 Stat. 3388, 3860 (to be codified at 10 U.S.C. § 723) [hereinafter NDAA]; see also discussion *infra* Part II.
 20. E.g., John Haltiwanger, *GOP-Led Senate Delivers First Successful Veto Override of Trump's Presidency in Fight Over Defense Bill During His Final Weeks in Office*, BUSINESS INSIDER (Jan. 1, 2021, 2:35 PM), <https://www.businessinsider.com/senate-gives-trump-first-veto-override-defense-spending-bill-2021-1> [https://perma.cc/65JS-ZLL9]. Trump's veto was on grounds unrelated to the inclusion of the language requiring law enforcement to wear insignias. See Amanda Macias, *Trump Vetoes Colossal \$740 Billion Defense Bill, Breaking with Republican-Led Senate*, CNBC, <https://www.cnn.com/2020/12/23/trump-vetoes-740-billion-ndaa-defense-bill.html> [https://perma.cc/36QP-UMRE] (Dec. 24, 2020, 8:35 PM).
 21. NDAA, *supra* note 19, § 723(a).
 22. *Id.* § 723(b).
 23. *Id.* § 723(a); Clevenger *supra* note 16.

suggests that the Legislature did not intend an identification requirement for federal law enforcement in all circumstances.²⁴ This leaves an unanswered—and essential—question: what is a “civil disturbance?”

On January 6, 2021, days after the legislation passed, a hoard of rioters stormed the United States Capitol.²⁵ Without badges, distinguishing between the armed National Guard activated by D.C. Mayor Bowser and “incognito” members of the Proud Boys and other armed protestors dressed in militaristic regalia would be impossible.²⁶ In response to the horrifying breach of the Capitol, the National Guard sent over 25,000 troops to D.C. in advance of President Biden’s inauguration.²⁷ After the peaceful transition of power, 7,000 troops remained in D.C. through the end of the month.²⁸ The January 6th insurrection²⁹ was undoubtedly a civil

24. See NDAA, *supra* note 19, § 723(a).

25. Dan Barry & Sheera Frenkel, ‘Be There. Will be Wild!’: Trump All but Circled the Date, N.Y. TIMES, <https://www.nytimes.com/2021/01/06/us/politics/capitol-mob-trump-supporters.html> [<https://perma.cc/EHB3-Y284>] (July 27, 2021).

26. D.C. National Guard to Activate Hundreds of Troops for Pro-Trump Demonstration, CBS (Jan. 4, 2021, 12:36 PM), <https://www.cbsnews.com/news/dc-national-guard-activating-hundreds-of-troops-for-pro-trump-demonstration/> [<https://perma.cc/28LP-HZS2>]; Kaelan Deese, *Proud Boys to Attend Jan 6. DC Rallies ‘Incognito’*, THE HILL (Jan. 2, 2021, 11:12 AM), <https://thehill.com/homenews/news/532362-proud-boys-to-attend-jan-6-dc-rallies-incognito> [<https://perma.cc/KB27-NTUR>]; see also Michael Biesecker et al., *Records Show Fervent Trump Fans Fueled US Capitol Takeover*, AP NEWS (Jan. 10, 2021), <https://apnews.com/article/us-capitol-trump-supporters-1806ea8dc15a2c04f2a68acd6b55cace> [<https://perma.cc/3FR4-SKV2>].

27. Press Release, National Guard, 25K Authorized; 50 States, Three Territories and DC Supporting Presidential Inauguration (Jan. 15, 2021), <https://www.nationalguard.mil/Resources/Press-Releases/Article/2474123/25k-authorized-50-states-threeterritories-and-dc-supporting-presidential-inaug/> [<https://perma.cc/C83H-MXKP>]; see also Matthew S. Schwartz, *Up to 25,000 Troops Descend on Washington for Biden’s Inauguration*, NPR (Jan. 16, 2021, 2:46 PM), <https://www.npr.org/sections/insurrection-at-the-capitol/2021/01/16/957642610/unprecedented-number-of-troops-descend-on-washington-d-c-for-bidens-inauguration> [<https://perma.cc/5ANH-KU9L>] (“[The] swearing-in of President-elect Joe Biden will see the biggest security presence of any inauguration in U.S. history.”).

28. Howard Altman, *26,000 National Guard Troops Came to DC and Protected the Inauguration Without Incident. Now the Drawdown Begins*, MILITARYTIMES (Jan. 21, 2021), <https://www.militarytimes.com/news/your-military/2021/01/21/26000-national-guard-troops-came-to-dc-to-protect-the-inauguration-now-the-drawdown-begins/> [<https://perma.cc/4DTP-SGMN>].

29. In this comment, I take no position on whether the events of January 6, 2021 constituted an insurrection for legal purposes, only that the events constituted a civil disturbance. By some definitions, the events of January 6 appear to meet the

disturbance;³⁰ however, would the presence of the National Guard at the inauguration or their continued presence to keep the peace constitute a “respon[se] to a civil disturbance,” thus triggering the badge requirements?³¹ The law is uncertain.

The country desperately needs this legislation.³² A lack of identification, coupled with incidents of police action against the press³³ and ordinary citizens,³⁴ as well as the events of January 6th,

requirements constituting an insurrection, while other definitions require some level of organization as opposed to mob violence. *Compare Insurrection*, OXFORD ENGLISH DICTIONARY (2d ed. 1989), <https://www.oed.com/view/Entry/97285> [<https://perma.cc/5V8U-W5GX>] (last visited Mar. 7, 2022) (“The action of rising in arms or open resistance against established authority or governmental restraint.”), *with Insurrection*, BLACK’S LAW DICTIONARY (11th ed. 2019) (quoting 77 C.J.S. *Riot; Insurrection* § 29, at 579 (1994)) (“Insurrection is distinguished from . . . mob violence by the fact that in insurrection there is an organized and armed uprising against authority or operations of government, while crimes growing out of mob violence, however serious . . . are simply unlawful acts in disturbance of the peace which do not threaten the stability of the government . . .”). It may be that the events of January 6 satisfy both definitions. At the time of publication, the House investigation is ongoing. *See, e.g.*, Press Release, Thompson & Cheney Statement on Bannon Indictment, Select Committee to Investigate the January 6th Attack on the United States Capitol (Nov. 12, 2021), <https://january6th.house.gov/news/press-releases/thompson-cheney-statement-bannon-indictment-0> [<https://perma.cc/3JXY-8E8A>] (“Steve Bannon’s indictment should send a clear message to anyone who thinks they can ignore the Select Committee or try to stonewall our investigation: no one is above the law.”); *see also* Jill Lepore, *What Should We Call the Sixth of January?*, THE NEW YORKER (Jan. 8, 2021), <https://www.newyorker.com/news/daily-comment/what-should-we-call-the-sixth-of-january> [<https://perma.cc/6RSY-38SE>] (describing the “vexed racial history” of the term “insurrection”).

30. *See infra* Part III (discussing civil disturbance).
31. Altman, *supra* note 28; NDAA, *supra* note 19, § 723(a).
32. *See* Kimberly Wehle & Joshua Gehret, *Unnamed Law Enforcement Banned Under the New NDAA*, THE HILL (Jan. 5, 2021, 1:30 PM), <https://thehill.com/opinion/national-security/532676-unnamed-law-enforcement-banned-under-the-new-ndaa> [<https://perma.cc/43ZE-HKEB>].
33. Marc Tracy & Rachel Abrams, *Police Target Journalists as Trump Blames ‘Lamestream Media’ for Protests*, N.Y. TIMES, <https://www.nytimes.com/2020/06/01/business/media/reporters-protests-george-floyd.html> [<https://perma.cc/4Y29-CCUX>] (Mar. 10, 2021).
34. *See, e.g.*, Eric Umansky, *My Family Saw a Police Car Hit a Kid on Halloween. Then I Learned How NYPD Impunity Works.*, PROPUBLICA (June 23, 2020, 5:00 AM), <https://www.propublica.org/article/my-family-saw-a-police-car-hit-a-kid-on-halloween-then-i-learned-how-nypd-impunity-works> [<https://perma.cc/FP8P-YPK2>]; Phil Helsel, *Man, 75, Shoved to Ground by Buffalo Police During Protest is Released from Hospital*, NBC NEWS (July 1, 2020, 2:56 AM), <https://www.nbcnews.com/news/us-news/man-75-shoved-ground-buffalo-police-during-protest-releasedhospital-n1232630> [<https://perma.cc/Q8V9-9RNJ>].

