

## NOTES

### THE POLITICAL AND SOCIAL CHANGE DRIVEN BY PROTEST: THE NEED TO REFORM THE ANTI-RIOT ACT AND EXAMINE ANTI-RIOT PROVISIONS

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*The right to join in peaceful assembly and petition is critical to an effective democracy and is at the core of the First Amendment. The assault of peaceful protestors in the pursuit of racial justice is not a new phenomenon, and legislators at the federal and state levels have drafted anti-riot provisions as a measure to target protestors they deem an existential threat to American society. As these provisions have become increasingly prevalent in light of the protests following the murders of Breonna Taylor and George Floyd, they have the likelihood of severely chilling the effect on protestors' right to freedom of expression.*

*This Note examines these effects, considering the Anti-Riot Act of 1968's intent to protect the public from violent protestors and, in light of congressional inaction due to ongoing political polarization, asks whether presidential intervention is warranted. More specifically, this Note determines whether the Act's current interpretation meets Congress's intent or subverts the constitutional right to freedom of expression. This Note contends that while persuasive arguments exist both in support for harsher anti-riot provisions and for a novel approach to address public safety, these arguments tend to rely on anecdotal evidence due to the limited scholarship on this topic. Therefore, this Note argues that the president should establish a commission to comprehensively investigate the recent outbreaks of racially motivated protests before potentially moving forward with executive action.*

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#### INTRODUCTION

“At this point it’s bigger than Breonna, it’s bigger than just Black Lives.”<sup>1</sup> In the spring and summer of 2020, two events were a catalyst for change that erupted into wide-scale demonstrations across the nation.<sup>2</sup> In March 2020, Breonna Taylor and Kenneth Walker were asleep in their bed when plainclothes police officers in Louisville, Kentucky executed a no-knock warrant on Ms. Taylor’s apartment.<sup>3</sup> The warrant was approved based on an investigation into Jamarcus Glover, who the police believed was utilizing her residence as a means to receive packages of drugs.<sup>4</sup> Shortly after midnight, the officers forcefully entered Ms. Taylor’s apartment without warning.<sup>5</sup> Mr.

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1. Richard A. Oppel Jr. et al., *What to Know About Breonna Taylor’s Death*, N.Y. TIMES (Apr. 26, 2021), <https://www.nytimes.com/article/breonna-taylor-police.html> [<https://perma.cc/BZA3-FFSS>]; see 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> [<https://perma.cc/629D-QVS7>]; Patrisse Cullors, *‘Black Lives Matter’ Is About More than the Police*, ACLU (June 23, 2020), <https://www.aclu.org/news/criminal-law-reform/black-lives-matter-is-about-more-than-the-police/> [<https://perma.cc/857G-ZLH7>].

2. See Oppel Jr. et al., *supra* note 1.

3. *Id.*; *Breonna Taylor: What Happened on the Night of Her Death?*, BBC (Oct. 8, 2020), <https://www.bbc.com/news/world-us-canada-54210448> [<https://perma.cc/9CVA-BG4D>].

4. See Oppel Jr. et al., *supra* note 1.

5. Anna North & Fabiola Cineas, *The Police Shooting Death of Breonna Taylor, Explained*, VOX (July 13, 2020, 12:36 PM), <https://www.vox.com/2020/5/13/21257457/breonna-taylor-louisville-shooting-ahmaud-arbery-justiceforbreonna> [<https://perma.cc/VDU2-K9MN>]; see Piper Hudspeth Blackburn, *Breonna Taylor’s Death: A Push to Limit No-Knock Warrants*, AP NEWS (Mar. 30, 2021), <https://apnews.com/>

Walker fired his gun believing that intruders entered, striking one of the police officers.<sup>6</sup> In response, the three officers leading the raid indiscriminately fired numerous bullets into the apartment, with stray bullets entering a neighboring apartment.<sup>7</sup> Afterward, Mr. Walker realized that Ms. Taylor was struck five times while still in her bed, and she ultimately died from her wounds.<sup>8</sup> Despite the foreseeable outrage over Ms. Taylor's death, no national response followed until an online campaign began over social media with the hashtag “#SayHerName,” demanding that the officers be held accountable for their actions.<sup>9</sup>

On May 25, 2020, George Floyd, a Black man, was arrested by Derek Chauvin, a Minneapolis police officer, for allegedly buying cigarettes with a counterfeit twenty-dollar bill.<sup>10</sup> After arresting Mr. Floyd, Officer Chauvin reported that Mr. Floyd was not complying with another officer's commands, so he detained Mr. Floyd on the street with his knee on Mr. Floyd's neck.<sup>11</sup> Officer Chauvin pinned his knee on Mr. Floyd's neck for nearly nine minutes, during which Mr. Floyd repeatedly pleaded that he could not breathe, before eventually losing consciousness and dying.<sup>12</sup> In contrast to Ms. Taylor's murder,<sup>13</sup> this fatal incident was captured on video by local witnesses and immediately broadcasted across all major national and global news networks.<sup>14</sup> The effect from this concerted media presence instantly

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article/breonna-taylor-shootings-police-legislation-police-brutality-c7f765369c398583fe48dc6dba945d14 [https://perma.cc/AN7Y-F4TS].

6. North & Cineas, *supra* note 5; see Tessa Duvall & Darcy Costello, *Louisville Police Pursued 'No-Knock' Search Warrant*, LOUISVILLE COURIER J. (Jan. 22, 2021, 8:19 PM), <https://www.courier-journal.com/story/news/2020/05/12/breonna-taylor-louisville-emt-not-main-target-drug-investigation/3115928001/> [https://perma.cc/D5KC-A3BL].

7. See Oppel Jr. et al., *supra* note 1.

8. *Id.*

9. See Christina Carrega & Sabina Ghebremedhin, *Timeline: Inside the Investigation of Breonna Taylor's Killing and Its Aftermath*, ABC NEWS (Nov. 17, 2020, 2:31 PM), <https://abcnews.go.com/US/timeline-inside-investigation-breonna-taylors-killing-aftermath/story?id=71217247> [https://perma.cc/43UY-R6BG]; Melissa Brown & Rashawn Ray, *Breonna Taylor, Police Brutality, and the Importance of #SayHerName*, BROOKINGS INST. (Sept. 25, 2020), <https://www.brookings.edu/blog/how-we-rise/2020/09/25/breonna-taylor-police-brutality-and-the-importance-of-sayhername/> [https://perma.cc/MY3Y-AMZ3]; *Breonna Taylor: Protesters Call on People to 'Say Her Name,'* BBC (June 7, 2020), <https://www.bbc.com/news/world-us-canada-52956167> [https://perma.cc/X6GV-BNQS].

10. See Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (Jan. 24, 2022), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> [https://perma.cc/72VG-BC3K]; Bill Chappell, *Cashier Says He Offered to Pay After Realizing Floyd's \$20 Bill Was Fake*, NPR (Mar. 31, 2021, 12:46 PM), <https://www.npr.org/sections/trial-over-killing-of-george-floyd/2021/03/31/983089623/watch-live-cashier-says-he-offered-to-pay-after-realizing-floyds-20-bill-was-fake> [https://perma.cc/FX3A-YCT8]; Luis Andres Henao et al., *For George Floyd, A Complicated Life and Consequential Death*, AP NEWS (Apr. 20, 2021), <https://apnews.com/article/george-floyd-profile-66163bbd94239afa16d706bd6479c613> [https://perma.cc/6WN8-M85G].

11. See Hill et al., *supra* note 10.

12. *Id.*

13. See Oppel Jr. et al., *supra* note 1 (noting that no body cameras were used by the police officers during the raid).

14. *Id.*

advanced the narrative on racial inequality and the lack of police accountability that impacts the Black community.<sup>15</sup>

On May 26, 2020, hundreds of protestors flooded the Minneapolis streets calling for justice.<sup>16</sup> The next day, protests erupted in cities across the country, where demonstrators called for justice after the consistent murders by police officers and vigilantes, such as the murder of Ahmaud Arbery in Georgia.<sup>17</sup> On May 28, 2020, Minnesota Governor Tim Walz activated thousands of National Guard troops to respond to acts of vandalism and fires that broke out during the demonstrations.<sup>18</sup> Governor Walz stated that vandalism befalling Minneapolis “is about attacking civil society, [and] instilling fear.”<sup>19</sup>

As protests spread across the country, state governments responded with a comparatively high degree of force.<sup>20</sup> Police officers, augmented with military equipment and full riot gear, descended on cities, oftentimes deploying threatening tactics to disperse the crowds.<sup>21</sup> In Memphis, officers dressed in riot gear emerged on horseback and positioned military vehicles to restrict protestors.<sup>22</sup> In Los Angeles, a citywide tactical alert was issued, with helicopters circling over the protestors to provide crowd control.<sup>23</sup> In Georgia, Governor Brian Kemp declared a state of emergency and activated nearly 500 National Guard troops to respond to the hundreds of demonstrators flooding the streets of Atlanta.<sup>24</sup> At the same time, conservative armed militia groups, anti-vaccination groups, and other

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15. See Kim Parker et al., *Amid Protests, Majorities Across Racial and Ethnic Groups Express Support for the Black Lives Matter Movement*, PEW RSCH. CTR. (June 12, 2020), <https://www.pewresearch.org/social-trends/2020/06/12/amid-protests-majorities-across-racial-and-ethnic-groups-express-support-for-the-black-lives-matter-movement/> [https://perma.cc/2KYB-RT52] (finding that “[m]ost Americans say they’ve had conversations about race or racial equality” as a reaction to Floyd’s death); see *infra* Part II.B.

16. *Timeline: Death of George Floyd, Reactions and Protests*, FOX 9 (May 27, 2020, 9:42 PM), <https://www.fox9.com/news/timeline-death-of-george-floyd-reactions-and-protests> [https://perma.cc/6Z9K-QMT3].

17. Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (Nov. 5, 2021), <https://www.nytimes.com/article/george-floyd-protests-timeline.html> [https://perma.cc/HV4R-ZD9S].

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* (acknowledging police officers utilizing tear gas, pepper spray, flash-bangs, rubber bullets, and beanbag rounds).

22. Desiree Stennett et al., *Memphis Protests: Demonstrators Confront Law Enforcement Throughout Sunday Night*, MEMPHIS COM. APPEAL (June 1, 2020, 8:51 AM), <https://www.commercialappeal.com/story/news/2020/05/31/george-floyd-memphis-protests-may-31/5283558002/> [https://perma.cc/3YKB-R49R].

23. Matthew Ormseth et al., *Protesters, Law Enforcement Clash in Downtown L.A. During Protest over George Floyd’s Death*, L.A. TIMES (Nov. 5, 2021, 10:06 PM), <https://www.latimes.com/california/story/2020-05-27/protestors-block-the-101-freeway> [https://perma.cc/8KE7-HXD4].

24. Richard Fausset & Michael Levenson, *Atlanta Protesters Clash with Police as Mayor Warns ‘You Are Disgracing Our City,’* N.Y. TIMES (May 29, 2020), <https://www.nytimes.com/2020/05/29/us/atlanta-protest-cnn-george-floyd.html> [https://perma.cc/JW43-2FY6].

elements of the radical right organized nationwide protests opposing COVID-19 restrictions<sup>25</sup> and were met with a comparatively mild response from police.<sup>26</sup>

The federal government's response to the Breonna Taylor and George Floyd protests was fragmented. As the protests intensified, then President Donald Trump threatened to deploy military troops, but this action was thwarted by his senior advisors since this level of federal intervention has "rarely [been] seen in modern American history."<sup>27</sup> Instead, President Trump signed an executive order to "ensure domestic tranquility" and to hold the alleged rioters from "left-wing extremists" groups, who had traveled across state lines, criminally liable for "promot[ing] their . . . violent agenda."<sup>28</sup> Moreover, Republican lawmakers in federal and state legislatures began amending current riot provisions and drafting new bills with the intent to target protestors advocating for policy changes related to discrimination and racially motivated violence.<sup>29</sup>

The institutional assault of peaceful protestors in the pursuit of racial justice is not a new phenomenon.<sup>30</sup> Marginalized communities continuously face systemic problems, and the ability to peacefully protest and promote activism is vital to "meaningfully address[ing] . . . [our nation's] . . . ills."<sup>31</sup> Though the destruction of property and looting should be condemned,

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25. See generally Michael Martina et al., *How Trump Allies Have Organized and Promoted Anti-Lockdown Protests*, REUTERS (Apr. 21, 2020, 7:56 PM), <https://www.reuters.com/article/us-health-coronavirus-trump-protests-idUSKCN2233ES> [<https://perma.cc/Q3TU-NWT7>]; Jason Wilson, *The Rightwing Groups Behind Wave of Protests Against Covid-19 Restrictions*, GUARDIAN (Apr. 17, 2020), <https://www.theguardian.com/world/2020/apr/17/far-right-coronavirus-protests-restrictions> [<https://perma.cc/62LX-MDU9>]; *Coronavirus Lockdown Protest: What's Behind the US Demonstrations?*, BBC (Apr. 21, 2020), <https://www.bbc.com/news/world-us-canada-52359100> [<https://perma.cc/RWP5-X8G8>]. See also Amanda Moreland et al., *Timing of State and Territorial COVID-19 Stay-at-Home Orders and Changes in Population Movement—United States, March 1–May 31, 2020*, 69 CDC MORBIDITY & MORTALITY WKLY. REP. 1198, 1198 (2020) (describing that "mandatory stay-at-home orders can help reduce activities associated with the spread of COVID-19, including population movement and close person-to-person contact outside the household").

