

The Breakfast Club

Constitutional Minute for 14 June 2025

Insurrections, Posses, and Martial Law; Using the Military as Law Enforcement - Update

I mentioned in last week's missive that Trump didn't need the Insurrection Act to take control of state National Guard troops, he need to only invoke [10 U.S. Code §12406](#). Under this law, passed by Congress in 1994, the president may order National Guardsmen into service in the event of a "rebellion or danger of a rebellion against the authority of the government of the United States." Significantly, without a companion invocation of the Insurrection Act, their use would still be constrained by the Posse Comitatus Act; i.e., the Guardsmen could only be used to protect federal property and personnel, and could not make arrests or carry out other law enforcement actions.

Governor Gavin Newsom requested a district judge issue a Temporary Restraining Order (TRO) against the President for federalizing the California National Guard "without his permission" and Judge Charles Breyer dutifully complied, but then stayed his own order until he could hold a hearing on the merits of the case, which was conducted on 12 June. Judge Breyer [ruled](#) that Trump's calling up the California National Guard was illegal, that Trump did not issue his callup "through the Governor of California," as required by law" (even though Hegseth's directive to the California Adjutant General was worded "through the Governor"). Judge Breyer cited the 1827 precedent of *Martin v Mott* but basically said the President's discretion in deciding whether there is an emergency situation (or a "rebellion" against government authority) is still reviewable by the courts, directly contradicting the Supreme Court conclusion in *Martin*. Perhaps the judge's most lamentable and ludicrous statements in the ruling is that: "it is not the federal government's place in our constitutional system to take over a state's police power whenever it is dissatisfied with how vigorously or quickly the state is enforcing its own laws." When did the Supreme Court decide that?

Breyer [ordered](#) the President of the United States to return control of the 2,000 California National Guardsmen to the Governor. Trump's team immediately appealed to the 9th Circuit, which issued a stay of Breyer's order and scheduled a hearing for 17 June. The 9th Circuit didn't let me down in my prediction that they would "reverse at least some of this terrible and biased ruling."

A three-judge panel unanimously [overturned](#) Breyer's order. The relatively short (38 page) [decision](#) includes a nice summary of the "political question doctrine," concluding (and a take-away for me) that "[t]he source of the President's power to federalize the National

Guard is statutory, not constitutional[,] thus] the political question doctrine does not bar judicial review.”

The most decisive statement the panel makes is “*the text of §12406 does not give governors any veto power over the President’s federalization decision.*” This of course flies in the face of Newsom’s contention that his Guard was called up “without his permission.”

The short ruling contains many other important points of law and is well worth your reading.

News outlets predict that “this case will eventually be appealed to the Supreme Court.” I don’t think it will be. It should be evident that the conservative majority on the current Supreme Court will side with Trump in the merits of this case. Remember, a 9th Circuit ruling only affects those states within the 9th Circuit. A Supreme Court ruling sets precedent for the entire nation. Does Newsom want to be responsible for that? I don’t think so. But Newsom will be Newsom; if California appeals, I predict SCOTUS will decline to hear the case and leave the 9th Circuit opinion in place.

Since last Saturday, I ran across another good compilation of information on the subject of the use of federal or federalized troops in law enforcement. Enjoy

[Presidential Use of Troops to Execute the Laws: A Brief History](#), by Daniel H. Pollitt

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