damaged trust between the police and the public.³⁵ However, Congress must go further.³⁶ The law requiring federal law enforcement to wear identification only applies when officers are sent in “respon[se] to a civil disturbance.”³⁷ Why should the requirement be limited, allowing federal law enforcement to go unidentified as long as there is no disturbance?³⁸ Pettibone was not involved in or around a civil disturbance when he was taken, he was on his way home.³⁹ Would the new law protect him?⁴⁰ Would it apply to the extended presence of the National Guard troops in D.C. after the insurrection?⁴¹ It is far from certain that a court would interpret the language in a way that would provide broader protection.⁴² Because the state of the law is unclear, it is Congress’s responsibility to expand the law and require federal officers to wear identification any time they perform their duties in public.⁴³

This Comment will make the case for strengthening the law to apply to federal law enforcement whenever they publicly perform policing tasks. First, in Part II, this Comment will examine the legislative history of the applicable language in the NDAA.⁴⁴ Next, Part III will explore how courts have construed “civil disturbance” and argue for a broader interpretation of the language.⁴⁵ Part IV will address the federal power to command and deputize law enforcement officers, and some of the vulnerabilities law enforcement may have under the badge requirement.⁴⁶ This Comment will then explore how constitutional protections will be furthered through strengthening the

35. Aimee Ortiz, *Confidence in Police Is at a Record Low, Gallup Survey Finds*, N.Y. TIMES (Aug. 12, 2020), <https://www.nytimes.com/2020/08/12/us/gallup-poll-police.html> [<https://perma.cc/B2QL-7NBY>] (“[W]hat Dr. Goff found most noteworthy is that now a majority does not have confidence in law enforcement. That’s ‘unprecedented in this country,’ he said, and it creates a problem for public safety because compliance with the law ‘begins with trust in it, and not fear of it.’”).

36. See discussion *infra* Part II, III.

37. NDAA, *supra* note 19, § 723(a).

38. See Barr & Wray, *supra* note 10. Comments made by Michael Carjaval suggest it is normal for federal officers not to wear identification. *Id.* This could raise problems in other situations, as documented instances of police abuse do not always occur at civil disturbances. See, e.g., Ford, *supra* note 8.

39. Levinson & Wilson, *supra* note 2.

40. See NDAA, *supra* note 19, § 723(a); *infra* Part III.

41. See NDAA, *supra* note 19, § 723(a); Altman, *supra* note 28; *infra* Part III.

42. See *infra* text accompanying notes 93–101.

43. See *infra* Part III.

44. See *infra* Part II.

45. See *infra* Part III.

46. See *infra* Part IV.

legislation in Part V.⁴⁷ The approach of the states and of international organizations will be examined in Part VI.⁴⁸ Finally, this Comment will conclude with the approach the Justice Department took towards policing issues in Ferguson, Missouri and the implications that approach has for identification.⁴⁹

II. LEGISLATIVE HISTORY—THE INSURRECTION ACT AND CONGRESSIONAL INTENT

While the general events leading to the identification requirement have been addressed,⁵⁰ a more thorough examination of the legislative history of the NDAA is instructive.⁵¹ This is best done by exploring the bipartisan nature of the legislation and the considerations made for both law enforcement and the public.⁵² The history of the NDAA further clarifies why Congress needs to take additional action.⁵³

Prior to Representative Chrissy Houlahan's amendment to the NDAA, legislators introduced bills to both the House and the Senate that would require federal law enforcement to display identification.⁵⁴ The stated purposes of the legislation was to promote accountability of law enforcement, protect the rights of protestors, and help the public distinguish law enforcement officers from vigilantes.⁵⁵ Both bills were scrapped when Houlahan, a Pennsylvania Democrat, proposed an amendment to the defense

47. See *infra* Part V.

48. See *infra* Part VI.

49. See *infra* Part VII.

50. See *supra* Part I.

51. See *infra* text accompanying notes 54–70.

52. See 116 CONG. REC. H3508-09 (daily ed. July 20, 2020) (statements of Reps. Houlahan & Mitchell); H.R. REP. NO. 116-457, at 224 (2020); Spencer Ackerman, *Incognito Cops Roamed the Streets Amid Summer Protests. The Defense Bill Will Put a Stop to it.*, DAILY BEAST (Dec. 8, 2020, 6:36 PM), <https://www.thedailybeast.com/incognito-cops-roamed-the-streets-amid-summer-protests-the-defense-bill-will-put-a-stop-to-it> [<https://perma.cc/D8GS-JHC9>].

53. See *infra* text accompanying notes 66–70; see also *infra* Part III.

54. Law Enforcement Identification Act, H.R. 7153, 116th Cong. (2020); Law Enforcement Identification Act, S. 3909, 116th Cong. (2020).

55. Press Release, Jamie Raskin, Top Democrats Introduce Law Enforcement Identification Act (June 11, 2020), <https://raskin.house.gov/media/press-releases/top-democrats-introduce-law-enforcement-identification-act> [<https://perma.cc/XU37-UWE2>]; Press Release, Chris Murphy & Chuck Schumer, Murphy, Schumer to Trump: Require All Federal Officers Engaged in Policing Peaceful Protests to Identify Themselves (June 8, 2020), <https://www.murphy.senate.gov/newsroom/press-releases/murphy-schumer-to-trump-require-all-federal-officers-engaged-in-policing-peaceful-protests-to-identify-themselves> [<https://perma.cc/3VS8-RYHJ>].

bill.⁵⁶ Houlahan was similarly motivated by the risk of vigilante law enforcement, stating she had seen footage of civilians in “ambiguous clothing” that suggested affiliation with the military, which “puts everyone at risk.”⁵⁷

Houlahan initially proposed amending the Insurrection Act instead of the eventual solution, which added to the special appointments chapter.⁵⁸ The initial amendment did not include the civil disturbance specification; however, because it amended the Insurrection Act, the law targeted instances of protest as opposed to general, broader policing practices.⁵⁹ The Insurrection Act specifically applies to “unlawful obstructions . . . or rebellion.”⁶⁰ Houlahan intended the law to be narrow.⁶¹ Representative Paul Mitchell’s (R-MI) concerns about overbreadth prompted lawmakers to change the original language.⁶² They added an exception for undercover officers.⁶³ The current language includes members of the armed forces, National Guard, or federal law enforcement personnel who are dispatched to support local authorities.⁶⁴ Compliance with the identification requirement is limited to “[f]ederal authorities . . . respond[ing] to . . . civil disturbance[s]”⁶⁵

It seems clear that Congress intended the identification requirement to apply only to instances of civil disturbance or “domestic violence.”⁶⁶ Both the original amendment to the Insurrection Act and the final language limit the application to specific instances where the police are responding to potentially volatile public assemblies.⁶⁷ While the adopted language does more to protect demonstrators, there is uncertainty about how far the requirements of identification extend, and how the interpretation of the law could develop as a

56. H.R. REP. NO. 116-457, at 224; Clevenger, *supra* note 16.

57. Clevenger, *supra* note 16.

58. Compare 116 CONG. REC. H3508, (daily ed. July 20, 2020) (amending the Insurrection Act, 10 U.S.C. § 253), with NDAA, *supra* note 19 (amending 10 U.S.C. § 723).

59. H.R. REP. NO. 116-457, at 224; see 10 U.S.C. § 252.

60. 10 U.S.C. § 252.

61. 116 CONG. REC. H3508 (daily ed. July 20, 2020) (statement of Rep. Houlahan) (“This amendment, my amendment, is very narrow in scope.”).

62. Clevenger, *supra* note 16; see 116 CONG. REC. H3509 (daily ed. July 20, 2020) (statement of Rep. Mitchell).

63. NDAA, *supra* note 19, § 723(b).

64. *Id.* § 723(a); Ackerman, *supra* note 52.

65. NDAA, *supra* note 19, § 723(a).

66. 116 CONG. REC. H3508 (daily ed. July 20, 2020) (statement of Rep. Houlahan) (quoting 10 U.S.C. § 253).