26. See Li Zhou & Kainaz Amaria, *These Photos Capture the Stark Contrast in Police Response to the George Floyd Protests and the Anti-Lockdown Protests*, VOX (May 27, 2020, 4:50 PM), <https://www.vox.com/2020/5/27/21271811/george-floyd-protests-minneapolis-lockdown-protests> [<https://perma.cc/TMA4-TZPN>]; Aymann Ismail, *The Anti-Lockdown Protests Prove Police Know How to Treat Protesters Fairly*, SLATE (May 28, 2020, 7:38 PM), <https://slate.com/news-and-politics/2020/05/police-response-george-floyd-minneapolis-shutdowns.html> [<https://perma.cc/TRV9-MTH9>].

27. Darlene Superville et al., *Trump Threatens Military Force Against Protesters Nationwide*, AP NEWS (June 2, 2020), <https://apnews.com/article/mo-state-wire-in-state-wire-mi-state-wire-election-2020-virus-outbreak-a2797b342b4fc509e43f404817a56aa9> [<https://perma.cc/DHN7-83DR>].

28. Exec. Order No. 13,933, 85 Fed. Reg. 40,081 (June 26, 2020), *revoked by* Exec. Order No. 14,029, 85 Fed. Reg. 27,025 (May 14, 2021).

29. See *infra* Part II.B.

30. See Tasnim Motala, "Foreseeable Violence" & Black Lives Matter: How Mckesson Can Stifle a Movement, 73 STAN. L. REV. ONLINE 61, 64 (2020).

31. John E. Taylor, *Reflecting on the Death of George Floyd*, W. VA. LAW., Autumn 2020, at 8, 9.

protests can also be interpreted as a sign of the “fraying of our social contract.”<sup>32</sup>

Over fifty years before the murders of Ms. Taylor and Mr. Floyd, the country found itself in a similar period of social unrest due to prevalent societal inequalities in the communities of Black Americans, known as the “long, hot summer [of 1967].”<sup>33</sup> In response, President Lyndon B. Johnson established the Kerner Commission to investigate the eruption of protests across the nation.<sup>34</sup> The Kerner Commission concluded that “white society” was to blame for the riots.<sup>35</sup> This inference irritated President Johnson and infuriated members of Congress who wanted to blame the rioting and looting on “outside agitators.”<sup>36</sup> As President Johnson was striving to pass the Civil Rights Act of 1968,<sup>37</sup> the Kerner Report was cited regularly by members of Congress who were arguing against its accuracy and instead promoting a narrative that Black activists were the source of rioting emerging across the nation.<sup>38</sup> In response, the Anti-Riot Act<sup>39</sup> (the “Act”) was included in the Civil Rights Act of 1968 as a measure for federal authorities to target protestors they deemed an existential threat to American society.<sup>40</sup> The emerging dangers addressed by the Kerner Report, for example, dealt with revitalizing failed education, social services, and housing policies.<sup>41</sup> In contrast, the Act was a tool utilized in response to impending crises.<sup>42</sup> However, legislators have questioned the Act’s constitutionality after a noticeably rising tide of protesting across the nation.<sup>43</sup>

The parallels between then and now invite the question of whether another commission is necessary. The consideration is this: To what avail is another presidential commission warranted today given the failure of the Kerner Commission? Moreover, is addressing the Act’s racialized legislative history effective in developing a contemporary response to rioting?<sup>44</sup> Generally, the president’s ability to persuade Congress to support divisive initiatives—for example, on issues related to race—is dependent on substantial public

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32. *Id.*

33. See generally Kathleen Weldon, *The Long Hot Summer: Riots in 1967*, CORNELL UNIV. ROOPER CTR. (Aug. 28, 2017), <https://ropercenter.cornell.edu/blog/long-hot-summer-riots-1967> [<https://perma.cc/MS3B-J8Q3>].

34. See NAT’L ADVISORY COMM’N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1967) [hereinafter KERNER REPORT], <https://www.ojp.gov/ncjrs/virtual-library/abstracts/national-advisory-commission-civil-disorders-report> [<https://perma.cc/B5RK-R958>].

35. See *id.* at 5.

36. See Hugh Davis Graham, *The Ambiguous Legacy of American Presidential Commissions*, 7 PUB. HISTORIAN 5, 15–16 (1985); see also *infra* Part I.C.

37. Pub. L. No. 90-284, 82 Stat. 73 (codified as amended in scattered sections of the U.S.C.).

38. See *infra* notes 110–11 and accompanying text.

39. Civil Obedience Act of 1968, Pub. L. No. 90-284, tit. X, 82 Stat. 73, 90–92.

40. See discussion *infra* Part I.C.

41. See KERNER REPORT, *supra* note 34, at 11–14; see *infra* Part I.A.

42. See *infra* notes 114–17 and accompanying text.

43. See *infra* Part II.B.2.

44. See generally Recent Case, United States v. Miselis, 972 F.3d 518 (4th Cir. 2020), 134 HARV. L. REV. 2614 (2021).

support.<sup>45</sup> When evaluating commissions, the public balances whether significant recommendations can be implemented without creating the *appearance* of taking some vague action.<sup>46</sup>

On the other hand, although Congress can enact meaningful policy reform,<sup>47</sup> others argue that Congress's failure to follow the Kerner Commission's recommendations over fifty years ago, either due to "paralysis of analysis" or fear of political fallout, is still indicative of the response legislators would have today.<sup>48</sup> Yet, given these varying views on the federal government, the efficacy of presidential commissions should not be diminished, especially when political polarization has led to congressional inaction on drafting meaningful policy reform.<sup>49</sup> However, much of the issue stems from limited scholarship on this topic and a distorted view of how to reasonably prevent violent civil disturbances.<sup>50</sup>

In an effort to resolve these concerns, this Note examines whether the Act's impact deserves direct review by the president of the United States. More precisely, it seeks to determine whether the current interpretation of the Act meets Congress's intent when drafting the Act and whether this interpretation subverts the constitutional right to freedom of expression.

Part I examines the Kerner Commission, a key contextual investigation into the causes of race riots following the "long, hot summer of 1967"<sup>51</sup> that recommended necessary preventative measures to control future violent protests. Part I also reviews relevant legislative history to understand Congress's intent when it quickly passed the Act in 1968. Part II analyzes the varied interpretations of the Act across the three branches of the federal government. It considers the Act's effects on racially diverse protests and reviews arguments as to whether the Act is compatible with Congress's intended protections from violent protests. Finally, Part III contends that the executive branch would be the most effective branch to address this issue and proposes that the president should establish a commission to comprehensively investigate the recent outbreaks of racially motivated protests before potentially moving forward with executive action.

#### I. THE RESTRICTIONS ON PEACEFUL ASSEMBLY AND PETITION

The First Amendment to the U.S. Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."<sup>52</sup> The third, fourth, and fifth clauses of the First

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45. *See generally* Graham, *supra* note 36, at 22–25.

46. *See id.*

47. *See* U.S. CONST. art. I, § 1.

48. Patrick Dankwa John, *Reparations: 40 Acres and a Mule . . . With Interest*, CBA REC., July/Aug. 2021, at 35, 37.

49. *See infra* Part III.A.

50. *See infra* Part I.C.

51. Corinna Barrett Lain, *Countermajoritarian Hero or Zero?: Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1428 (2004).

52. U.S. CONST. amend. I.

Amendment are referred to as the Freedom of Speech Clause,<sup>53</sup> the Assembly Clause,<sup>54</sup> and the Petition Clause,<sup>55</sup> respectively.<sup>56</sup> The general proposition that the Freedom of Speech Clause, Assembly Clause, and Petition Clause are secured in the “freedom of expression,” has long been settled by the U.S. Supreme Court.<sup>57</sup> The Court has interpreted the constitutional guarantee of freedom of expression to be vital in protecting an “uninhibited debate on important political and social issues.”<sup>58</sup>

These rights are not absolute<sup>59</sup> and are subject to reasonable restriction as to time and place of exercise,<sup>60</sup> to safeguard public interest,<sup>61</sup> and ensure public safety and order.<sup>62</sup> Indeed, the Court’s finding that the Assembly Clause and Petition Clause encompass peaceful demonstrations<sup>63</sup> has led to interpretations of broad statutes aimed at preventing the incitement of violence and crime as placing necessary restrictions on upholding public peace.<sup>64</sup> However, the power to abridge these rights “must find its justification in a reasonable apprehension of danger to organized government.”<sup>65</sup> These rights may not be abridged because police and municipal authorities believe or are afraid that some “unpleasantness or . . . damage to property . . . might possibly occur.”<sup>66</sup>

In determining what constitutes actions likely to incite violence, the Supreme Court in *Brandenburg v. Ohio*<sup>67</sup> established a two-part test for evaluating inciteful speech that advocates the use of force or illegal activity.<sup>68</sup> This constraint on speech has led to a discussion as to whether this protection is constitutional as it specifically relates to the Act and whether there is a

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53. See *Moore v. City of Kilgore*, 877 F.2d 364, 370 (5th Cir. 1989).

54. See *Bourgeois v. Peters*, 387 F.3d 1303, 1311 (11th Cir. 2004).

55. See *Kottle v. Nw. Kidney Ctrs.*, 146 F.3d 1056, 1059 (9th Cir. 1998).

56. U.S. CONST. amend. I, cls. 3–5.

57. See *Nat’l Rev., Inc. v. Mann*, 140 S. Ct. 344, 346–47 (2019) (Alito, J., dissenting); *Snyder v. Phelps*, 562 U.S. 443, 451–52 (2011); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

58. See *Nat’l Rev., Inc.*, 140 S. Ct. at 346; *NAACP v. Button*, 371 U.S. 415, 429–31 (1963).

59. See *Am. Commc’ns Ass’n v. Douds*, 339 U.S. 382, 398–99 (1950).

60. See *Cox v. Louisiana*, 379 U.S. 559, 573 (1965).

61. *Cantwell v. Connecticut*, 310 U.S. 296, 305–06 (1940); *Frohwerk v. United States*, 249 U.S. 204, 206 (1919).

62. See *Cox*, 379 U.S. at 574.

63. *Id.*

64. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573–74 (1942).

65. *Herndon v. Lowry*, 301 U.S. 242, 258 (1937).

66. *U.S. Servicemen’s Fund v. Shands*, 440 F.2d 44, 46 (4th Cir. 1971).

67. 395 U.S. 444 (1969).

68. *Id.* at 447 (noting that the government may prohibit speech advocating the use of force or crime if such speech is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action”); see *infra* Part II.A.1.

“significant harm . . . worth preventing,”<sup>69</sup> since courts have found incitement-to-riot provisions constitutionally problematic.<sup>70</sup>

This part reviews the history of executive and legislative responses in combating violent civil disturbances following the civil rights movement in the 1960s. Part I.A discusses the formation and purpose of the Kerner Commission during the Johnson administration. Part I.B assesses the utility of a presidential commission. Part I.C then outlines the relevant legislative history of the Anti-Riot Act.

