Unmarked Agents, Accountability, and the Anti-Commandeering Doctrine

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Nicholas Almendares

The Trump Administration recently deployed federal agents to Portland, Oregon in response to ongoing protests. Notably, these agents wore camouflage and drove unmarked cars instead of uniforms and vehicles that would clearly identify their agency affiliation and whose authority they act under. The administration also deployed officers in riot gear lacking agency identification to the nation’s capital in June.

Critics argue that these actions represent authoritarian tactics, encourage the use excessive force, and overstep the statutory and constitutional powers of the federal government. They sparked another wave of protests in response throughout the country. Here, I want to sketch an argument relating to the recent events in Portland that is different from those criticisms in two ways. First, it situates these actions in relation to the anti-commandeering doctrine, a legal consideration that has received little attention in this context. Second, it focuses squarely on the fact that these federal agents did not make their affiliation plain. If, for instance, federal law enforcement used excessive force in Portland, that would be unlawful regardless of what uniforms they wore or their identifying markings. Here I want to concentrate on the distinct issue of these federal agents being “unmarked,” and the ways in which these unmarked agents challenge the policy of government accountability that is the basis of the anti-commandeering doctrine.

The anti-commandeering doctrine, articulated most famously in New York v. United States and Printz v. United States, forbids the federal government from “dragooning” state agents into enforcing federal programs and mandates. In Printz, for example, the Supreme Court struck down a background check provision in a federal gun law because state officials would be enforcing it. These major anti-commandeering cases can be immediately distinguished from the events in Oregon, because the personnel involved are all federal. No state agents have been impressed into service. But the anti-commandeering doctrine is based on a theory of political accountability, which is undermined by these unmarked federal agents. Thus, while there is no formal commandeering happening, the federal government’s use of unmarked agents creates exactly the kind of confusion in the lines of political accountability that the anti-commandeering doctrine is designed to prevent. In other words, the theory behind anti-commandeering is at odds with the federal government’s use of agents
with such ambiguous affiliation.

Justice Scalia, writing for the Supreme Court in *Printz*, explained the theory behind anti-commandeering this way:

> . . . even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects. . . . Under the present law, for example, it will be the [state law enforcement officer] and not some federal official who stands between the gun purchaser and immediate possession of his gun. And it will likely be [that state officer], not some federal official, who will be blamed for any error (even one in the designated federal database) that causes a purchaser to be mistakenly rejected.

The problem with the federal government commandeering state officials is that the state will take the blame for a program it had no hand in enacting. Commandeering muddies the lines of political accountability. And it does so on the ground, in real time, when the law actually touches people's lives. The gun purchaser in *Printz*, or whatever other relevant person, will mistakenly ascribe responsibility to the state, not the federal government, for the policy.

What does all this have to do with Portland, Washington DC, and possibly elsewhere? The key problem with commandeering is that it makes it difficult to know who is responsible. Federal officers with hidden affiliations create the same difficulties that decided the case in *Printz*—without knowing the agents' affiliation, we cannot know whether to hold the state or the federal government accountable.

Some might counter that protestors probably know that these are federal agents despite the lack of clear identifying markings on their uniforms: there has been extensive media coverage of the federal government's presence in Portland, protestors are politically-engaged, and local authorities have denounced the federal government's actions. The same can be said in *Printz*, though. There, the Court struck down the Brady Act, which involved paperwork for the transfer of handguns. Firearms, especially handguns, are heavily regulated, so the people affected by the law would likely understand Congress’s role in creating further regulation. Furthermore, state officers would have ample opportunity—and ample incentive—to explain the situation. The situation in *Printz* was a far cry from tense interactions on the street between protestors and the police. If the Court is worried about confused chains of accountability in a context like *Printz*, then it should be all the more concerned with unmarked federal agents responding to protests.

There is something formalistic, even kabuki-like about the anti-commandeering doctrine, then: It safeguards clear lines of political accountability even when the people involved understand the situation, i.e., when everyone involved is unlikely to be confused. Indeed, the Supreme Court wholly embraced this; to a majority of the Court this was a feature, not a bug. This aspect of the doctrine has been subjected to extensive criticism, including some of my own arguments in another context.

But there are reasons for thinking that the political accountability rationale is more plausible here—that is, it might make more sense in this context than in the actual case law. First, the federal government seems to be deliberately trying to blur the lines of accountability. Ambiguous uniforms and unmarked cars are unusual, and the Justice Department itself has argued in court that law enforcement personnel should be easy to identify. Second, there is reason to believe that on the street, in the present moment, the vague camouflaged
uniforms create confusion because they closely resemble the dress of increasingly common private militia groups. Third, as mentioned above, these are tense, abrupt interactions between the government and the public colored by the use or threat of official force. The luxury of carefully explaining the lines of accountability does not exist in these instances, especially if it is not entirely clear whether the people involved are even government agents at all.

It bears reiterating that none of this is a direct application of the anti-commandeering case law, as no state personnel were conscripted in Portland. Moreover, there is no general requirement that federal law enforcement officers disclose their affiliation. Yet the arguments underpinning the anti-commandeering case law indicate that government actors tasked with law enforcement, or with simply interacting with the public, should clearly present their affiliation, especially if there is bound to be some confusion.

We could go further and develop a theory of “departmental anti-commandeering.” The anti-commandeering doctrine directly addresses the fundamental distinction between state and federal governments. Yet if enabling political accountability is the lodestar of the doctrine, then it is often important to go beyond a mere federal/state distinction and enable citizens to identify which part of the government they are interacting with. Congress has a variety of ways to hold agencies accountable, including hearings and budgeting authority, but in order to effectively utilize these mechanisms, Congress has to know which agency to address. The federal agents in Portland reportedly came from a variety of disparate agencies, ranging from Customs and Border Protection to the Transportation Security Administration to the Coast Guard. Further, in order for voters to encourage their representatives to hold federal agencies accountable, which has long been a prized form of constituent service, voters must also be able to identify the agencies that should be monitored. Simply identifying the agents as federal would enable voters to take the government’s actions into account going into a presidential election. They would at least know what level of government to criticize, the main point of Printz. But confining political accountability to something that happens once every four years, and which loses much of its bite in the second term, is an impoverished view. Moreover, and though less immediately relevant, there is also the possibility that the agencies in question could be insulated from presidential control, meaning that voters would need some other way to hold them accountable other than presidential elections.

The anti-commandeering doctrine is one of several doctrines designed to foster political, and ultimately, democratic accountability. Accountability works best, is most effective, when we know precisely who we are dealing with. Arguably, that is what the anti-commandeering doctrine is really about.

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