67. *Id.*

result.⁶⁸ Courts construing this language and examining the NDAA's legislative history may find congressional intent to limit the application of the language and opt for a narrower interpretation, potentially leaving citizens outside the law's protection.⁶⁹ A better interpretation of the "respon[se] to" language is as a reflection of congressional intent for law enforcement to be generally identified publicly, especially since Congress passed the language to directly combat and end unidentified law enforcement agents interacting with the public.⁷⁰

III. "CIVIL DISTURBANCE" INTERPRETATIONS BY COURTS REFERS TO VIOLENT OCCURRENCES

Since the NDAA fails to define "civil disturbance," this area of the law could develop in a variety of ways.⁷¹ The best solution is for Congress to amend the law to require federal law enforcement identification generally, subject to narrow exceptions.⁷² Another option is for the Department of Justice to issue guidance interpreting "respon[se] to a civil disturbance" broadly, requiring badges anytime federal officers support local authorities—similar to their guidance on the policing issues in Ferguson.⁷³ A broader interpretation would prevent the abuses which happened to Pettibone and ensure the identification of officers deployed to prevent a civil disturbance.⁷⁴ If neither Congress nor the Department of Justice clarify the law's language, courts will be left to determine what a "respon[se] to a civil disturbance" means.⁷⁵ In such a case, the courts may look to other uses of "civil disturbance" and the legislative history of the NDAA.⁷⁶

68. See *infra* Part III.

69. See 116 CONG. REC. H3508 (daily ed. July 20, 2020) (statement of Rep. Houlahan). Courts often look to the legislative history when determining what the law is. See, e.g., CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 36–38 (2018); *Mitchell v. Cohen*, 333 U.S. 411, 417–18 (1948).

70. See *infra* Part III; NDAA, *supra* note 19, § 723(a); see also 116 CONG. REC. H3508 (daily ed. July 20, 2020) (statement of Rep. Houlahan) (“[W]e cannot afford uncertainty. Our military members are clearly identifiable, and so must our law enforcement officers be as well.”).

71. See NDAA, *supra* note 19, § 723(a)

72. See *infra* text accompanying notes 93–101; see also *infra* Section IV.B.

73. See *infra* Part VII.

74. See *infra* text accompanying notes 93–101; see also Levinson & Wilson, *supra* note 2; Altman, *supra* note 28.

75. See NDAA, *supra* note 19, § 723(a).

76. See *infra* Sections III.A–B.; *supra* Part II.

A. U.S. Supreme Court

There are few modern U.S. Supreme Court cases discussing the term “civil disturbance,” and where it has been used, it has been closely tied to terms like “civil disorder” or “insurrection.”⁷⁷ Where “civil disturbance” does appear in case law, it is closely connected with incidents of violence.⁷⁸ In *Laird v. Tatum*, civilians in Detroit claimed that the Army’s surveillance of lawful civilian protests following the assassination of Dr. Martin Luther King, Jr. violated their First Amendment rights.⁷⁹ President Johnson had ordered federal troops to assist local authorities in response to the “civil disorders”—i.e., the protests—pursuant to the Insurrection Act.⁸⁰ The Undersecretary of the Army, in a letter, referred to “civil disturbance” as “outbreaks of violence or incidents with a high potential for violence beyond the capability of state and local police . . . to control.”⁸¹ In addition, Attorney General Ramsey Clark indicated one of the three prerequisites for the use of federal troops in responding to an event of domestic violence under the Insurrection Act was when “a situation of serious ‘domestic violence’ exists within the state.”⁸²

While Clark’s reasoning is somewhat circular, it does suggest that the use of the Insurrection Act requires present occurrences of serious violence beyond the ability of local law enforcement to handle and that anticipated or imminent violence does not qualify.⁸³ The Detroit protest, described as an instance of “civil disorder” or a “civil disturbance,” is strikingly similar to the Black Lives Matter protests in the summer of 2020.⁸⁴ The interpretation of the language in the

77. See *Laird v. Tatum*, 408 U.S. 1, 4–6 (1972); see also *Butz v. Economou*, 438 U.S. 478, 496–97 (1978) (describing the events in *Scheuer v. Rhodes*, 416 U.S. 232 (1974), as a “civil disturbance”). *Scheuer* dealt with the Kent State shootings, which the *Scheuer* court itself described as a “civil disorder.” *Id.* at 233.

78. See *Laird*, 408 U.S. at 4–5.

79. *Id.* at 3–5.

80. *Id.*

81. *Id.* at 7–8.

82. *Id.* at 3 n.2 (“There are three basic prerequisites to the use of Federal troops in a state in the event of domestic violence: (1) That a situation of serious ‘domestic violence’ exists within the state. While this conclusion should be supported with a statement of factual details to the extent feasible . . .”).

83. See *id.*

84. See *id.* at 3–5; 116 CONG. REC. H3508 (daily ed. July 20, 2020) (statement of Rep. Houlahan); Audra D. S. Burch et al., *The Death of George Floyd Reignited a Movement. What Happens Next?*, N.Y. TIMES, <https://www.nytimes.com/2021/>

context of the Insurrection Act is noteworthy, since the identification requirement was originally proposed as an amendment to the Insurrection Act.⁸⁵

B. State Courts

Guidance from the states is similarly sparse, though the cases also indicate civil disturbances are connected to violence.⁸⁶ Many cases which discuss civil disturbances arise in the context of a citizen suing a city in tort for damages arising from injury during a protest.⁸⁷ These cases describe such clearly violent behavior as “civil disturbances.”⁸⁸

One case from Michigan recently distinguished “civil disturbances” from public health issues when interpreting the state’s Emergency Powers of the Governor Act (EPGA) in response to a state of emergency during the COVID-19 pandemic.⁸⁹ The court held that the EPGA did not authorize the Michigan governor to declare a state of emergency, and accordingly restrain healthcare providers from performing nonessential procedures.⁹⁰ In a concurring opinion, Judge Viviano elaborated on the types of “safety concerns” on which the EPGA authorized the governor to issue orders, including events “like riots, in which the behavior of the public is what poses the safety risk.”⁹¹ The concurrence referred to these as “civil disturbances” and explained that emergency action in response to epidemics or a public health crisis was not a civil disturbance—and thus outside the power granted to the state by the EPGA—leading to a narrow interpretation limited to occurrences of physical violence.⁹²

04/20/us/george-floyd-protests-police-reform.html [https://perma.cc/FN5G-MEUM] (Sept. 7, 2021).

85. See *Laird*, 408 U.S. at 3–5; 116 CONG. REC. H3508 (daily ed. July 20, 2020) (statement of Rep. Houlahan).

86. See cases cited *infra* notes 87–88, see also *infra* notes 89–92 and accompanying text.

87. See *Biloon’s Elec. Serv., Inc. v. City of Wilmington*, 417 A.2d 371, (Del. 1980); *Monarch Ins. Co. of Ohio v. District of Columbia*, 353 F. Supp 1249 (D.D.C. 1973); *Jahnke v. Inc. City of Des Moines*, 191 N.W.2d 780 (Iowa 1971); *Citoli v. City of Seattle*, 114 Wash. App. 1047 (2002); *City of Baltimore v. Silver*, 283 A.2d 788 (Md. 1971).

88. See cases cited *supra* note 87; see also *Murley v. Smith*, 322 F. Supp. 991, 994 (N.D. Tex. 1971) (distinguishing a civil disturbance from a peaceful assembly, implying civil disturbances involve violent occurrences).

89. *Midwest Inst. of Health, PLLC v. Governor of Mich. (In re Certified Questions from the U.S. Dist. Ct.)*, 958 N.W.2d 1, 14 n.12 (Mich. 2020).

90. *Id.* at 24.

91. *Id.* at 42 (Viviano, J., concurring).