#### A. *The Kerner Commission Report*

During the summer of 1967, there was an outburst of riots involving “sustained and widespread looting and destruction of property” that took place in more than 150 cities.<sup>71</sup> This chaos eventually erupted in Newark, New Jersey and Detroit, Michigan and came to be known as the “long, hot summer of 1967,” during which Black Americans protested in response to abusive policing, the lack of access to decent housing, and a generational lack of economic mobility.<sup>72</sup> Many Americans blamed the riots on outside agitators or young Black men who were the most visible participants among the publicized groups.<sup>73</sup> An inaccurate coverage of the disturbances by the media led to millions of Americans incorrectly believing the disturbances were “uncontrolled and irrational spasms of reckless violence . . . [that were the] result of a breakdown of respect for authority.”<sup>74</sup> Moreover, pundits proposed that the imbalance between reality and impression resulted from conservatives and mainstream media outlets viewing such actions as a breakdown of respect for the law, while liberals saw the actions as resulting from unrest due to racism and economic disadvantages.<sup>75</sup>

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69. See Margot E. Kaminski, *Incitement to Riot in the Age of Flash Mobs*, 81 U. CIN. L. REV. 1, 36 (2012).

70. *Id.* at 10; see Marvin Zalman, *The Federal Anti-Riot Act and Political Crime: The Need for Criminal Law Theory*, 20 VILL. L. REV. 897, 921–24 (1975); Recent Case, *supra* note 44, at 2616–18.

71. See KERNER REPORT, *supra* note 34, at 15; Alice George, *The 1968 Kerner Commission Got It Right, but Nobody Listened*, SMITHSONIAN MAG. (Mar. 1, 2018), <https://www.smithsonianmag.com/smithsonian-institution/1968-kierner-commission-got-it-right-nobody-listened-180968318/> [<https://perma.cc/XWR9-PD7G>].

72. See KERNER REPORT, *supra* note 34, at 15–16; Clyde Haberman, *The 1968 Kerner Commission Report Still Echoes Across America*, N.Y. TIMES (Oct. 7, 2020), <https://www.nytimes.com/2020/06/23/us/kierner-commission-report.html> [<https://perma.cc/VZ8K-VJJV>]. See generally Steven M. Gillon, *Why the 1967 Kerner Report on Urban Riots Suppressed Its Own Expert Findings*, HIST. (Jan. 31, 2019), <https://www.history.com/news/race-riots-kierner-commission-findings-suppressed-lbj> [<https://perma.cc/7NKA-SK5B>].

73. See George, *supra* note 71.

74. See Gillon, *supra* note 72; see also KERNER REPORT, *supra* note 34, at 201–02.

75. See Gillon, *supra* note 72. See generally KERNER REPORT, *supra* note 34, at 202 (noting that millions of Americans formed incorrect impressions and judgments about the disorder in the summer of 1967 because the media sensationalized the disturbances and consistently overplayed violence).

Americans were alarmed with the staggering amount of protests occurring throughout the summer, and President Johnson undertook executive action.<sup>76</sup> On July 29, 1967, President Johnson issued Executive Order 11,365, establishing the National Advisory Commission on Civil Disorders<sup>77</sup> (“Kerner Commission”), for the purpose of exploring “the roots of the [civil] unrest and possible remedies.”<sup>78</sup> The commission was comprised of three groups: (1) researchers who gathered evidence and spoke with local leaders in the cities, (2) social scientists who handled the information and searched for patterns, and (3) eleven commissioners “who approved the final report.”<sup>79</sup> The eleven-member commission was directly appointed by President Johnson, led by Governor Otto Kerner of Illinois, and included two Black members: Senator Edward Brooke of Massachusetts, the only African American Senator, and Mr. Roy Wilkins, the executive director of the National Association for the Advancement of Colored People (NAACP).<sup>80</sup> To accurately examine President Johnson’s inquiries, the investigators visited a dozen cities<sup>81</sup> to interview hundreds of Black residents, activists, and community leaders to better understand the uneasy relations between Black communities and the police.<sup>82</sup> The research occurred over seven months, and the Kerner Commission’s final report, the Kerner Report, was completed and presented to President Johnson on March 1, 1968.<sup>83</sup> The Kerner Report was over 400 pages and included three parts: “What Happened?”<sup>84</sup>; “Why Did It Happen?”<sup>85</sup>; and “What Can Be Done?”<sup>86</sup>

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76. See KERNER REPORT, *supra* note 34, at 201–03.

77. Exec. Order No. 11,365, 32 Fed. Reg. 11,111 (Aug. 1, 1967).

78. Haberman, *supra* note 72.

79. See Gillon, *supra* note 72; see also KERNER REPORT, *supra* note 34, at 15–16.

80. KERNER REPORT, *supra* note 34, at 298–99.

81. The cities visited are: Tampa, Florida; Cincinnati, Ohio; Atlanta, Georgia; Newark, New Jersey; Elizabeth, New Jersey; Englewood, New Jersey; Jersey City, New Jersey; Plainfield, New Jersey; New Brunswick, New Jersey; and Detroit, Michigan. See KERNER REPORT, *supra* note 34, at 22–47.

82. *Id.*; Gwen Prowse & Vesla Mae Weaver, *How a 50-Year-Old Report Predicted America’s Current Racial Reckoning*, VOX (June 24, 2020, 10:40 AM), <https://www.vox.com/first-person/2020/6/24/21299649/george-floyd-protests-police-brutality-kerner-commission> [<https://perma.cc/997E-ZJPQ>]. See generally Haberman, *supra* note 72.

83. See Marcus Casey & Bradley Hardy, *50 Years After the Kerner Commission Report, the Nation Is Still Grappling with Many of the Same Issues*, BROOKINGS INST. (Sept. 25, 2018), <https://www.brookings.edu/blog/up-front/2018/09/25/50-years-after-the-kerner-commission-report-the-nation-is-still-grappling-with-many-of-the-same-issues/> [<https://perma.cc/K8KC-XKHK>].

84. KERNER REPORT, *supra* note 34, at 2–5 (containing accounts of the “disorders that took place during the summer of 1967 . . . indicat[ing] how the disorders happened, who participated in them, and how local officials, police forces, and the National Guard responded”).

85. *Id.* at 5–7 (focusing on the national scene, “from the particular events of the summer of 1967 to the factors within the society at large that created a mood of violence among many urban Negroes”).

86. *Id.* at 8–13 (establishing that “virtually every major episode of violence was foreshadowed by an accumulation of unresolved grievances and by widespread dissatisfaction among Negroes with the unwillingness or inability of local government to respond”).

The Kerner Report concluded that the “[n]ation is moving toward two societies, one black, one white—separate and unequal.”<sup>87</sup> The Kerner Commission argued that the legislative successes with the Civil Rights Act of 1964<sup>88</sup> and the Voting Rights Act of 1965<sup>89</sup> were not reflected in the daily lives of African Americans facing police misconduct, economic inequality, segregated housing, and inferior education.<sup>90</sup> It outlined and advocated for numerous responses to suppress the rioting, including “large-scale, targeted government investment in housing, education, and employment programs, and more robust social insurance programs.”<sup>91</sup>

Despite these warnings, scholars infer that President Johnson ultimately chose to ignore the Kerner Commission’s findings because it implied “that the Great Society programs [he engineered] had not made much of a dent in the urban and racial problem.”<sup>92</sup>

### *B. Competing Views on Presidential Commissions*

Scholars have argued whether presidential commissions are an effective mechanism for providing expert advice on public policy matters.<sup>93</sup> The success or impact of a commission has largely been measured by the president’s public support and clear policy proposals.<sup>94</sup> Furthermore, commissions allow presidents to “formulate innovative domestic policies” in their desire to effectuate new policy directives for the nation.<sup>95</sup> However, a commission’s ultimate effectiveness and impact depends largely on the president’s subsequent actions, due to its fundamental role as an advisory group.<sup>96</sup> While presidential support does not guarantee that Congress will accept the commission’s recommendations, “the absence of such support . . . reduces the chances that a commission[’s findings] will . . . convert[] into . . . executive or legislative action.”<sup>97</sup> Thus, commissions are usually effective when the “character and influence” of a president’s administration are

87. *Id.* at 1.

88. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28, 42, and 52 U.S.C.).

89. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 and 52 U.S.C.).

90. See KERNER REPORT, *supra* note 34, at 109–13; George, *supra* note 71.

91. Casey & Hardy, *supra* note 83 (noting that the Kerner Commission predicted that without immediate action rioting would most likely continue).

92. Graham, *supra* note 36, at 16; see STEPHANIE SMITH, CONG. RSCH. SERV., RL87668, PRESIDENTIAL COMMISSIONS: THEIR PURPOSE AND IMPACT 1–2 (1987) (noting the importance of a presidential commission to elicit public support in favor of a president’s policy).

93. Compare SMITH, *supra* note 92, at 2 (contending that presidential commissions “by virtue of their ad hoc status . . . [can] circumvent the normal bureaucratic channels”), with David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095, 1120–22 (2008) (noting a cause for concern in the politicization of presidential appointments since the appointees would likely recite the president’s personal views).

94. See SMITH, *supra* note 92, at 48–49.

95. *Id.* at 46.

96. *Id.* at 48.

97. *Id.* at 48–49.

convincing to the public and when it is politically feasible for the administration to consult with Congress.<sup>98</sup>

Professor Amy B. Zegart contextualizes this by arguing that “members of Congress, interest groups, and voters are more attentive to and vested in domestic policy issues,” and the active role of Congress requires the president to aggressively “sell” his agenda.<sup>99</sup> She explains that commissions are needed to supplement a president’s inexperience in social and political issues and that the three ideal types of commissions<sup>100</sup> and their core functions are strategically employed to address the president’s different policy issues.<sup>101</sup> Professor Zegart posits that presidents use commissions to gather critical information for imminent policy decisions because, while most conventional views on presidential commissions believe that such action produces no substantive change or shifts the issues off the president’s agenda, they are an important function for the president to recognize and grapple with significant matters.<sup>102</sup>

One weakness of presidential commissions is their inability to enact legislation. As previously mentioned, the effectiveness of commissions requires executive and congressional support to be successful.<sup>103</sup> The Kerner Commission’s recommendations<sup>104</sup> would only have been successful if the political branches of government agreed on a manner to equitably achieve its purpose of preventing violent civil disturbances and maintaining citizens’ constitutional rights to peacefully assemble and petition the government.<sup>105</sup> As the next section will demonstrate, the lack of President Johnson’s support for the Kerner Report led Congress to swiftly draft legislation addressing the lack of federal protections against rioting.

### C. Legislative History of the Anti-Riot Act

The Anti-Riot Act was passed as a rider to the Civil Rights Act of 1968.<sup>106</sup> Throughout the 1960s, members of Congress considered the need for anti-riot legislation, despite such legislation already existing at the state level.<sup>107</sup> Initially, Congress could not identify an even-handed approach to

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98. *Id.* at 53.

99. Amy B. Zegart, *Blue Ribbons, Black Boxes: Toward a Better Understanding of Presidential Commissions*, 34 *PRESIDENTIAL STUD. Q.* 366, 378–79 (2004).

100. Zegart identifies three “ideal” kinds of commissions: (1) agenda commissions, which generate support for the president’s initiatives and target a mass audience; (2) information commissions, which provide new facts and thinking about policies and target government officials; and (3) political constellation commissions, which seek to foster consensus among competing interests and target commission members themselves. *Id.* at 375 fig.2.

101. *See id.* at 389.

102. *Id.* at 390.

103. *See SMITH, supra* note 92, at 48–49.

104. *See supra* notes 84–90 and accompanying text.

105. *See Zegart, supra* note 99 and accompanying text.

106. Char Adams, *Experts Call ‘Anti-Protest’ Bills a Backlash to 2020’s Racial Reckoning*, NBC NEWS (May 18, 2021, 1:46 PM), <https://www.nbcnews.com/news/nbcblk/experts-call-anti-protest-bills-backlash-2020-s-racial-reckoning-n1267781> [https://perma.cc/D3LG-2QNZ].