92. *Id.*

The case law suggests that a “civil disturbance” has a threshold requirement of violent, unlawful activity, indicating federal officials would not likely be bound by the badge requirement if asked to provide support to states in instances unconnected to violence.⁹³ However, the language of the NDAA does not solely require badges when officers are physically present at a civil disturbance but when *responding* to one.⁹⁴ This language would allow a court to read the badge requirements of the NDAA more broadly, as it should.⁹⁵ As long as there is a civil disturbance and the duty of the federal officer is to support the state in response to that disturbance, the badge requirement should trigger even if the officer is not physically present at a scene of violence. For example, the National Guard’s presence in D.C. for the 2021 inauguration was in response to the violence of January 6th, even though that violence occurred weeks ago; the Guard’s presence was to prevent future disorder.⁹⁶ The officers who abducted Pettibone, although not physically present at the protest, were present in Portland in response to aiding local enforcement in keeping the peace.⁹⁷ The statutory language suggests a broad reading if the presence of the law enforcement is connected, even remotely, to a violent incident.⁹⁸ A broad reading serves the public interest, leading to the accountability Congress sought when passing the law in the first place.⁹⁹

If there is no connection to violence, then a judicial interpretation based solely on the precedential history of “civil disturbance” would be unlikely to aid a citizen who suffers injustice from an unidentified officer.¹⁰⁰ A citizen should not need to rely on the presence of nearby violence to be afforded the right to know the identity of the agent of the state with whom that citizen interacts. Congress should take further action to clarify the reach of the law to ensure accountability of federal law enforcement to the people and to give guidance to the judiciary.¹⁰¹

93. See *supra* cases cited and text accompanying notes 87–89.

94. NDAA, *supra* note 19, § 723(a).

95. See *id.*

96. See Altman, *supra* note 28.

97. See Levinson & Wilson, *supra* note 2.

98. See NDAA, *supra* note 19, § 723(a); *Laird v. Tatum*, 408 U.S. 1, 3–5 (1972).

99. See 116 CONG. REC. H3508 (daily ed. July 20, 2020) (statement of Rep. Houlahan); see also *supra* Part II.

100. See NDAA, *supra* note 19, § 723(a); *Laird*, 408 U.S. at 4–5.

101. See *infra* Section VI.B. (human rights and accountability); Part VII (DOJ and accountability).

IV. FEDERAL GOVERNMENT'S AUTHORITY TO COMMAND LAW ENFORCEMENT AND LAW ENFORCEMENT SAFETY

The executive branch has broad statutory authority to enforce the law.¹⁰² In response to the 2020 protests for racial justice, Attorney General Barr stated “all” major law enforcement arms of the Department were activated to ensure “safety and justice,” including the U.S. Marshals Service, the Bureau of Prisons (BOP), the Drug Enforcement Administration (DEA), the Federal Bureau of Investigation (FBI), the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), as well as the Department of Homeland Security (DHS).¹⁰³ These agencies may designate local law enforcement to act under federal authority, and without a law requiring otherwise, local officers deputized under these statutes would not need to identify themselves unless responding to a civil disturbance.¹⁰⁴ Brief attention will also be given to how the identification requirement may affect law enforcement.¹⁰⁵

A. *Statutory Authority of the Executive Branch*

The U.S. Marshals Service has the power to deputize federal, state, and local law enforcement, in “any district” designated, “whenever the law enforcement needs . . . require.”¹⁰⁶ U.S. Marshals have the power to execute federal arrest warrants¹⁰⁷ and “make arrests without warrant for any offense against the United States committed in their presence.”¹⁰⁸ The law grants substantially similar powers to the DEA,¹⁰⁹ the FBI,¹¹⁰ and the ATF.¹¹¹ The BOP has similar powers for certain offenses, such as assaulting officers, escape, and riot when the offense occurs in a penal facility.¹¹²

The Department of Homeland Security—the agency implicated in the seizure of Mark Pettibone—has the authority to protect federal property, including areas outside the property to the “extent

102. See statutes and regulations cited *infra* notes 106–14, 116.

103. Barr & Wray, *supra* note 10.

104. See *infra* Section IV.A.; NDAA, *supra* note 19, § 723(a).

105. See *infra* Section IV.B.

106. 28 C.F.R. § 0.112 (2020).

107. 28 C.F.R. § 0.111 (2020).

108. 18 U.S.C. § 3053.

109. 21 U.S.C. § 878.

110. 18 U.S.C. § 3052.

111. 18 U.S.C. § 3051.

112. 18 U.S.C. § 3050.

necessary” to protect the occupants and the property itself.¹¹³ Otherwise, the department must “enter into agreements with . . . local governments” to exercise the agency’s powers or deputize local officers.¹¹⁴ Recently, an Inspector General report determined that the DHS failed to properly designate officers by name who were deployed to Portland (in violation of 40 U.S.C. § 1315), and some of those officers used force.¹¹⁵ Like the aforementioned agencies, DHS agents may make arrests without a warrant and may deputize local officers when “in the public interest.”¹¹⁶

This wide latitude to deputize local law enforcement and arrest citizens illustrates the need for accountability.¹¹⁷ In tense situations where law enforcement must act quickly to keep the peace (and especially where action could result in unlawful harm to or seizure of a citizen), requiring officers to wear identifying badges is critical.¹¹⁸ This is necessary for accountability not only during “civil disturbances,” but in any capacity.¹¹⁹ With such massive grants of power, a law requiring identification of law enforcement in every situation is essential.¹²⁰

B. Considerations for Law Enforcement

In expanding the law to apply more broadly than simply responding to “civil disturbances,” Congress should consider the effect on the men and women who serve our country and the potential dangers they are exposed to if required to be identified at all times.¹²¹ For example, a New York City police official warned police

113. 40 U.S.C. § 1315; *see also* Levinson et. al., *supra* note 7; Levinson & Wilson, *supra* note 2.

114. 40 U.S.C. § 1315(b)(1), (e).

115. OFF. OF INSPECTOR GEN., DEPT. OF HOMELAND SEC., OIG-21-05, MANAGEMENT ALERT - FPS DID NOT PROPERLY DESIGNATE DHS EMPLOYEES DEPLOYED TO PROTECT FEDERAL PROPERTIES UNDER 40 U.S.C. § 1315(B)(1) (2020) (explaining that designation was improper because authority was improperly delegated); *see also* Christopher Dunn, *Federal Forces Storm Portland Protests; Prompting Three Lawsuits*, LAW.COM: N.Y. L.J. (Aug. 5, 2020, 10:37 AM), <https://www.law.com/newyorklawjournal/2020/08/05/federal-forces-storm-portland-protests-prompting-three-lawsuits/> [<https://perma.cc/85K2-ACS2>].

116. 40 U.S.C. § 1315(b)(2)(C).

117. *See supra* text accompanying notes 106–16.

118. *See* Levinson & Wilson, *supra* note 2.

119. *See infra* Part VII.

120. *See supra* Part III.

121. *See* Ackerman, *supra* note 52; 116 CONG. REC. H3508-09 (daily ed. July 20, 2020) (statements of Reps. Houlahan & Mitchell).

officers to forego wearing uniforms when back-to-back “hits” had been ordered on two police officers by a career criminal.¹²² The challenges law enforcement face can also take emotional tolls, particularly during the summer of 2020, as local officers needed to balance duty, personal beliefs, and conflicting messages coming from President Trump, local chiefs and mayors, the criticism of protestors, and the scrutiny of the media.¹²³

The cooperation between Reps. Houlahan and Mitchell was impressive not only for its bipartisan nature, but also for their attention to balancing the needs of the public and law enforcement.¹²⁴ Houlahan (an Air Force veteran) and Mitchell (whose son is a police officer) are great examples of lawmakers’ ability to balance both interests.¹²⁵ “[W]e wanted to both protect civilians[,] and we also wanted to protect those people who are in uniform, whether they are law enforcement from our communities or whether they are National Guard,” Houlahan stated.¹²⁶ The law must be broadened. As agents of the state, police possess the incredible power to deprive citizens of life and liberty at their discretion and must bear identification when they exercise that power.¹²⁷ Due to the overwhelmingly great public interest served by the badge requirement, only law enforcement needs of the highest order should be accommodated, as in circumstances when the physical safety of law enforcement and the need for anonymity are of utmost importance.¹²⁸ To serve the public interest effectively, such exceptions should be lawful in only the gravest and rarest of circumstances and should be proven necessary by clear and convincing evidence by law enforcement before being accommodated in the law by Congress.

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122. Shawn Cohen & Megan Sheets, *Top NYPD Cop Warns Officers Not to Wear Their Uniforms in Public for Their Own Safety Following Assassination Attempts on Police as Suspect is Pictured Handcuffed to Hospital Bed*, DAILY MAIL, https://www.dailymail.co.uk/news/breaking_news/article7985655/NYPD-head-warns-officers-not-wear-uniforms-department-logos-public.html [https://perma.cc/R4VD-NPYY] (Feb. 21, 2020, 12:06 PM).
123. Manny Fernandez, *For Police Officers, Demonstrations Take a Toll and Test Duty*, N.Y. TIMES, <https://www.nytimes.com/2020/06/02/us/police-officers-minneapolis-protest.html> [https://perma.cc/P295-M58L] (June 6, 2020).
124. See Ackerman, *supra* note 52; 116 CONG. REC. H3508–09 (daily ed. July 20, 2020) (statements of Reps. Houlahan & Mitchell).
125. See Ackerman, *supra* note 52; 116 CONG. REC. H3508–09 (daily ed. July 20, 2020) (statements of Reps. Houlahan & Mitchell).
126. Ackerman, *supra* note 52.
127. See 116 CONG. REC. H3508–09 (daily ed. July 20, 2020) (statements of Reps. Houlahan & Mitchell).
128. See NDAA, *supra* note 19, § 723(a); Cohen & Sheets, *supra* note 122; Fernandez, *supra* note 123.

V. REQUIRING LAW ENFORCEMENT TO WEAR IDENTIFICATION IS CONSISTENT WITH THE CONSTITUTION

Passing a law requiring federal law enforcement agents to wear badges in any situation where they are policing the public is an important step the Legislature can take to protect Constitutional rights.¹²⁹ The current legislation helps assure the safety and welfare of those protesting so they can exercise their rights during situations of public unrest without the threat of anonymous police.¹³⁰ However, this protection is hollow if the state determines there is not a civil disturbance.¹³¹ A broader law guarantees protection of these constitutional rights.

A. *Fourth Amendment Not Implicated by Presence of Unidentified Law Enforcement*

The issue presented by law enforcement that refuse to identify themselves during police interactions with the public is a novel one under the Fourth Amendment.¹³² Unreasonable seizure violates the Fourth Amendment, so any analysis must center on how an unreasonable seizure can occur.¹³³ However, the mere presence of unidentified police is unlikely to constitute a “show of authority” that would implicate the Fourth Amendment.¹³⁴

A seizure can occur by a show of authority which requires submission to an officer.¹³⁵ In *California v. Hodari D.*, a show of authority seizure did not occur when police chased an escaping suspect even though the fleeing suspect knew he was not at liberty to

129. See *infra* Sections V.A–C.

130. See *infra* Section V.B.

131. See *supra* Part III.

132. Rachel Brown & Coleman Saunders, *Can Law Enforcement Officers Refuse to Identify Themselves?*, LAWFARE (June 12, 2020, 12:46 PM), <https://www.lawfareblog.com/can-law-enforcement-officers-refuse-identify-themselves> [<https://perma.cc/H8YK-RWT5>].

133. *Id.*; *Terry v. Ohio*, 392 U.S. 1, 16 (1986) (“[W]henver a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person.”); U.S. CONST. amend. IV.

134. See *I.N.S. v. Delgado*, 466 U.S. 210, 218 (1984) (holding the work force of a factory was not seized by the presence of federal agents at the exit); see *infra* notes 135–37 and accompanying text.

135. *California v. Hodari D.*, 499 U.S. 621, 626–27 (1991). See also Jeffrey P. Rosenberger, *Seizing the Moment: Is a New Test Needed to Determine Submission in Show-of-Authority Seizure Cases?*, 47 N. KY. L. REV. 31, 32 (2020) (arguing a broad test for submission is consistent with the outer contours of the *Hodari D.* rule).

leave.¹³⁶ A show of authority will only result in a seizure if the person physically submitted to law enforcement, such as being tackled after an escape attempt.¹³⁷ In most lawful, nonviolent protests, passive surveillance by unidentified police is unlikely to be an unreasonable seizure violating the Fourth amendment as most people are free to come and go as they please—though seeing unmarked police may raise other concerns.¹³⁸ So while seeing an armed, unidentified individual in military garb may inspire fear, unless an individual physically submits to their authority, it is unlikely to trigger the Fourth Amendment.¹³⁹

B. *Chilled Speech and the First Amendment*

The First Amendment guarantees the right of the “people peaceably to assemble, and to petition the Government for a redress of grievances.”¹⁴⁰ The complete range of ways the First Amendment might be implicated by the presence of unidentified federal agents is beyond the scope of this Comment.¹⁴¹ However, a brief examination of how the presence of unidentified federal officers at a lawful assembly may “chill” the speech of protesters is warranted.¹⁴²

Free speech is strongest and most vigorously protected when criticism is leveled against the government.¹⁴³ In one of the seminal free speech cases of the 20th century, *New York Times v. Sullivan*, the Supreme Court held that the Times did not libel a police

136. *Hodari D.*, 499 U.S. at 629.

137. *Id.* at 626–27, 629.

138. *See id.*; *Delgado*, 466 U.S. at 218; *infra* Section V.B.

139. *See Hodari D.*, 499 U.S. at 626–27.

140. U.S. CONST. amend. I.

141. The First Amendment has been said to occupy a “preferred position” in American constitutional jurisprudence due to the basic democratic precepts it stands for. *Baker v. F & F Inv.*, 470 F.2d 778, 783 (2d Cir. 1972). The criticism of state law enforcement by the public in the wake of George Floyd’s death (as has happened previously in our nation’s history when the public demanded racial equality, such as the protests in Ferguson, *infra* Part VII, and the protests in the wake of Martin Luther King Jr.’s assassination, *supra* Section III.A.) is a right rooted in the First Amendment. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 278 (1964). Due to the First Amendment’s preferred position and its influence on American constitutional law, the various ways unidentified state agents could implicate the First Amendment is vast. *See United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (describing the preferred freedoms rationale); Douglas R. Vadnais, *Constitutional Law—Fourth Amendment—Expanding Permissible Intrusion into First Amendment Freedoms Under the Aegis of the Fourth Amendment*, 12 CREIGHTON L. REV. 881, 895 n.93, 895–96, (1978) (describing the preferred position doctrine).

142. *See infra* notes 143–50 and accompanying text.

143. *See, e.g., N.Y. Times Co.*, 376 U.S. at 292.

commissioner when it published criticism of police conduct.¹⁴⁴ To hold otherwise—that private entities could be civilly liable for criticism of the government—would create a “pall of fear and timidity imposed upon those who would give voice to public criticism” that is contrary to the First Amendment.¹⁴⁵ The Court has gone to great lengths to allow “breathing room” for the First Amendment to prevent a “chilling effect” on free speech.¹⁴⁶ This “breathing room” allows wide latitude for criticism of public institutions, such as the police, by the public.¹⁴⁷ How can the public criticize the federal agency that the unidentified officer serves, much less take the agency to court, if the agents of the government go unidentified?¹⁴⁸

It is easy to imagine why good-faith critics of governmental conduct may seek to assemble. But, upon seeing the presence of armed, unidentified police, good-faith critics may decline to exercise the right to assemble out of fear of police action without a way to hold the police accountable, even if the police never act unlawfully. This presence could easily chill someone like Mark Pettibone from exercising his Constitutional rights.¹⁴⁹ The bulwark of First Amendment jurisprudence seeks to prevent chilling of this sort.¹⁵⁰

C. Due Process Demands Notice of Litigation, Presuming Identification of Adversary

The Fifth and Fourteenth Amendments to the Constitution insist that life and liberty not be deprived without “due process of law.”¹⁵¹ Fundamentally, due process requires an opportunity to be heard.¹⁵² A

144. *Id.* at 283.

145. *Id.* at 278.

146. *Id.* at 298, 300 (Goldberg, J., concurring) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

147. *Id.* at 292 (majority opinion) (“[T]ransmuting criticism of government, however impersonal it may seem on its face, into personal criticism, and hence potential libel, of the officials of whom the government is composed” “strikes at the very center of the constitutionally protected area of free expression.”); *Button*, 371 U.S. at 433 (“First Amendment freedoms need breathing space to survive[.]”).

148. *See N.Y. Times Co.*, 376 U.S. at 292.

149. *See Levinson & Wilson*, *supra* note 2.

150. *See, e.g., N.Y. Times Co.*, 376 U.S. at 292; *Button*, 371 U.S. at 433.

151. U.S. CONST. amend. V; *id.* amend. XIV, § 1.

152. *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)).

hearing requires notice,¹⁵³ and its touchstone is one of reasonableness.¹⁵⁴

There are practical reasons that support identification for purposes of notice; namely, if the police unlawfully seize a person but the person does not know who has done so, how can the person take the government to court? How can the person be sure the government has acted instead of a vigilante?¹⁵⁵ Notice under due process presumes identification of the parties is possible. Failing to require identification unless government agents are responding to a civil disturbance intentionally shields those agents from accountability for potential unlawful actions, exempting them from the judicial process and inhibiting justice.¹⁵⁶

VI. OTHER JURISDICTIONS FAVOR GENERAL IDENTIFICATION OF LAW ENFORCEMENT

Other jurisdictions favor law enforcement identification in general circumstances beyond responses to civil disturbances. More than half of U.S. states either require law enforcement officers to wear identifying insignias or recognize the authority a state's insignia holds and take steps to prevent abuse, such as banning look-alikes.¹⁵⁷ While many states can—and should—go further and require identification at all times in the same way this Comment advocates with respect to the federal government, the states' steps are significant and indicate the importance of identifying law enforcement.¹⁵⁸ In addition, international organizations require identification for transparency and accountability, citing human rights.¹⁵⁹

A. *The States Favor Identification of Law Enforcement*

A significant number of states and D.C. recognize the importance of identification when law enforcement agents are on duty in non-covert operations.¹⁶⁰ This legislation recognizes that unidentified state actors, or private actors that are misidentified, threaten the

153. *Id.* at 267–68.

154. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) (“An elementary and fundamental requirement of due process in any proceeding . . . is notice reasonably calculated . . .”).

155. *See* Wehle, *supra* note 15.

156. *See Mullane*, 339 U.S. at 314; NDAA, *supra* note 19, § 723(a).

157. *See infra* Section VI.A.

158. *See infra* Section VI.A.

159. *See infra* Section VI.B.

160. *See infra* Section VI.A.1–2.

public.¹⁶¹ States that have not codified badge requirements have local ordinances or local policies requiring clear identification.¹⁶² These requirements indicate that states recognize the association of badges with the unique state power to arrest or detain and proactively take steps to avoid abuse by those who wrongfully identify as law enforcement officers.¹⁶³ The federal government should follow suit by strengthening the current legislation.

1. States Requiring Identification for Officers

Four states have statutes requiring law enforcement officers to either wear identifying insignias or identify themselves when requested. Massachusetts requires uniformed police officers to wear badges identifying them by name or unique number.¹⁶⁴ The state also requires that every police officer carry an identification card bearing the officer's photograph and other identifying information, and requires the officer to produce it "upon lawful request for purposes of identification."¹⁶⁵ California,¹⁶⁶ New Hampshire,¹⁶⁷ and Connecticut¹⁶⁸ have similar legislation.

D.C. and Virginia have strong requirements, though less broad. In 2021, D.C. enacted emergency legislation requiring law enforcement to modify uniforms to ensure officers' names and badge numbers appear visibly during First Amendment assemblies, even if the officers are wearing riot gear.¹⁶⁹ Virginia's statute requires Virginia officers who arrest a citizen without a warrant to display "a badge of office."¹⁷⁰ Both Virginia and D.C. recognize that when an officer is

161. *See infra* Section VI.A.3.

162. *See infra* Section VI.A.4.

163. *See infra* Section VI.A.2–3.

164. MASS. GEN. LAWS ch. 41, § 98C (West 2021).

165. *Id.* § 98D.

166. CAL. PENAL CODE § 830.10 (West 2021) (amended 1989); *see also* PENAL § 830.1 (defining "peace officer" to include many different types of law enforcement agents, including police officers).

167. N.H. REV. STAT. ANN. § 105:3-a (West 2021).

168. An Act Concerning Police Accountability, Pub. Act 20-1, § 14(a), 2020 Conn. Legis. Serv., 1, 12 (West 2020).

169. D.C. CODE ANN. § 5-331.09 (West 2021); *see also* Comprehensive Policing and Justice Reform Congressional Review Emergency Act of 2021, D.C. Laws Act 24-128, sec. 112, § 5-331.09, 68 D.C. Reg. 7656, 7666 (enacting an amendment requiring law enforcement uniforms to "prominently identify" the officers' status as local law enforcement during First Amendment assemblies).

170. VA. CODE ANN. § 52-20 (West 2021) (allowing state police to apprehend suspects without a warrant provided officers are in uniform or displaying a "badge of office");

making an arrest during a sensitive situation where citizens are protesting or may be arrested without a warrant, the citizen should have notice that the person arresting them acts with the state's authority.¹⁷¹

2. States Requiring Identification of Certain Branches of Law Enforcement

Many states, though lacking general legislation requiring all officers to wear badges, require certain branches of law enforcement to be distinctively identified to the public. For example, South Carolina requires their immigration enforcement division to “conspicuously display” their badges.¹⁷² Indiana and Oregon require police officers to wear badges when enforcing traffic laws.¹⁷³ Mississippi, Washington, and Ohio require railroad police officers to wear badges while on duty.¹⁷⁴ Rhode Island, Maryland, and Nebraska require badges for specially designated officers as well.¹⁷⁵

While not explicitly requiring a badge to be worn, Louisiana requires state police uniforms to be “distinctive in color, design, material, markings, and insignia so as to be readily and easily identifiable from a reasonable distance as the uniform worn by the [state's] police”¹⁷⁶ The statute forbids other state agencies and private individuals from wearing similar uniforms that could “confuse” or “not be clearly distinguishable” from police uniforms.¹⁷⁷ Though it is not required for Louisiana officers to wear

see also id. § 46.2-102 (requiring state police and law enforcement officers to either be uniformed or display a badge or other signal of authority during enforcement).

171. *See id.* § 52-20; D.C. CODE ANN. § 5-331.09.

172. S.C. CODE ANN. § 23-6-60(C)(2)(d) (West 2021) (requiring officers of the immigration enforcement unit to wear badges “conspicuously displayed”).

173. IND. CODE ANN. § 9-30-2-2(a)(1)–(2) (West 2021) (preventing arrests for violations of traffic offenses unless the officer is either wearing a badge and uniform or driving a vehicle clearly marked as police); OR. REV. STAT. ANN. § 810.400 (West 2021).

174. MISS. CODE ANN. § 77-9-505(3) (West 2021) (requiring railroad officers to wear badges in plain view while on duty); WASH. REV. CODE ANN. § 81.60.050 (West 2021) (requiring railroad police to wear badges “in plain view” and to provide official credentials on request); OHIO REV. CODE ANN. § 4973.20 (West 2021) (requiring officers to wear a badge identifying the officer as police when on duty and “in plain view”).

175. 12 R.I. GEN. LAWS ANN. § 12-2.2-3 (West 2021) (requiring capitol police to visibly wear badges); MD. CODE ANN., PUB. SAFETY § 3-310 (West 2021) (requiring that special police wear “a distinctive police badge” worn in plain view, unless on detective duty); NEB. REV. STAT. ANN. § 23-1717 (West 2021) (requiring sheriffs and deputies wear a badge while on duty).

176. LA. STAT. ANN. § 40:1376(B) (West 2020).

177. *Id.* § 40:1376(C).

badges during active duty, the state clearly recognizes the power the uniform and insignia communicates to the public and that agents in uniform are endowed with authority to potentially deprive someone of liberty.¹⁷⁸ By prohibiting copycats and even other state agencies from using uniforms that, even unintentionally, could mislead the public into thinking they must comply with the directions of the bearer, the state recognizes the power of identification and the dangers of mis-identification.¹⁷⁹ Notably, none of the aforementioned states require badges only when the police perform certain kinds of tasks, such as policing a disturbance.

3. States That Prohibit Non-State Actors from Wearing Insignias Similar to State Badges

Like Louisiana, at least nine other states do not require law enforcement agents to wear badges in the line of duty but do criminalize imposters or forbid the use of badges that look substantially similar to official badges. Many have regulations preventing private security guards from wearing badges that look like police badges.¹⁸⁰ Other states criminalize impersonation of an officer.¹⁸¹

Such statutes are constitutional.¹⁸² The Fourth Circuit held in *United States v. Chappell* that a Virginia statute criminalizing the use of badges to impersonate officers did not violate the First

178. *See id.* § 40:1376(F).

179. *See id.*

180. *See* HAW. CODE R. § 16-97-14 (LexisNexis 2021) (preventing private detectives from wearing badges similar in design to government law enforcement agencies); IOWA ADMIN. CODE r. 661-121.12(80A) (West 2021) (limiting badges for private security to only those approved, and excluding from approval any with similarities to state agencies); MICH. COMP. LAWS ANN. § 338.1069 (West 2021) (private security badges shall not deceive the public by looking like federal or state law enforcement agency insignias); MONT. ADMIN. R. 24.182.407(1) (West 2021) (private security badges must not display a word like “police” or wear patches indicating association with the state); TENN. CODE ANN. § 62-35-127 (West 2021) (prohibiting badges or insignias worn by security guards that are similar to state law enforcement agencies).