107. *See Zalman, supra* note 70, at 911–13.

address the riots.<sup>108</sup> Senators Strom Thurmond of South Carolina and Frank Lausche of Ohio initially argued that an anti-riot amendment was needed to “protect society from the extremist element which advocates the destruction of our Nation.”<sup>109</sup> Senators Thurmond and Lausche subsequently introduced an expansive anti-riot proposal on March 4, 1968,<sup>110</sup> that swiftly passed through the Senate on March 11, 1968, with minor amendments.<sup>111</sup> President Johnson signed the Act on April 11, 1968.<sup>112</sup> The Act differed from state riot laws in that it did not criminalize rioting itself but rather criminalized interstate travel or the use of interstate commerce, with intent to do one of four things: (1) incite a riot; (2) organize, promote, encourage, participate in, or carry out a riot; (3) commit any act of violence in furtherance of a riot; or (4) aid or abet any person in inciting, participating in, or carrying out a riot, or committing any act of violence in furtherance of a riot.<sup>113</sup>

Numerous senators objected to the rushed process, arguing that they were asked to vote for a bill with little consideration of its implications, particularly with such a complicated matter.<sup>114</sup> However, Senator Thurmond argued that the government “must be empowered to deal firmly and actively with these harbingers of anarchy who undoubtedly contributed substantially to the tragedies of our cities.”<sup>115</sup> As such, Congress broadly defined “riot”<sup>116</sup> and “incite a riot”<sup>117</sup> in the Act as a means to target “outside agitators” who were alleged to have traveled between various cities with the intent of stirring up discontent and leaving a crowd prepared for a future riot.<sup>118</sup> Of note, Attorney General Ramsey Clark submitted recommended definitions to the

108. *See id.*; *see also* Reply Brief of the Appellants at 5, *United States v. Miselis*, 972 F.3d 518 (No. 19-4550) (4th Cir. 2020).

109. 114 CONG. REC. 5523–24 (1968) (statement of Sen. Thurmond); *see also* Ryan J. Reilly, *How Segregationists Rushed Through the 1968 Rioting Laws DOJ Is Using in 2020*, HUFFPOST (Sept. 24, 2020), [https://www.huffpost.com/entry/anti-rioting-act-civil-disorder-law-doj-barr-trump-constitutional\\_n\\_5f6a012cc5b655acbc701ca2](https://www.huffpost.com/entry/anti-rioting-act-civil-disorder-law-doj-barr-trump-constitutional_n_5f6a012cc5b655acbc701ca2) [<https://perma.cc/R2QW-C7T2>].

110. *See* 114 CONG. REC. 5033 (1968) (statement of Sen. Lausche).

111. *See id.* at 6001–02 (statement of Sen. Spong); Zalman, *supra* note 70, at 912.

112. *See* Reply Brief of the Appellants, *supra* note 108, at 8.

113. 18 U.S.C. § 2101(a); *see* Kaminski, *supra* note 69, at 27.

114. 114 CONG. REC. 5213–14 (1968) (statement of Sen. Harris); *see also* Reply Brief of the Appellants, *supra* note 108, at 8 (noting that several senators objected to voting for the bill due to the hasty process).

115. *See* Reilly, *supra* note 109.

116. 18 U.S.C. § 2102(a) (defining a “riot” as a public disturbance involving an assemblage of three or more persons in which: an act or acts of violence by one or more of those persons constitute a clear and present danger of or result in damage or injury to the property or person of another; or a threat of violence in which the assemblage individually or collectively has the ability to immediately execute the threat with actual violence either results in damage or poses a clear and present danger of damage or injury).

117. 18 U.S.C. § 2102(b) (defining “incite a riot” as including “urging or instigating other persons to riot,” but not oral or written advocacy of ideas or, as the expression of belief, advocacy of any act or acts of violence or assertion of the rightness of, or the right to commit, any such act or acts).

118. *See* Zalman, *supra* note 70, at 916 (quoting remarks from Representative Albert W. Watson that “[t]here is no longer any doubt that the leaders of the mobs who are attacking our policemen and innocent victims are allied with the Communists”).

Senate floor on behalf of the Johnson administration to provide more precise language and remove any constitutional concerns of overbreadth; however, the submissions were rejected due to the urgency from some senators to pass this Act.<sup>119</sup> As mentioned, congressmembers had conflicting views on the necessity to enact the Act,<sup>120</sup> and Senator John Sherman Cooper of Kentucky even stated, “I do not believe that the passage of a riot act will deal with the causes of riots. . . [and] there are deeper causes [to the riots], as spelled out by the [Kerner] Commission.”<sup>121</sup> In response, Senator Russell B. Long of Louisiana declared that his constituents and the American people were waiting on senators to hold civil rights leaders like H. Rap Brown and Stokely Carmichael accountable for starting riots.<sup>122</sup> Surprisingly, Congressman Emanuel Celler of New York was on record having an intense exchange with Congressman Joe Waggoner of Louisiana stating that his vote in support of the Act, despite his serious opposition to its entirety, was merely to ensure his “good provisions” in the Fair Housing Act<sup>123</sup> would successfully make it through.<sup>124</sup>

In sum, the congressional record illustrates that the literal violence from rioting was to be prosecuted by the states, as “keeping of the public peace in our cities has always been traditionally a matter of local control.”<sup>125</sup> The Act was not drafted to focus on literal acts of violence, but rather to provide the federal government with a means to prosecute the individuals who initiated the events that precede the riots.<sup>126</sup>

Nevertheless, the constitutionality of a federal or state statute requires prompt notice and review by the federal government.<sup>127</sup> With this in mind, Part II considers the views from the three branches of government regarding citizens’ right to peacefully assemble and petition.

## II. DOES THE ANTI-RIOT ACT ACCOMPLISH CONGRESS’S ENVISIONED SAFEGUARDS AGAINST VIOLENT CIVIL DISTURBANCES?

The historical effort to evenly apply the Act to every U.S. citizen, including protected classes, has received varied criticism from the three branches of government. The benefits of the Act are tangible since a strategic response from law enforcement authorities exists to prevent the fear of public unrest in American streets. However, a notable detriment of anti-riot provisions is the impact they have on racially diverse protestors,<sup>128</sup>

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119. *See generally* 114 CONG. REC. 5213 (1968) (statement of Att’y Gen. Clark); *United States v. Dellinger*, 472 F.2d 340, 411 (7th Cir. 1972) (Pell, J., concurring in part).

120. *See supra* note 114 and accompanying text.

121. 114 CONG. REC. 5212 (1968) (statement of Sen. Cooper).

122. *Id.* at 5227–28 (statement of Sen. Long).

123. Pub. L. No. 90-284, 82 Stat. 81 (1968) (codified as amended in scattered sections of the U.S.C.).

124. 114 CONG. REC. 6490 (1968) (statement of Rep. Celler).

125. 112 CONG. REC. 18,464 (1966) (statement of Rep. Edwards).

126. *See supra* note 122 and accompanying text.

127. FED. R. CIV. P. 5.1.

128. *See infra* note 233 and accompanying text.

specifically when the issues are related to equality and police brutality.<sup>129</sup> The question of whether the Act is being enforced as Congress intended—as a safeguard for the public against violent civil disturbances—arises as a result. Part II.A outlines the federal government’s recent assessment of the Act. Part II.B then considers whether the Act’s effects are consistent with Congress’s intent.

### A. *Contemporary Assessment of the Anti-Riot Act*

The government has a high burden when it intends to single out speakers based on their opinions. As such, one of the most common issues in the “freedom of expression”<sup>130</sup> jurisprudence arises when the government is authorized to permissibly restrict certain expressions in society.<sup>131</sup> While the Act is a significant means to regulate protests and demonstrations,<sup>132</sup> courts have inquired into its constitutional validity, the construction of its provisions, and its application.<sup>133</sup> Of note, neither the government nor the courts have explicitly addressed the level of scrutiny the courts should apply to the Act, and this omission has resulted in analyses of the provisions under varying standards.<sup>134</sup> Part II.A.1 reviews how federal courts have interpreted the Act’s anti-riot provisions. Part II.A.2 evaluates the U.S. Department of Justice’s interpretation of the Act.

#### 1. The Federal Judiciary’s Interpretation

Federal courts have found the Act facially constitutional on numerous instances.<sup>135</sup> However, courts have struggled over how to interpret many provisions of the Act,<sup>136</sup> including the overt act elements, and whether they should be severed for “fail[ing] to bear an adequate relation between speech and violence.”<sup>137</sup> Additionally, courts have assessed whether the specific

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129. *See generally* Thomas J. Sugrue, *2020 Is Not 1968: To Understand Today’s Protests, You Must Look Further Back*, NAT’L GEOGRAPHIC (June 11, 2020), <https://www.nationalgeographic.com/history/article/2020-not-1968> [<https://perma.cc/8HLM-4SE6>].

130. *See supra* notes 52–58 and accompanying text.

131. *See supra* notes 59–66 and accompanying text.

132. *See supra* notes 116–17 and accompanying text.

133. *See infra* Part II.A.1.

134. *See* *United States v. Daley*, 378 F. Supp. 3d 539, 553 (W.D. Va. 2019).

135. *See, e.g.*, *United States v. Dellinger*, 472 F.2d 340, 354–64 (7th Cir. 1972) (holding that the legislative history does not expound on an intent outside the Act’s reasonable construction); *United States v. Hoffman*, 334 F. Supp. 504, 509 (D.D.C. 1971) (upholding the Act as a valid exercise of Congress’s power under the Commerce Clause); *In re Shead*, 302 F. Supp. 560, 564–67 (N.D. Cal. 1969) (finding that no significant legislative material is found to refute a reasonable interpretation of the Act).

136. *Compare Daley*, 378 F. Supp. at 555–58 (rejecting the defendants’ claims regarding vagueness and overbreadth and their *Brandenburg* challenge), *with* *United States v. Rundo*, 497 F. Supp. 3d 872, 880 (C.D. Cal. 2019) (holding that the Anti-Riot Act is unconstitutionally overbroad in violation of the First Amendment).

137. *Compare* *United States v. Miselis*, 972 F.3d 518, 534 (4th Cir. 2020) (disagreeing with both parties’ interpretation of the overt act element and analogizing the provision to an attempt

intent elements of “organizing,” “promoting,” “encouraging,” and “urging” are overbroad and whether they should be severed for not “bear[ing] the requisite relation between speech and lawlessness.”<sup>138</sup> Moreover, courts have reflected on whether a particular phrase that states mere advocacy of any act or acts of violence is severable from the remainder of the statute.<sup>139</sup>

Following the Act’s passage in 1968, the Court established the *Brandenburg* incitement test,<sup>140</sup> which was designed to determine whether a statute’s distinction between permissible and impermissible actions would violate one’s constitutional guarantees as related to freedom of expression.<sup>141</sup> Applying this test, several circuits have recently found the Act itself to be constitutional, though they differ over questions of severability.<sup>142</sup>

One of the first cases to consider the Act’s constitutionality was *United States v. Dellinger*,<sup>143</sup> which arose from protests during the 1968 Democratic National Convention in response to the United States’s involvement in the Vietnam War.<sup>144</sup> Defendants David Dellinger, Rennie Davis, and Tom Hayden were members of an organization called the National Mobilization Committee to End the War in Vietnam, and Abbie Hoffman and Jerry Rubin were members of the Youth International Party (“Yippie” or the “Yippies”).<sup>145</sup> Their chief purpose was to travel across the nation organizing various protests against military involvement in the Vietnam War and “racism, poverty, and injustice in the United States.”<sup>146</sup> As a result of their involvement with organizing the demonstration in Chicago, all five were prosecuted for traveling in interstate commerce with the intent to “incit[e], organiz[e], promot[e], and encourag[e] a riot.”<sup>147</sup>

The defendants were convicted in the U.S. District Court for the Northern District of Illinois for violating the Act.<sup>148</sup> In its decision to reverse and

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offense), *with* *United States v. Rundo*, 990 F.3d 709, 715–16 (9th Cir. 2021) (noting that the overt act provisions can be reasonably interpreted in a more limited scope).

138. *See Miselis*, 972 F.3d at 535–38 (tracing the definitions and examples of each speech-related verb to determine whether the Act violates any protected language); *Rundo*, 990 F.3d at 717–20 (examining the protected speech prohibited by the Act and determining whether the Act “may be salvaged by severance”).

139. *See Miselis*, 972 F.3d at 546–47 (noting that the Act is severable to a partial extent to ensure that the remainder of the Act is left intact); *Rundo*, 990 F.3d at 720 (holding that the Act is salvageable by severance).

140. 395 U.S. at 447 (noting that mere advocacy of the rightness of violence was protected speech).

141. *See id.* at 447–48.

142. *See supra* note 139 and accompanying text.

143. 472 F.2d 340 (7th Cir. 1972).

144. *Id.* at 349.

145. *Id.* at 348.

146. *Id.* at 349; *see also* Laurie L. Levenson, *Judicial Ethics: Lessons from the Chicago Eight Trial*, 50 LOY. U. CHI. L.J. 879, 883–84 (2019).