181. *See* ARK. CODE ANN. § 5-37-208 (West 2021) (criminalizing impersonation of an officer when displaying a badge by which an officer is lawfully distinguished); NEV. REV. STAT. ANN. § 199.430 (West 2021) (criminalizing impersonation of an officer when unlawfully assuming the badge of an officer); N.M. STAT. ANN. § 29-2-14 (West 2021) (those who impersonate an officer by use of a badge commit a petty misdemeanor); TEX. PENAL CODE ANN. § 37.12 (West 2021) (criminalizing false identification of an officer when possessing a badge bearing the insignia of a law enforcement officer).

182. *See, e.g., United States v. Chappell*, 691 F.3d 388, 399–400 (4th Cir. 2012).

Amendment.¹⁸³ The defendant, who was formerly employed as a police officer, used his driver's license photo depicting him in a police uniform to get out of a traffic ticket.¹⁸⁴ The defendant was convicted under the anti-impersonation statute.¹⁸⁵ The court found the statute was consistent with the First Amendment, acknowledging that the police carry the "oppressive potential . . . [to] curtail[] . . . liberty" and their identity should not be appropriated by unauthorized individuals to exercise that power over others.¹⁸⁶ Police impersonation statutes further a "compelling" interest of promoting public safety, and overturning them would allow "an untold flock of faux policemen."¹⁸⁷ While the *Chappell* court did not discuss whether the defendant was pictured wearing a badge in the photo, the court's holding indicates that the use of uniforms carries great influence in the public's ability to identify who possesses the power of the state, and states have a lawful interest in preventing imposters.¹⁸⁸

4. States Requiring Identification by Body Cam Legislation or Local Ordinances

Some states recognize badges as an important part of a uniform. Illinois, for example, passed body camera legislation requiring the cameras be turned on "at all times" when police officers are in uniform.¹⁸⁹ "Uniform" is defined as wearing, among other things, a badge which includes the officer's identification number.¹⁹⁰

Beyond state-wide legislation, countless local ordinances and department policies require badge-wearing or other identification methods.¹⁹¹ For example, New York City passed the Right to Know Act in 2017 which requires police officers to furnish business cards with identifying information whenever they stop or search an

183. *See id.*

184. *Id.* at 391.

185. *Id.*

186. *Id.* at 399–400 (alteration in original).

187. *Id.* at 399.

188. *See id.* at 399–400.

189. 50 ILL. COMP. STAT. ANN. § 706/10-20(a)(3) (West 2021).

190. *Id.* § 706/10-10.

191. *See, e.g.,* Brown & Saunders, *supra* note 132; Brian Palmer, *Do Police Officers Have to Identify Themselves?*, SLATE (July 22, 2009, 5:07 PM), <https://slate.com/news-and-politics/2009/07/a-henry-louis-gates-jrexplainer-roundup.html> [<https://perma.cc/5MMT-A5A7>].

individual suspected of a crime who is ultimately not arrested.¹⁹² In Cheyenne, Wyoming, reserve officers are required to wear badges by local ordinance.¹⁹³ Local police departments, such as ones in Minnesota¹⁹⁴ and Alaska,¹⁹⁵ have policies requiring officers to wear badges as well.

At least twenty-nine states and D.C. recognize the role proper identification of law enforcement plays in public life, whether by requiring officers to wear or carry identification, seeking to prevent misappropriation of identity by imposters, in bodycam legislation, or in local ordinances and policies.¹⁹⁶ These actions by the states demonstrate that badges are associated with state power and serve to place the public on notice that an agent of the state is present, whether it be for a citizen's protection or the exercise of state power to arrest or detain.¹⁹⁷ Identification keeps officers accountable if they commit an act of abuse.¹⁹⁸ States have taken broad action recognizing the power and potential for abuse of state insignias, and Congress should follow suit by removing the "civil disturbance" limitation.¹⁹⁹

B. International Organizations

In addition to the home front, the federal government can look to international organizations.²⁰⁰ The United Nations has issued guidance for law enforcement to comply with human rights practices.²⁰¹ In addition, the United Nations General Assembly

192. Ashley Southall, *Right to Know Is Now the Law. Here's What That Means.*, N.Y. TIMES (Oct. 19, 2018), <https://www.nytimes.com/2018/10/19/nyregion/right-to-know-act-nypd.html> [<https://perma.cc/G2GB-CNJ8>].

193. CHEYENNE, WYO., CODE § 2.28.090 (2001) (requiring badges to be used to identify reserve officers).

194. MINNEAPOLIS POLICE DEP'T, POL'Y & PROC. MANUAL § 3-116 (2021), <https://www.minneapolismn.gov/media/-www-content-assets/documents/MPD-Policy-and-Procedure-Manual.pdf> [<https://perma.cc/4T56-6H9F>].

195. ALASKA DEP'T OF PUB. SAFETY, OPERATING PROC. MANUAL § 124.320 (2021), https://dps.alaska.gov/AST/PIO/CompleteOPM_Redacted.pdf [<https://perma.cc/BY27-ERFU>]. The manual details the different types of uniforms, with most listing a badge as part of the required uniform. *Id.* §§ 102.360(A)(1), 102.360(D)(1), 102.370(B), 102.380(F)(5), 102.390(A)(1)–(2), 102.390 (B)(3).

196. *See supra* text accompanying notes 160–95.

197. *See supra* Sections VI.A.1–3.

198. *See* discussion *infra* Section VI.B.

199. *See supra* Sections VI.A.1–3.

200. *See* sources cited *infra* notes 205–17 and accompanying text.

201. OFF. OF THE U.N. HIGH COMM'R FOR HUM. RTS., HUMAN RIGHTS AND LAW ENFORCEMENT, A TRAINER'S GUIDE ON HUMAN RIGHTS FOR THE POLICE 78 (2002), <https://www.un.org/ruleoflaw/files/training5Add2en.pdf> [<https://perma.cc/SD67->

passed resolutions indicating law enforcement officers should be identifiable.²⁰² A primary goal in requiring identification is to ensure accountability of law enforcement to their superiors.²⁰³ The position of the United Nations provides another compelling reason for the United States to expand legislation requiring federal agents to wear identification in situations beyond civil disturbances.²⁰⁴

The United Nations Office of the High Commissioner of Human Rights published a training guide on human rights and the police.²⁰⁵ One of the stated objectives is “[t]o provide information on international human rights standards relevant to the work of police.”²⁰⁶ In a chapter on transparency, the manual describes practices that are consistent with the international standards of treatment of arrested citizens by detention officers.²⁰⁷ The model practices require all officers to “[w]ear clearly visible identity badges at all times,” so any violations may be reported to a supervising officer.²⁰⁸ While these standards are given in the context of prison officials, the theory that law enforcement remains accountable to the individuals the state has detained is consistent with requiring general identification.²⁰⁹

In 1990, delegates of the United Nations convened in Havana as the Eighth Congress on the Prevention of Crime to agree to basic principles on when and how law enforcement officials should use force.²¹⁰ The congress passed a resolution and presented it to the General Assembly, which adopted it.²¹¹ The principles require

ESPY] [hereinafter HUMAN RIGHTS GUIDE] (“Wear a clearly visible identity badge at all times.”).

202. OFF. OF THE U.N. HIGH COMM’R FOR HUM. RTS., BASIC PRINCIPLES ON THE USE OF FORCE AND FIREARMS BY LAW ENFORCEMENT OFFICIALS 2 (Sept. 7, 1990), <https://www.ohchr.org/Documents/ProfessionalInterest/firearms.pdf> [hereinafter LAW ENFORCEMENT BASIC PRINCIPLES].

203. *Id.* ¶ 24 (“[L]aw enforcement agencies shall ensure that superior officers are held responsible if they know . . . that law enforcement officials under their command are resorting . . . to the unlawful use of force and firearms . . .”); HUMAN RIGHTS GUIDE, *supra* note 201, at 79 (“Require all detention officers to wear clearly visible identity badges to facilitate accurate reporting of violations.”).

204. *See infra* notes 205–17 and accompanying text.

205. *See* HUMAN RIGHTS GUIDE, *supra* note 201.

206. *Id.* at 1.

207. *Id.* at 77–78.

208. *Id.* at 78–79.

209. *See id.*

210. *See* LAW ENFORCEMENT BASIC PRINCIPLES, *supra* note 202, ¶ 1.