147. *Dellinger*, 472 F.2d at 348.

148. *See id.* at 348–50. *See generally* Susan R. Klein, *Movements in the Discretionary Authority of Federal District Court Judges over the Last 50 Years*, 50 LOY. U. CHI. L.J. 933, 936–37 (2019) (noting that this infamous trial is commonly known as the “Chicago Seven” trial, during which the media focused almost exclusively on the theatrical and contentious outbursts between the defendants and Judge Julius Hoffman).

remand the case,<sup>149</sup> the Seventh Circuit reviewed the constitutionality of the Act.<sup>150</sup> This is significant because, at the time of trial, the Act had received only limited judicial treatment<sup>151</sup> and presented issues of potentially abridging expression that had never been previously addressed.<sup>152</sup>

The Seventh Circuit upheld the Act after applying the *Brandenburg* incitement test and acknowledged that the “legislative history [gave] no help in identifying the intent.”<sup>153</sup> It also found that, despite the “awkward phraseology” and “unnecessary language” employed in the Act, the Act in its entirety did not chill free speech and did not raise overbreadth doctrine concerns.<sup>154</sup> Moreover, the court held that Congress had a legitimate goal in drafting the Act for national security reasons and that the means by which Congress adopted the Act were constitutional.<sup>155</sup> However, in partial dissent, Judge Wilbur F. Pell, Jr. concluded that the Act was facially unconstitutional and “clearly violative of the First Amendment right of freedom of speech.”<sup>156</sup> Judge Pell also argued that the statute was not sufficiently narrow or precise enough to avoid constitutional conflicts.<sup>157</sup> Moreover, Judge Pell argued that Congress’s intent to punish such agitators would not happen in the Act’s current form without “running afoul of First Amendment rights.”<sup>158</sup>

Following *Dellinger*, few cases have arisen from the Act, leaving the courts with limited opportunities to examine its constitutionality.<sup>159</sup> However, several protests in recent years have spurred prosecutions under the Act, requiring courts to again review the Act’s constitutionality.

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149. *Dellinger*, 472 F.2d at 409. A detailed examination of the grounds for reversal is beyond the scope of this Note.

150. *See id.* at 354–64.

151. *See In re Shead*, 302 F. Supp. 560, 566–67 (N.D. Cal. 1969) (finding the provisions of the Act to be sufficiently restrictive to sustain its validity unless an indictment fails to refine the distinction between mere advocacy and incitement); *Carter v. United States*, 417 F.2d 384 (9th Cir. 1969) (noting that the appellant had no standing to contest the constitutionality of the Act since the underlying issue of immunity is covered by another statute).

152. *See Dellinger*, 472 F.2d at 354–55.

153. *Id.* at 363.

154. *Id.* at 355–64 (concluding that when a statute is so broadly drafted and “no readily apparent construction suggests itself as a vehicle for rehabilitating the statute[],” it must be declared a violation of an individual’s First Amendment rights).

155. *See id.* at 362.

156. *Id.* at 409 (Pell, J., concurring in part) (reviewing the legislative history and describing how Congress gave serious attention to the need to enact anti-riot bills as a response to the violence that took place in the mid-1960s).

157. *See id.* at 410.

158. *Id.* at 410.

159. *See United States v. Markiewicz*, 978 F.2d 786, 813 (2d Cir. 1992) (acknowledging that “[t]he use of a facility of interstate commerce is an essential element of an anti-riot act offense”); *Providence Washington Ins. Co. v. Lynn*, 492 F.2d 979, 985 (1st Cir. 1974) (finding that the definition of riot explicitly covers a public disturbance involving acts of violence and excludes a covert act); *United States v. Betts*, 509 F. Supp. 3d 1053, 1059–60 (C.D. Ill. 2020) (holding that the Act is not unconstitutionally overbroad in violation of an individual’s First Amendment rights); *In re Application of Madison*, 687 F. Supp. 2d 103, 112 (E.D.N.Y. 2009) (finding that the Act provides adequate notice to prohibited conduct, and acknowledging that it is a “broad criminal statute”).

Recently, the Fourth<sup>160</sup> and Ninth<sup>161</sup> Circuits were presented with similar disputes addressing the constitutionality of the Act. Each of these cases is discussed in turn.

In *United States v. Miselis*,<sup>162</sup> defendants Benjamin Daley and Michael Miselis were members of the Rise Above Movement (RAM), a local white supremacist, “combat-ready” militant movement that had the chief purpose of attending political rallies organized by other groups and engaging in violent attacks on counterprotesters.<sup>163</sup> On appeal, the defendants challenged their convictions<sup>164</sup> on the grounds that the Act is facially overbroad under the Free Speech Clause of the First Amendment and void for vagueness under the Due Process Clause of the Fifth Amendment.<sup>165</sup> The lower court ruled that the Act “does not criminalize peaceful protest or lawful assembly but rather targets ‘public disturbance[s] involving’ violence or the threat of such violence undergirded by the ‘ability of immediate execution.’”<sup>166</sup> The lower court rejected the defendants’ facial challenge under the *Brandenburg* incitement test,<sup>167</sup> holding that the conduct condemned by the Act is “sufficiently limit[ed]” to criminalize the acts that the defendants’ may have advocated in connection to an “actual or imminent riot.”<sup>168</sup>

A panel of the Fourth Circuit unanimously affirmed the lower court’s ruling<sup>169</sup> and held that the Act was not unconstitutionally vague.<sup>170</sup> The court acknowledged that the Act did “sweep[] up a substantial amount of speech that remains protected,” violating the First Amendment.<sup>171</sup> However, the court determined that the Act, as a whole, was consistent with the First Amendment and that the appropriate remedy to invalidating the discrete instances of overbreadth was to sever<sup>172</sup> the discrete areas of overbreadth<sup>173</sup> to keep the remainder of the Act intact.<sup>174</sup>

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160. *United States v. Miselis*, 972 F.3d 518 (4th Cir. 2020).

161. *United States v. Rundo*, 990 F.3d 709 (9th Cir. 2021).

162. 972 F.3d 518 (4th Cir. 2020).

163. *Id.* at 526; see *Rise Above Movement (R.A.M)*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/resources/backgrounders/rise-above-movement-ram> [https://perma.cc/3K3X-BE4T] (last visited Mar. 4, 2022).

164. The defendants were charged with traveling in interstate commerce while violently participating in white supremacist rallies that occurred in California as well as the notorious “Unite the Right” rally in Charlottesville, Virginia. See *Miselis*, 972 F.3d at 525.

165. *Id.*

166. *United States v. Daley*, 378 F. Supp. 3d 539, 554–55 (W.D. Va. 2019) (alteration in original) (quoting 18 U.S.C. § 2102(a)).

167. See *id.* at 556–57.

168. *Id.* (alteration in original) (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969)).

169. See *Miselis*, 972 F.3d at 525.

170. See *id.* at 525–26.

171. *Id.* at 525.

172. See *id.* at 530 (connotating that “the remainder of the statute is constitutionally valid, capable of operating independently, and consistent with Congress’s basic objectives”).

173. See *id.* at 525–26 (noting that “speech intending to ‘encourage’ or ‘promote’ a riot, as well as speech ‘urging’ others to riot or ‘involving’ mere advocacy of violence” were protected).

174. See *id.*

After agreeing that the Act was facially overbroad in part, the court outlined the overbreadth analysis to determine what the statute covers and whether the Act reached too far.<sup>175</sup> Applying this analysis, courts must first “construe the challenged statute” and ask whether “limiting construction” is viable.<sup>176</sup> Second, courts must examine whether the statute “criminalizes a substantial amount of protected expressive activity.”<sup>177</sup> Finally, if the unconstitutional portions are severable, then they must be invalidated.<sup>178</sup>

The court evaluated the Act’s congressional intent by assessing the plain meaning of each of the “string of speech-related verbs”<sup>179</sup> under the Act.<sup>180</sup> Taking up each provision, the court determined that the plain meaning of “incite” most sensibly referred to speech that would likely produce lawlessness.<sup>181</sup> The court then turned to “promote” and “encourage,” holding that these provisions were overbroad because these terms included too much conduct unlikely to produce an imminent riot.<sup>182</sup> Moreover, the court determined that speech “urging” others to riot or involving “mere advocacy of violence” were similarly inadequate.<sup>183</sup> However, the court held that the term “organize” was not overbroad because it is readily understood to mean the formation or establishment of something—it is not simply an abstract idea, but rather is “concrete aid” to an event that has “begun to take shape.”<sup>184</sup>

In the second step of its overbreadth analysis, the court found that the Act included a “substantial amount of protected advocacy” relative to its “plainly legitimate sweep.”<sup>185</sup> The regulation of “speech tending . . . to ‘encourage,’ ‘promote,’ or ‘urge’ others to riot, as well as mere advocacy of any act of violence” was meant to be protected by *Brandenburg*.<sup>186</sup> Therefore, the court determined that the Act is inconsistent with the First Amendment and “encroach[es] substantially upon free speech.”<sup>187</sup>

Moreover, the Fourth Circuit also found that the substantially overbroad provisions of the Act were severable.<sup>188</sup> In its examination, the court applied

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175. *See id.* at 531.

176. *Id.*

177. *Id.* (quoting *United States v. Williams*, 553 U.S. 285, 297 (2008)).

178. *Id.*

179. *Id.* at 535 (referencing to “incite,” “organize,” “promote,” and “encourage”).

180. 18 U.S.C. §§ 2101–2102.

181. *Miselis*, 972 F.3d at 536.

182. *Id.* at 536–37 (“[W]e don’t think either verb is ‘readily susceptible’ of such an artificial limitation.” (quoting *United States v. Stevens*, 559 U.S. 460, 481 (2010))).

183. *Id.* at 538 (“[The] verb [‘urging’] suffers from a similarly inadequate relation between speech and lawless action . . .”).

184. *Id.* at 537 (“[S]peech tending to organize a riot serves . . . to facilitate the occurrence of a riot that has already begun to take shape.”).

185. *Id.* at 541.

186. *Id.*

187. *Id.* (“[T]he Anti-Riot Act . . . sweeps up a substantial amount of protected advocacy.”).

188. *Id.*

the traditional rule for severability<sup>189</sup> by retaining the constitutionally valid portions of the Act that are “capable of functioning independently” and consistent with Congress’s original intent when enacting the statute.<sup>190</sup> Applying this rule, the court held that the language responsible for overbreadth should be severed but that the remainder of the Act was “perfectly valid.”<sup>191</sup> The court reasoned that while Congress intended to “encompass the full scope of . . . unprotected speech” relating to the wave of riots, Congress would likely prefer the trimmed version of the Act instead of no statute at all.<sup>192</sup>

Like the Fourth Circuit in *Miselis*, the Ninth Circuit in *United States v. Rundo*<sup>193</sup> also applied the *Brandenburg* incitement test to determine whether the Act’s anti-riot provisions were facially overbroad and criminalized a substantial amount of protected speech.<sup>194</sup> In *Rundo*, defendants Robert Paul Rundo, Robert Boman, Tyler Laube, and Aaron Eason were members of RAM charged with conspiracy to violate the Act after posting recruitment videos and pictures online showing their combat training and assaults on protestors at various political rallies across California.<sup>195</sup> The lower court dismissed their indictment on the ground that the Act was unconstitutional.<sup>196</sup>

The government appealed to the Ninth Circuit arguing that the district court erred in not applying a narrow construction of the Act which would have thereby severed the offending portions of the Act.<sup>197</sup> Reviewing de novo, the Ninth Circuit agreed that the district court erred in not applying the severability clause.<sup>198</sup> Utilizing a similar analysis as applied in *Miselis*, the court found that the Act was salvageable<sup>199</sup> and that Congress would have preferred severance over complete invalidation.<sup>200</sup> Thus, the Ninth Circuit held that the Act was not “unconstitutional on its face” and that a balance must be struck between the government’s ability to protect the nation from people “who are trying to perpetrate, or cause the perpetration of . . . violent outrages” and the importance in maintaining a citizens’ freedom of expression.<sup>201</sup>

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189. *Id.* at 542 (“[U]nconstitutional provision[s] must be severed unless the statute created in its absence is legislation that Congress would not have enacted.” (quoting *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2209 (2020))).

190. *Id.*

191. *Id.* at 543.

192. *Id.* (“[I]f Congress could have foreseen the Court’s decision in *Brandenburg*, it would have readily preferred to enact this appropriately narrowed version of the statute.”).

193. 990 F.3d 709 (9th Cir. 2021).

194. *See id.* at 716–17.

195. *See id.* at 713.

196. *See id.* at 712–13; *see also* *United States v. Rundo*, 497 F. Supp. 3d 872, 879–80 (C.D. Cal. 2019).

197. *See* Government’s Opening Brief, *United States v. Rundo*, 990 F.3d 709 (9th Cir. 2021) (No. 19-50189).

198. *See Rundo*, 990 F.3d at 714.

199. *Id.* at 716–20 (“[S]everance is the remedy that must be applied when it is possible to do so.” (quoting *United States v. Booker*, 543 U.S. 220, 258–59 (2005))).

200. *See id.* at 720; *Miselis*, 972 F.3d at 543–44.

201. *Rundo*, 990 F.3d at 721.

As the cases above underscore, the severability clause has been accepted by the Supreme Court as a justiciable remedy “whenever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional,” and courts, therefore, have a duty to maintain an act’s validity.<sup>202</sup> Applying this principle, both the Fourth and Ninth Circuits recommended that the language responsible for the Act’s overbreadth be removed, rendering the Act “perfectly valid” and consistent with Congress’s basic intent when drafting it.<sup>203</sup>

## 2. The Department of Justice’s Interpretation

While state and local officials have primary responsibility for preventing any acts of violence, the Department of Justice (DOJ) may intervene when it believes that an unending threat of riots falls within its jurisdiction.<sup>204</sup> Specifically, one of the Act’s central provisions serves to prevent organizers who travel or use any interstate facility<sup>205</sup> from inciting or “commit[ting] any act of violence in furtherance of a riot.”<sup>206</sup>

However, following the decision in *Miselis*, the DOJ Acting Solicitor General Elizabeth Prelogar prepared a memorandum for Speaker of the House Nancy Pelosi outlining the DOJ’s disagreement with the Fourth Circuit’s conclusion that portions of the Act violated the First Amendment.<sup>207</sup> Notably, the court had actually affirmed the defendants’ convictions, so the rationale for severing the provisions was effectively inconsequential to the DOJ’s case.<sup>208</sup> Nevertheless, the DOJ summarized that it remains committed to prosecuting individuals under the Act.<sup>209</sup> Further, the DOJ acknowledged that the affirmance of convictions under the Act validated its constitutionality if narrowly applied.<sup>210</sup> Therefore, the DOJ decided not to file a petition for a writ of certiorari following *Miselis*, believing that their analytical approach to applying the Act would continue

202. See *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (quoting *El Paso & Ne. Ry. Co. v. Gutierrez*, 215 U.S. 87, 96 (1909)); *Miselis*, 972 F.3d at 541.

203. See *Miselis*, 972 F.3d at 543; *Rundo*, 990 F.3d at 721.

204. See Press Release, William P. Barr, Att’y Gen., U.S. Dep’t of Just., Att’y Gen., William P. Barr’s Statement on Riots and Domestic Terrorism (May 31, 2020), <https://www.justice.gov/opa/pr/attorney-general-william-p-barrs-statement-riots-and-domestic-terrorism> [<https://perma.cc/4WX3-U4UD>]; see also Josh Gerstein & Evan Semones, *Barr Threatens to Bust ‘Far-Left Extremist Groups’ in Floyd Unrest*, POLITICO (May 30, 2021, 4:04 PM), <https://www.politico.com/news/2020/05/30/william-barr-george-floyd-protests-290792> [<https://perma.cc/A5G3-NE85>].

205. 18 U.S.C. § 2101(b) (“[I]ncluding but not limited to, mail, telegraph, telephone, radio, or television, to communicate with or broadcast to any person or group of persons prior to such overt acts . . .”).

206. 18 U.S.C. § 2101(a).

207. Memorandum from Elizabeth B. Prelogar, Acting Solic. Gen., U.S. Dep’t of Just. to Nancy Pelosi, Speaker, House of Reps. (Feb. 18, 2021), [https://www.justice.gov/oip/foia-library/osg-530d-letters/us\\_v\\_miselis\\_530d/download](https://www.justice.gov/oip/foia-library/osg-530d-letters/us_v_miselis_530d/download) [<https://perma.cc/46JF-MF3Q>].

208. See *id.* at 1.

209. See *id.* at 3.

210. See *id.*

to achieve the mission of investigating and prosecuting individuals and groups who engage in “violent confrontations” during protests.<sup>211</sup>

In response to the protests that spanned the United States following the deaths of Ms. Taylor and Mr. Floyd, Attorney General William Barr immediately asserted that “[w]e must have law and order on our streets and in our communities” and singularly condemned these actions as being carried out by “far-left extremist groups.”<sup>212</sup> Attorney General Barr further claimed that the “radical left” was solely responsible for the violence and criticized local district attorneys for their “lax” approach to enforcing the law, arguing that such actions put the country in danger.<sup>213</sup> Despite Attorney General Barr’s unsubstantiated claims,<sup>214</sup> the DOJ began prosecuting individuals under the Act based on these assertions.<sup>215</sup>

### *B. The Effects of Lawful Enforcement of the Anti-Riot Act*

As previously noted, the congressional record revealed that the violence from rioting was to be prosecuted by the states; notably, the “keeping of the public peace in our cities has always been traditionally a matter of local control.”<sup>216</sup> As such, states have proposed and passed a high volume of anti-riot legislation following the death of Mr. Floyd.<sup>217</sup> However, the anti-riot legislation is divided along partisan lines as the parties have differing

211. *Id.*

212. See Gerstein & Semones, *supra* note 204.

213. See *id.*

214. See U.S. DEP’T OF HOMELAND SEC., HOMELAND THREAT ASSESSMENT 4, 17–18 (2020), [https://www.dhs.gov/sites/default/files/publications/2020\\_10\\_06\\_homeland-threat-assessment.pdf](https://www.dhs.gov/sites/default/files/publications/2020_10_06_homeland-threat-assessment.pdf) [<https://perma.cc/D9RT-B7J3>] (finding that the most concerning domestic threat to homeland security is from “white supremacist violent extremists who have been exceptionally lethal in their abhorrent, targeted attacks”); Alanna Durkin Richer et al., *AP Finds Most Arrested in Protests Aren’t Leftist Radicals*, AP NEWS (Oct. 20, 2020), <https://apnews.com/article/virus-outbreak-race-and-ethnicity-suburbs-health-racial-injustice-7edf9027af1878283f3818d96c54f748> [<https://perma.cc/DW29-3KWF>]; Eric Tucker and Ben Fox, *FBI Director Says Antifa Is an Ideology, Not an Organization*, AP NEWS (Sept. 17, 2020), <https://apnews.com/article/donald-trump-ap-top-news-elections-james-comey-politics-bdd3b6078e9efadcfcd0be4b65f2362e> [<https://perma.cc/WK3B-VVHG>].

215. See *Betts*, 509 F. Supp. 3d at 1056; see also *United States v. Rupert*, No. 20-CR-104, 2021 WL 942101, slip op. at \*1 (D. Minn. Mar. 12, 2021).

216. See 112 CONG. REC. 18,464 (1966) (statement of Rep. Edwards).

217. See, e.g., H.B. 1508, 93d Gen. Assemb., Reg. Sess. (Ark. 2021) (creating a new mandatory minimum sentence of thirty days in jail for “the offense of riot” and defining rioting to include engaging with two or more persons in “tumultuous” conduct that creates a “substantial risk” of “public alarm”); H.B. 289, 2021 Gen. Assemb., Reg. Sess. (Ga. 2021) (expanding the definition of “unlawful assembly” to include “two or more persons who harass or intimidate another person within any public accommodation”); H.B. 1205, 122d Gen. Assemb., 1st Reg. Sess. (Ind. 2021) (increasing the penalty for “riot” from a Class A misdemeanor to a Level 6 felony, punishable by up to 2.5 years in prison and a \$10,000 fine if committed by a person wearing a mask or other face covering); H.B. 2464, 58th Gen. Assemb., 1st Sess. (Okla. 2021) (creating a new mandatory minimum sentence of not less than two years in jail for any act in connection with a riot); H.B. 3491, 124th Gen. Assemb., Reg. Sess. (S.C. 2021) (criminalizing the blocking of a street, sidewalk, or “any other place used for the passage of persons, vehicles or conveyances” without legal privilege, and any person found guilty could face up to three years in jail).

views on promoting public safety.<sup>218</sup> For example, Republican lawmakers argue that harsher penalties are needed to protect public spaces, irrespective of whether these penalties chill access to peaceful protests.<sup>219</sup> In contrast, Democratic lawmakers assert that a novel approach predicated on safeguarding First Amendment rights is needed.<sup>220</sup>

This political divide is echoed in discussions concerning the intent behind the Act. Thus, Part II.B.1 considers the conflicting views regarding the Act's original intent. Part II.B.2 then examines whether contemporary federal solutions and state anti-riot provisions comport or conflict with the Act's stated purpose.

### 1. The Political Divide over the Act's Intent

While Republican legislators who support anti-riot provisions acknowledge the public anger over the murder of Black Americans by law enforcement, some also believe that protecting the nation, its citizens, and real property from destruction is essential to a secure community.<sup>221</sup> Indeed, legislative history indicates that current members of Congress want to “prevent violence and protect law enforcement officers.”<sup>222</sup> Accordingly, it is necessary to assess whether this intent is being carried out without usurping individuals' constitutional rights.<sup>223</sup>

Republicans argue that increasing the penalties associated with anti-riot provisions will further the Act's intentions by promoting security.<sup>224</sup> The enforcement of these strict penalties overtly persuades citizens to limit their protest activity due to the fear of over-policing.<sup>225</sup> Under this view, the proposed anti-riot provisions deter an individual from behaving with a mob mentality and engaging in violent assemblies that would destroy business establishments and other property.<sup>226</sup>

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218. *Compare* Press Release, Ken Buck, Rep., U.S. House of Reps., Congressman Ken Buck Reintroduces the BRICKS Act (Jan. 25, 2021), <https://buck.house.gov/media-center/press-releases/congressman-ken-buck-reintroduces-bricks-act> [<https://perma.cc/3REU-SQ8B>] (statement by Republican member of Congress), *with* Press Release, Karen Bass, Rep., House of Reps., Reps. Bass Issues Statement Regarding Police Reform Negotiations (Sept. 22, 2021), <https://bass.house.gov/media-center/press-releases/reps-bass-issues-statement-regarding-police-reform-negotiations> [<https://perma.cc/CR5Z-R6HH>] (statement by Democratic member of Congress).

219. *See infra* notes 241–50 and accompanying text.

220. *See generally* Press Release, Karen Bass, *supra* note 218.

221. *See, e.g.*, Press Release, Ken Buck, *supra* note 218; Sophie Quinton, *Eight States Enact Anti-Protest Laws*, PEW (June 21, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/06/21/eight-states-enact-anti-protest-laws> [<https://perma.cc/N2YW-HDMQ>] (quoting remarks from Governor Ron DeSantis: “We want[] to make sure that we were able to protect the people of our great state, people's businesses and property against any type of mob activity or violent assemblies”).

222. *See* Press Release, Ken Buck, *supra* note 218; Quinton, *supra* note 221.

223. *See* Adams, *supra* note 106.

224. *See* Reid J. Epstein & Patricia Mazzei, *G.O.P. Bills Target Protesters (and Absolve Motorists Who Hit Them)*, N.Y. TIMES (June 16, 2021), <https://www.nytimes.com/2021/04/21/us/politics/republican-anti-protest-laws.html> [<https://perma.cc/X3VF-RKVS>].

225. *See* Adams, *supra* note 106.

226. *See* Quinton, *supra* note 221.