211. G.A. Res. 45/121, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, ¶ 3 (Dec. 14, 1990) (“Welcomes the instruments and resolutions adopted by the Eighth Congress, and invites Governments to be guided by

violations of use of force measures to be reported to superior officers and demand the government hold superior officers responsible for the actions of those they supervise.²¹² The accountability requirement raises a key practical question: how can law enforcement agents be held accountable to their superiors if the citizenry cannot identify those officers?²¹³

The guidance presumes identification is possible for reporting; but, if occurrences such as the one that happened to Pettibone are repeated outside a response to a civil disturbance, citizens will be unable to identify law enforcement agents who act unlawfully.²¹⁴ Unidentified officers cannot be held accountable to their superiors or through the judicial process.²¹⁵ Requiring identification of federal officers also reaffirms the central tenets of democracy that the United States has always stood for on the international stage.²¹⁶ The United States has been part of the General Assembly since its inception and would disrespect the body and their senior status by ignoring central human rights principles.²¹⁷

VII. DEPARTMENT OF JUSTICE SUPPORTS GENERAL IDENTIFICATION OF LAW ENFORCEMENT

After a police officer shot Michael Brown, an 18-year-old black man, in Ferguson, Missouri, the Department of Justice (DOJ) conducted a civil rights investigation of the Ferguson Police

them in the formulation of appropriate legislation and policy directives and to make efforts to implement the principles contained in them”) (emphasis omitted).

212. See LAW ENFORCEMENT BASIC PRINCIPLES, *supra* note 202, ¶ 24.

213. See *id.*

214. See *id.*; Levinson & Wilson, *supra* note 2; NDAA, *supra* note 19, § 723(a).

215. See LAW ENFORCEMENT BASIC PRINCIPLES, *supra* note 199, ¶ 24.

216. Compare *id.*, ¶10 (ensuring officers are held responsible for the unlawful use of firearms), with Vitaly Shevchenko, “Little Green Men” or “Russian Invaders”?, BBC (Mar. 11, 2014), <https://www.bbc.com/news/world-europe-26532154> [<https://perma.cc/5UWP-5LK6>] (describing accountability challenges stemming from unidentified law enforcement during the Ukrainian crisis of 2014).

217. See Celine Van den Rul, *Why Have Resolutions of the UN General Assembly if They Are Not Legally Binding?*, E-INT’L RELS. (July 16, 2016), <https://www.e-ir.info/2016/06/16/why-have-resolutions-of-the-un-general-assembly-if-they-are-not-legally-binding/> [<https://perma.cc/5CGQ-YMXE>]; UNITED NATIONS, GROWTH IN UNITED NATIONS MEMBERSHIP, <https://www.un.org/en/about-us/growth-in-un-membership> [<https://perma.cc/683Z-SP92>] (last visited Mar. 6, 2021); LAW ENFORCEMENT BASIC PRINCIPLES, *supra* note 202, ¶ 24; HUMAN RIGHTS GUIDE, *supra* note 201, at 16.

Department.²¹⁸ The DOJ published a scathing report criticizing the police department's practices and sent a letter giving reasons why local police should wear nameplates.²¹⁹ A critical part of the letter states:

Officers wearing name plates while in uniform is a basic component of transparency and accountability. It is a near-universal requirement of sound policing practices and required under some state laws. Allowing officers to remain anonymous when they interact with the public contributes to mistrust and undermines accountability. The failure to wear name plates conveys a message to community members that, through anonymity, officers may seek to act with impunity. Further, the lack of name plates makes it difficult or impossible for members of the public to identify officers if they engage in misconduct, or for police departments to hold them accountable.²²⁰

The letter also encourages the department to enforce the provisions of the uniform policy, which requires nameplates.²²¹ In addition to this letter and the report, the United States and the City of Ferguson signed a consent decree where the city agreed to "require all [Ferguson Police Department] officers to wear nameplates or nametags as part of the standard uniform" so the public can identify the officers when they interact.²²²

218. See Matt Apuzzo, *Ferguson Police Routinely Violate Rights of Blacks*, *Justice Dept. Finds*, N.Y. TIMES (Mar. 3, 2015), <https://www.nytimes.com/2015/03/04/us/justice-department-finds-pattern-of-police-bias-and-excessive-force-in-ferguson.html> [<https://perma.cc/F873-K7SF>].

219. See Press Release, Dep't of Just., Just. Dep't Announces Findings of Two C.R. Investigations in Ferguson, Missouri (Mar. 4, 2015), <https://www.justice.gov/opa/pr/justice-department-announces-findings-two-civil-rights-investigations-ferguson-missouri> [<https://perma.cc/EQM7-3KUD>]; U.S. DEP'T OF JUST., C.R. DIV., INVESTIGATION OF FERGUSON POLICE DEPARTMENT (2015) https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [<https://perma.cc/4USP-9C66>]; Letter from Christy E. Lopez, Deputy Chief, U.S. Dep't of Just., to Thomas Jackson, Police Chief, City of Ferguson (Sept. 23, 2014), https://www.justice.gov/sites/default/files/crt/legacy/2014/11/04/ferguson_ltr_nameplates_9-23-14.pdf [<https://perma.cc/YT28-MNT7>].

220. Letter from Christy E. Lopez to Thomas Jackson, *supra* note 219.

221. *Id.*; see also Ferguson, Mo., Ordinance 214.02(C)(13) (Jan. 13, 2012), <http://www.fergusoncity.com/DocumentCenter/View/2230/Ferguson-Police-Department-General-Orders-?bidId=> [<https://perma.cc/L4YH-QU8A>].

222. Consent Decree at 90, *United States v. City of Ferguson*, No. 4:16-cv-000180-CDP (E.D. Mo. Mar. 17, 2016) ("The City will require all FPD officers to wear nameplates

Why should the reasons given for requiring local police to wear a nameplate not apply with equal force to federal officers? Why should the requirements only apply in response to civil disturbances?²²³ Transparency, the dangers of anonymity and undermining public trust, and disciplining misconduct are all important when policing the public in any capacity, whether federal or local.²²⁴ The City of Ferguson formally agreed, on the DOJ's insistence, to require officers to wear identification to increase accountability and foster public trust.²²⁵ These same steps should be taken by federal law enforcement agents when they are called upon to perform a police function. The DOJ should require federal officers to do what it demanded of local law enforcement.²²⁶

VII. CONCLUSION

There is ample support for why legislation requiring federal law enforcement to wear identification should be extended to cover any instance of federal officers policing the public. State laws and international human rights guidance indicate the need for accountability and care in ensuring state agents, such as police officers, are properly identified to the public.²²⁷ The Department of Justice investigation and response to the Ferguson Police Department corroborates this stance while emphasizing the need to build public trust and transparency.²²⁸ In addition, expanding the law would be an essential step the Legislature can take to protect constitutional rights.²²⁹ If Congress does not take action, courts can construe the statute's "respond" language broadly to require federal troops to wear identification whenever they are deployed in connection with "violent occurrences."²³⁰ If Congress wants to take control over the law and not leave it for the courts to interpret, potentially leaving

or nametags as part of the standard uniform that will allow members of the public to identify officers with whom they interact.").

223. See Letter from Christy E. Lopez to Thomas Jackson, *supra* note 219; NDAA, *supra* note 19, § 723(a).

224. See Letter from Christy E. Lopez to Thomas Jackson, *supra* note 219.

225. See Consent Decree, *supra* note 222, at 90.

226. See Letter from Christy E. Lopez to Thomas Jackson, *supra* note 219; see, e.g., Apuzzo, *supra* note 218; Burch et al., *supra* note 84.

227. See *supra* Part VI.

228. See *supra* Part VII.

229. See *supra* Part V.

230. See *supra* Part III.

citizens vulnerable, it must take immediate action to expand the reach of the law beyond civil disturbances.²³¹

This law was certainly needed in the wake of the Black Lives Matter protests calling for police accountability.²³² Requiring federal agents who are called in to assist with civil disturbances to wear identification was a victory for the American people and certainly will protect Americans asserting their rights during tense assemblies.²³³ However, Congress must go further by requiring federal law enforcement to identify themselves when they publicly perform policing tasks, including exercising the power to arrest and detain, to prevent abuses of state power outside civil disturbances.²³⁴ Extending the law is an essential step the Legislature has already embarked upon and is necessary to keep the government accountable to the American people.²³⁵

231. *See supra* Part III.; NDAA, *supra* note 19, § 723(a).

232. *See* Wehle & Gehret, *supra* note 32.

233. *See id.*

234. *See supra* Part III.

235. *See supra* Part VII.