In contrast, Democrats contest the use of anti-riot provisions, arguing that it dissuades individuals from exercising their constitutional rights.<sup>227</sup> Accordingly, this harm incurred by the proposed anti-riot provisions affects the interests of peaceful protestors who Democrats believe would otherwise feel welcome to march on matters that address social issues.<sup>228</sup> For example, an individual who participates in a peaceful protest that subsequently becomes violent through the acts of individuals unassociated with the demonstration would still be liable under the Act for being part of the crowd.<sup>229</sup> These issues are exacerbated by anti-riot provisions because their broad interpretations could create liability by association and allow law enforcement authorities the ability to incarcerate protestors for actions they deem undesirable.<sup>230</sup>

As a result, the ability to protest is subdued because the Act causes organizers and peaceful protestors to fear they may be prosecuted when other actors incite and commit violence.<sup>231</sup> This burden impacts all individuals and, by dissuading Americans from peacefully protesting, undermines the congressional intent behind the Act to “protect society from the *extremist element* which advocates the destruction of our nation.”<sup>232</sup>

## 2. The Convergence of Congressional Solutions and State Legislative Defenses

Beyond the Act’s intentions, the question of whether federal intervention is necessary depends on whether state legislative efforts to create new classes of offenses for prosecuting organizers of protests are sufficient to address the concerns of anti-riot provisions’ drafters.

In response to an increase in anti-riot provisions proposed at the federal and state level, representatives of civil rights groups, for example, have stated that “turnout at protests drastically decrease[d] and [leaders] have . . . cancel[ed] demonstrations to protect members from violence.”<sup>233</sup>

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227. See Adams, *supra* note 106.

228. See *id.*

229. See *id.* (noting that the Act’s penalties on demonstrators are unclear since the delineation between a peaceful protestor and violent actor is vague).

230. See *id.*

231. See *id.*

232. See Reilly, *supra* note 109 (emphasis added).

233. See Lalee Ibssa, *What To Know About Florida’s Anti-Riot Law and the Corresponding Legal Challenge*, ABC NEWS (Aug. 7, 2021, 9:56 AM), <https://abcnews.go.com/US/floridas-anti-riot-law-legal-challenge/story?id=79224398> [<https://perma.cc/UH6D-HMTH>]; see also *Civil Rights Groups File Federal Lawsuit Challenging Florida’s Anti-Protest Law*, ACLU (May 11, 2021), <https://www.aclufl.org/en/press-releases/civil-rights-groups-file-federal-lawsuit-challenging-floridas-anti-protest-law> [<https://perma.cc/85Y8-M9UM>] (filing on behalf of “The Black Collective, Black Lives Matter Alliance Broward, Chainless Change, Dream Defenders, the Florida State Conference of the NAACP, and the Northside Coalition of Jacksonville”).

Meanwhile, Congress has remained silent in the face of courts striking text from the Act as unconstitutional,<sup>234</sup> since those holdings did not undermine the validity of any other enforceable provision in the Act.<sup>235</sup>

Instead, in response to the escalation of protests that occurred across the nation, Congress took two entirely different approaches<sup>236</sup>—generally along partisan lines—to study and address this problem.<sup>237</sup> One response led by Republican congressmembers was a proposed action to amend the Act by increasing the maximum term of imprisonment for the offense of rioting and other unlawful action<sup>238</sup> despite the chilling impact on peaceful protests. At the same time, a different approach, which garnered bipartisan support, was the George Floyd Justice in Policing Act of 2020<sup>239</sup> (“Policing Act”) and the establishment of a Commission on the Social Status of Black Men and Boys Act<sup>240</sup> (“Commission on Black Men”).

Senator Tom Cotton of Arkansas and Congressman Ken Buck of Colorado proposed the Blocking Rioters and Insurrectionists from our Cities to Keep us Safe Act of 2021<sup>241</sup> (“BRICKS Act”) in the Senate and the House of Representatives, respectively. Of note, the original proposal was introduced in 2020 but died on the House floor.<sup>242</sup> As a result, Representative Buck reintroduced the BRICKS Act in 2021, intending to increase terms of imprisonment for protestors to alleviate the potential fear citizens had from the wave of protests that swept across the country.<sup>243</sup> The BRICKS Act proposed increasing the statutory maximum prison terms for a rioting offense from five years to ten years.<sup>244</sup> It also established higher statutory maximum penalties for rioting offenses that involve certain aggravating characteristics.<sup>245</sup> Specifically, the bill proposed a prison term of up to twenty-five years for a rioting offense resulting in serious bodily injury or including dangerous activity, and a prison term of any years or for life for a rioting offense resulting in death or including a capital offense.<sup>246</sup> In defense of the bill, Representative Buck stated that “[i]n order to truly restore unity in this country, Congress must support efforts like this to stop the violence perpetrated by the far left. . . . and [to] hold these criminals accountable for

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234. *See supra* Part II.A.1.

235. *See supra* Part II.A.1.

236. Both political parties have remained relatively silent on the arguments posed by the courts and the views summarized by the DOJ. *See infra* Part II.A.2.

237. *See* Sarah Ferris & Heather Caygle, *Congress Turns to Age-Old Fix After Police Reform Stalls: A Commission*, POLITICO (July 28, 2020, 5:54 PM), <https://www.politico.com/news/2020/07/28/congress-police-reform-commission-384921> [<https://perma.cc/KGJ4-2T6D>].

238. *See* BRICKS Act of 2021, S. 33, 117th Cong. (2021).

239. H.R. 7120, 116th Cong. (2020).

240. Pub. L. No. 116-156, 134 Stat. 700 (2020) (codified at 42 U.S.C. § 1975 note).

241. S. 33, 117th Cong. (2021).

242. *See* BRICKS Act of 2020, H.R. 8757, 116th Cong. (2020).

243. *See* Press Release, Ken Buck, *supra* note 218.

244. *See* BRICKS Act of 2021, S. 33, 117th Cong. (2021).

245. *See id.*

246. *See id.*

their large-scale destruction once and for all.”<sup>247</sup> Moreover, Representative Buck reiterated the same contention Senator Thurmond expressed when introducing the Anti-Riot Act: that organized “leftist” groups are traveling across the country from the “west coast to the east coast to the middle of the country” to engage in criminal acts that the federal government has jurisdiction over and needs to prosecute.<sup>248</sup> In a similar tone, Senator Cotton stated, “Those who use violence to advance their political agenda must be met with the full force of the law.”<sup>249</sup> Despite this bill being referred to the U.S. Senate Committee on the Judiciary, the committee has currently taken no further action to advance it.<sup>250</sup>

In contrast, other members of Congress identified the protesting across America as a response to decades of systemic racism and excessive policing in communities of Black and Brown people.<sup>251</sup> Congresswoman Karen Bass of California proposed the Policing Act<sup>252</sup> to increase accountability for law enforcement misconduct and establish measures to prevent racial profiling by law enforcement at the federal, state, and local levels.<sup>253</sup> The Policing Act was designed to enhance existing mechanisms to resolve law enforcement violations, such as limiting qualified immunity and requiring officers to complete training on implicit bias and the duty to intervene when another officer uses excessive force.<sup>254</sup> The bill passed in the House but failed in the Senate.<sup>255</sup>

However, through bipartisan support, Senator Marco Rubio of Florida and Congresswoman Frederica Wilson of Florida introduced the Commission on Black Men.<sup>256</sup> Within the U.S. Commission on Civil Rights, the Commission on Black Men takes an ideological view similar to that of the Policing Act in addressing the issues of systemic protests.<sup>257</sup> The Commission on Black Men allows lawmakers the opportunity to address broader issues of civil rights violations that affect Black men and boys.<sup>258</sup> Specifically, the Commission on Black Men will conduct annual studies on systematic conditions related to poverty, drug abuse, and health issues,

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247. See Tyler Olson, *Ken Buck's Big Idea: Protect American Political System by Toughening Federal Penalties Against Rioters*, FOX NEWS (Nov. 20, 2020), <https://www.foxnews.com/politics/ken-bucks-big-idea-the-brick-act-rioters-stiffer-penalties> [https://perma.cc/9ANT-SD85].

248. See *id.*

249. Press Release, Ken Buck, *supra* note 218.

250. See BRICKS Act of 2021, S. 33, 117th Cong. (2021).

251. See George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. (2020).

252. *Id.*

253. See *id.*

254. See *id.*

255. 166 CONG. REC. S4263 (daily ed. July 20, 2020) (indicating that H.R. 7120 was placed on the calendar).

256. See Pub. L. No. 116-156, 134 Stat. 700 (2020) (addressing the varying conditions affecting Black males in the history of America's cultural landscape).

257. See *id.*

258. See *id.*

among other topics, to document trends within the Black community and evaluate the impact of government programs in each area.<sup>259</sup>

Equally important, statewide criminal laws addressing anti-riot provisions significantly vary across the nation.<sup>260</sup> As previously stated, the Act was designed to target organizers of protests who allegedly crossed state lines or used a facility of interstate commerce with the intent to agitate local citizens and violently destroy people’s businesses and property without being prosecuted.<sup>261</sup> By contrast, state anti-riot provisions were meant to target crimes committed during a protest, regardless of their interstate nature.<sup>262</sup> However, recent holdings from federal courts,<sup>263</sup> as well as several proposed state laws,<sup>264</sup> have left open a debate as to whether additional federal legislative action is desirable or even warranted.

Among the most disruptive of contemporary cases involving anti-riot provisions is *Dream Defenders v. DeSantis*,<sup>265</sup> a case arising from Florida’s proposed anti-riot law (“HB-1”), spearheaded by Governor Ron DeSantis as a way to quell violent protests following the wave of demonstrations in response to the killing of George Floyd.<sup>266</sup> Analogous to the *Miselis* court’s interpretive approach when analyzing the Act,<sup>267</sup> the Northern District of Florida in *Dream Defenders* found HB-1 “vague” and “overbroad.”<sup>268</sup> The court held that HB-1 amounted to an assault on one’s freedom of expression and violated the Constitution’s due process protections.<sup>269</sup>

In *Dream Defenders*, the court found that the definition of “riot” in HB-1 could have multiple reasonable interpretations and that its association with the terms “participate” and “violent public disturbance” could lead to infinite alternative readings such that an individual of ordinary intelligence would be unable to discern its “real-world consequence.”<sup>270</sup> The court further found that the actions outlined as riotous conduct under HB-1—and its inclusion of any associated participant—was a “trap for the innocent.”<sup>271</sup> According to the court, harmless protestors were thus required to make a choice between expressing their views or facing the probability of being arrested.<sup>272</sup>

The court also noted that Governor DeSantis intended for HB-1 to empower law enforcement officers against “[protestors] who may criticize

259. *See id.*

260. *See supra* note 217 and accompanying text; Quinton, *supra* note 221.

261. *See supra* Part I.C.

262. *See supra* note 216.

263. *See supra* Part II.A.1.

264. *See supra* note 217.

265. No. 21cv191, 2021 WL 4099437 (N.D. Fla. Sept. 9, 2021), *appeal docketed*, No. 21-13489 (11th Cir. Mar. 17, 2022).

266. *See* Curt Anderson, *Florida’s GOP-Backed ‘Anti-Riot’ Law Blocked by Judge*, AP NEWS (Sept. 9, 2021), <https://apnews.com/article/courts-george-floyd-florida-race-and-ethnicity-laws-bd110e1229212aa5345a039db2223325> [<https://perma.cc/AAD3-W59A>].

267. *See supra* Part II.A.1.

268. *Dream Defs.*, 2021 WL 4099437, at \*29.

269. *Id.* at \*13–14; *see also* Anderson, *supra* note 266.

270. *See Dream Defs.*, 2021 WL 4099437, at \*26–27.

271. *Id.*

272. *Id.* at \*27.

their legal authority” because he stated that “a ton of bricks [will] rain down on [those who violate HB-1].”<sup>273</sup> The court found that such threats do not protect Floridians.<sup>274</sup> The court further held that its judicial role was not to narrow the construction of HB-1, but rather to hold HB-1 unconstitutional so state legislators could amend HB-1.<sup>275</sup>

The court also noted that numerous criminal statutes<sup>276</sup> relating to public safety and private property already exist for law enforcement officers.<sup>277</sup> The court concluded that, in light of its breadth, the current application of HB-1 would negatively impact any political or social movement regardless of what those speakers were advocating, thus violating individuals’ constitutional rights.<sup>278</sup> For these reasons, the court granted a preliminary injunction against the enforcement of the new definition of “riot” contained in HB-1.<sup>279</sup>

Despite this latest judicial decision pertaining to the scope of a recent state anti-riot provision, other states have continued to propose new anti-rioting legislation.<sup>280</sup>

### III. A PROPOSAL FOR A RENEWED FEDERAL EFFORT TO UPHOLD THE RIGHT TO PEACEFUL ASSEMBLY AND PETITION

In light of contentious legislative divides, judicial findings of unconstitutionality, and the fundamental freedoms of speech and assembly that are at stake, the time is ripe for executive intervention. It is evident that a narrower, contemporary review would foster a balanced discussion concerning peaceful protests with respect to an individual’s constitutional rights given the legislative history,<sup>281</sup> contemporary assessments,<sup>282</sup> and current application of the Act.<sup>283</sup> This part focuses on determining what steps the executive branch should take to address anti-riot provisions concerning the Act’s intended defenses. As discussed above, Congress’s relative silence on the unenforceable provisions in the Act is telling, especially when the courts have explicitly emphasized that certain applications of those provisions are found to be unconstitutional.<sup>284</sup> Moreover, the effects of the

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273. *Id.* at \*28.

274. *Id.*

275. *Id.*

276. The nonexhaustive list includes but is not limited to:

Disorderly Conduct, Affray, Criminal Mischief, Arson, Fire bombs, Assault, Aggravated Assault, Battery and Felony Battery, Aggravated Battery, Assault of Battery on Law Enforcement, Assault or Battery on Person 65 or Older, Trespassing, Burglary, Mob Intimidation, Resisting Officer With Violence, Resisting Officer Without Violence, Obstruction by Disguised Persons, Unlawful Assemblies, and Destroying/Demolishing Memorial or Historic Property.

*Id.* at \*32.

277. *Id.*

278. *Id.* at \*32–33.

279. *Id.* at \*33–34.

280. *See supra* note 217 and accompanying text.

281. *See supra* Part I.C.

282. *See supra* Part II.A.

283. *See supra* Part II.B.

284. *See supra* Part II.A.1.

Act and state-level anti-riot provisions on protestors, as detailed in Part II.B, demonstrate that the provisions' obvious impact on individuals' constitutional rights is paramount. Specifically, anti-riot provisions have a "severe chilling impact on demonstrations"<sup>285</sup> and force protestors to engage in a risk calculation—namely, whether the risk of being shot by a counterprotester<sup>286</sup> or being arrested for peacefully protesting is a possibility they are willing to accept.<sup>287</sup> Not only do these provisions impact an individual's freedom to assemble and protest, but the effects of a vague and overbroad statute could cause more hesitant individuals to refrain from exercising their right to freedom of expression.<sup>288</sup> This issue is especially noticeable in the context of the latest federal government assessments<sup>289</sup> and conflicting congressional solutions designed to address such harms.<sup>290</sup>

This part proposes that a narrowly focused presidential review is necessary to determine the cause of escalating violence since the summer of 2020. It also focuses on whether the impact of the Act and anti-riot provisions on protestors is justified. Part III.A outlines the benefits of an executive branch agenda to shape public policy on anti-riot provisions in the context of the Act's intended purpose. Part III.B demonstrates the value of a presidential commission to study the current state of anti-riot provisions and how such provisions could and should be eliminated.

*A. The Development of an Executive Branch Agenda to Examine the Rise of Protests*

Congress is unquestionably the most appropriate venue when deciding whether to amend or repeal federal laws because of its ability to gather a breadth of data and input from its constituents. However when, in the Supreme Court's considered judgment, such legislation conflicts with the Constitution, Congress's failure to amend or repeal a law can serve as a violation of their responsibilities.<sup>291</sup> While this Note does not argue that congressional inaction on this issue amounts to a violation of Congress's constitutional responsibility, a balance between managing public safety and protecting citizens' right to protest should be at the forefront of the legislative agenda, especially when "global mass political protests continue to increase in scale and frequency."<sup>292</sup>

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285. *See Dream Defs.*, 2021 WL 4099437, at \*7 ("[M]any [potential protestors] . . . have decided not to protest out of fear of being arrested.").

286. *See, e.g.,* Becky Sullivan, *Kyle Rittenhouse Is Acquitted of All Charges in the Trial over Killing 2 in Kenosha*, NPR (Nov. 19, 2021, 5:53 PM), <https://www.npr.org/2021/11/19/1057288807/kyle-rittenhouse-acquitted-all-charges-verdict> [<https://perma.cc/L9T4-8DAZ>].

287. *See supra* Part II.B.

288. *See supra* Part II.B.2.

289. *See supra* Part II.A.

290. *See supra* Part II.B.

291. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803) (declaring that "it is emphatically the province and duty of the judicial department to say what the law is").

292. *See* Riley McCabe, *Global Political Protests and the Future of Democracy*, CTR. FOR STRATEGIC & INT'L STUD. (Mar. 5, 2021), <https://www.csis.org/analysis/global-political-protests-and-future-democracy> [<https://perma.cc/B4Z2-87LW>].

This Note surmises that a widening partisan divide on how to fundamentally address recent protests could significantly impact the views of Americans, especially those who believe that the rights of all people are not being respected.<sup>293</sup> Indeed, it is imperative to outline why presidential attention is the most practical and sound choice to effectuate necessary change. The justification has three components.

First, a presidential commission would provide the president with a more accurate assessment of current public views specifically related to protesting and help effectuate new policy directives to set an agenda.<sup>294</sup> Second, as discussed in Part II.A, federal courts have generally held that certain provisions of the Act are unconstitutional due to the overbreadth doctrine but are divided as to an appropriate remedy to save the Act. The Supreme Court has denied petitions for writs of certiorari.<sup>295</sup> Third, the commission's final recommendations could subsequently lead the DOJ—which has the authorization to promulgate rules and regulations—to codify new guidance practices related to violent protesting.<sup>296</sup>

It is important to state that this Note is not directed at any one administration. In fact, this part argues that sustained presidential consideration is reasonably desired to guarantee significant progress on this issue. The events that shaped President Johnson's decision to establish the Kerner Commission are in some respects similar to today's demonstrations, and presidential leadership for the development of a new executive branch agenda to examine the rise of recent protests may be necessary for effective reform.<sup>297</sup> Furthermore, executive action would bring renewed vigor, resources, and consideration to the examination of the rise in protests and could counteract current congressional inaction.<sup>298</sup>

### *B. The Establishment of a Presidential Commission*

The president should establish a commission via executive order to study whether the Act and statewide anti-riot provisions have chilled access to peaceful protests, with an emphasis on studying demonstrations stemming from sociopolitical dissent. This commission would also consider how violent protests could effectively be reduced. Scholars have recognized that presidential commissions can serve a variety of functions, including gathering and organizing information, providing an educational forum for the public on a given issue, and generating novel policy recommendations.<sup>299</sup> However, some have questioned the effectiveness of presidential

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293. See *supra* Part II.B.

294. See U.S. CONST. art. II, § 3, cl. 2 (requiring the president to recommend matters to Congress for their consideration that he deems necessary and expedient).

295. See, e.g., *Miselis*, 972 F.3d 518 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2756 (2021); *Daley*, 972 F.3d 518 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2756 (2021).

296. See *supra* Part II.A.2.

297. See *supra* Part I.A.

298. See *supra* Part I.B.

299. See SMITH, *supra* note 92, at 13; Graham, *supra* note 36, at 8; Zegart, *supra* note 99, at 373–76.

commissions,<sup>300</sup> despite others noting the commissions' abilities to spark significant reform.<sup>301</sup> For example, President Ronald Reagan created the National Commission on Social Security Reform due to the failing Old-Age and Survivors Insurance Trust Fund<sup>302</sup> and eroding public confidence in the Social Security system.<sup>303</sup> Although history indicates President Reagan appointed the commission to support one of his domestic policy goals, it was a success, despite the "heated partisan politics surrounding the Social Security issue," because the recommendations were incorporated into the Social Security Amendments of 1983.<sup>304</sup> Moreover, the commission sent a message to Congress accompanied with a compromise agreement calling for necessary reforms, which led to further congressional study on the U.S. Social Security Administration.<sup>305</sup>

In a similar vein, the president should develop a commission that would gather information about the extent to which anti-riot provisions chill participation in peaceful protests and should develop policy recommendations for addressing this issue. Such a commission could serve as a vehicle for educating the public about the harms of disrupting and restricting lawful assembly and protest and for engaging the public in a dialogue about the most effective avenues for reform. An advantage of commissions is that they command public attention about an issue outside the president's administration, and the massive circulation of their focus leads to an extended public dialogue.<sup>306</sup> The commission could conduct a public dialogue to inform the public of the social costs and benefits that may be won through reforming anti-riot provisions. Furthermore, the president could require the commission to develop recommendations for which DOJ policies and procedures could better build trust in the communities and ensure the safety of demonstrators who choose to peacefully protest.

Additionally, commissions can generate their own recommendations absent presidential influence, exhibiting an independence of thought, and thus maintain their political consensus and credibility among the public.<sup>307</sup> To ensure the independence of the recommendations, a cross section of experts with bipartisan support would likely be necessary, and the president would need to avoid influencing the work of the commission and its resulting

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300. See Barron, *supra* note 93, at 1122 (suggesting that commissions do not "play a meaningful role in influencing regulatory policy" but "merely issue reports and the like"); Zegart, *supra* note 99, at 389–90 (describing that most think of presidential commissions as panels that "defuse, deflect, and delay presidential action . . . without producing much substantive policy change").

301. See *supra* Part I.B.

302. The Old-Age and Survivors Insurance Trust Fund is a separate financial account in the U.S. Department of the Treasury that automatically covers the payments of Social Security benefits to retired-worker beneficiaries and their spouses and children and to survivors of deceased insured workers. See 42 U.S.C. § 401(a).

303. See SMITH, *supra* note 92, at 40.

304. See *id.* at 40–41; Social Security Amendments of 1983, Pub. L. No. 98-21, 97 Stat. 65 (codified as amended in scattered sections of the U.S.C.).

305. See SMITH, *supra* note 92, at 41.

306. See Graham, *supra* note 36, at 17.

307. See SMITH, *supra* note 92, at 45; Graham, *supra* note 36, at 16.

policy recommendations. While the president would lose the ability to determine the exact nature of the recommendations, the added credibility of the recommendations coming from the commission should help to gain public support for their implementation.

Finally, the new commission should draw on some of the lessons learned from the Kerner Commission on how to increase commission effectiveness.<sup>308</sup> For example, a commission will be most successful when (1) its final report provides concrete proposals that receive presidential and congressional support rather than broad sweeping recommendations, (2) it develops well-supported findings and recommendations, and (3) the recommendations are politically feasible for both parties.<sup>309</sup> The commission should avoid broad proposals that may exceed legislative capabilities, as the wide scope of the Kerner Commission's recommendations may have been key to their ultimate dismissal by President Johnson.<sup>310</sup> A bipartisan commission focused on developing policies addressing the chilling effects of anti-riot provisions on peaceful protestors would be sufficiently clear and narrow and could recommend specific policy changes that seek to achieve concrete and measurable results. By taking lessons from the Kerner Commission, a new commission could seek to not merely reiterate the same analysis and the same recommendations that are already a part of the dialogue, but rather produce useful, new information that is measurable over time.<sup>311</sup>

#### CONCLUSION

The federal government should not ignore that anti-riot provisions have become critical parts of federal and state legislators' attempts to diminish the voices of protestors. Despite the courts' application of the severability clause in *Miselis* and *Rundo*, partisan divisiveness has led to congressional inaction where no effective measure has been adopted to address violent protests. Concurrently, policy makers promoting public safety and safeguarding the freedom of expression should not dissociate these matters from their sociolegal context. The regularity with which policy makers discuss the deterrence of protests today, coupled with the passage of anti-riot provisions in several states, has only continued to chill free speech. The federal government should not discount this veiled attack on constitutional freedoms. The failure to investigate the potentially dangerous and discriminatory practices of anti-riot provisions has led to a lack of information on their impact, leaving citizens with anecdotal evidence to argue in their defense.

Protestors understand that overbroad and vague statutes could have the effect of criminalizing protected speech for law-abiding citizens. While Congress has not heeded the federal judiciary's suggestion to amend the Act's text, the three branches of government have also not presented a united

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308. See *supra* notes 87–91 and accompanying text.

309. See SMITH, *supra* note 92, at 45.

310. See *supra* Part I.A.; Graham, *supra* note 36, at 9.

311. See KERNER REPORT, *supra* note 34, at 265.

front against preventing violent public disturbances. Policy arguments on both sides are persuasive; however, this Note contends that the ambiguous intentions of anti-riot provisions need to be resolved with the establishment of a presidential commission to adequately gather evidence. These discoveries, in turn, would guide the president to either implement executive action or recommend a legislative response, and the ultimate effectiveness from such presidential support is critical to address the harmful effects of anti-riot provisions.