

## Can President Trump Federalize the California National Guard?

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**[00:00:00.5] Jeffrey Rosen:** On June 7, 2025, President Trump invoked emergency authority to assume federal control of the California National Guard. Hello, friends. I'm Jeffrey Rosen, president and CEO of the National Constitution Center, and welcome to We the People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan nonprofit chartered by Congress to increase awareness and understanding of the Constitution among the American people. This week, we'll explore the meaning of the law that President Trump invoked, it's 10 U.S.C. 12406, and we'll unpack California Governor Gavin Newsom's lawsuit challenging legality of President Trump's actions. To help us answer these questions, we have two leading scholars of national security law. Professor Michael Ramsey is the Warren Distinguished Professor of Law at the University of San Diego School of Law. Mike clerked for Judge J. Clifford Wallace of the U.S. Court of Appeals for the Ninth Circuit and for Justice Antonin Scalia of the U.S. Supreme Court. He co-edited the book *International Law in the U.S. Supreme Court: Continuity and Change*, and wrote an excellent blog post on the originalism blog about *Trump v. Newsom*. Professor Ramsey, it is wonderful to welcome you to We the People.

**[00:01:19.5] Michael Ramsey:** Well, thanks so much, Jeff, for having me here. And it's always an honor to be on this great show.

**[00:01:25.0] Jeffrey Rosen:** And Liza Goitein is senior director of the Brennan Center's Liberty and National Security Program. She's a nationally recognized expert on presidential emergency powers, government surveillance, and government secrecy. Before joining the Brennan Center, Liza served as counsel to Senator Russ Feingold, chair of the Constitution Subcommittee of the Senate Judiciary Committee. She graduated from Yale Law School and clerked for Judge Michael Daley Hawkins of the U.S. Court of Appeals for the Ninth Circuit. She's the author of a very helpful analysis of President Trump's National Guard order in just security. Liza, it's wonderful to welcome you to We the People.

**[00:02:01.2] Liza Goitein:** Thanks so much, Jeff. Happy to be here.

**[00:02:04.0] Jeffrey Rosen:** Well, let's start, as always, with the text of the statute. It's 10 U.S.C. 12406. It's called National Guard and Federal Service, and it says that whenever "there is a rebellion or danger of rebellion against the authority of the government of the United States, or

the President is unable with the regular forces to execute the laws of the United States, the President may call into Federal service members and units of the National Guard of any state in such numbers as he considers necessary to repel the invasion, suppress the rebellion, or execute those laws. Order for these purposes shall be issued through the governors of the states, or, in the case of the District of Columbia, through the commanding general of the National Guard of the District of Columbia.” Judge Charles Breyer stayed President Trump's deployment of the troops. He held that the statute requires the President to issue his order through the governor of the state, and he said that President Trump hadn't done that, and he also said that President Trump had not met the standard for repelling the invasion, suppressing the rebellion, or executing those laws. Liza, tell us more about Judge Charles Breyer's opinion.

**[00:03:24.9] Liza Goitein:** Okay, well, I think we have to start with a question of reviewability, because before even trying to unpack what the terms of the statute actually mean, the judge was faced with an argument by the Trump administration that the court could perform no review whatsoever of this law, what it meant, or how it was applied. The government, or I should say the federal government in this case, was relying both on a claim that the statute itself commits these questions entirely to the discretion of the President, and on a version of the political question doctrine, which is a doctrine that basically says that there are certain determinations that are inherently political in nature and that courts cannot review. And the judge looked at some similar claims that had been raised recently in lawsuits challenging the Alien Enemies Act invocation by President Trump. And these claims have really relied on very similar case law, very similar arguments. And the judge pointed out that the courts in these cases, relying themselves on Supreme Court precedent, have essentially said that the meaning of a statute, the terms of a statute, can always be interpreted by a court. That is never a political question.

**[00:04:50.6] Liza Goitein:** That is always something that courts have the ability and, in fact, responsibility to do. And so, for example, in this case, the courts can say what a rebellion is supposed to mean according to the statute, what Congress had in mind when it used the term rebellion. Separately, there's the factual question of whether the president's determination of whether those conditions actually exist can be reviewed by the courts. And on this matter, the judge said, I'm not questioning the facts as the administration has presented them. So I'm not even getting to that. However, if I did have to get to that, the determination that's being made here is in the context of domestic civil unrest. It is not in the context of foreign affairs. It is not in the context of war. It is not in any of the contexts where courts have traditionally held that the president's factual determinations are accorded maximal deference. So, that gets us past the reviewability question. Judge Breyer then looked at these provisions within 12406. You know, whenever there is a rebellion or when the president is unable to execute the law using the regular forces, the judge decided that, I should say, the judge looked at the sort of definitions of rebellion that were available through dictionaries at the time this law was passed and came to the conclusion that the definition that best fit what Congress likely meant in the statute was a definition of essentially an uprising that must be not only violent but armed, that it must be organized, that it must be open and avowed, and that it has to be a rebellion against the government as a whole, often with the aim of overthrowing the government, rather than just being in opposition to a single law or issue.

**[00:06:56.9] Liza Goitein:** So, basically, the court was rejecting some of these secondary definitions that are more like when your teenager refuses to do their homework. And the court held that there was not that the facts as alleged by the Trump administration did not meet that definition. The court then looked at whether or not the president was unable to execute the law using the regular forces. And the court basically said nothing in the record tells me that the president was unable to execute the law. The fact that there might have been some impediments surely cannot be enough for us as a court to make a finding or for the Trump administration to have reasonably concluded that they were unable to execute the law using the regular forces. So, that was how the court addressed the substantive criteria in the statute. When it came to this criterion or this requirement in the law that the issues be ordered through the governor, there was a lot of discussion of what that meant. Did that require affirmative consent by the governor? Does it require cooperation, coordination? Essentially, the judge did not reach those questions. The judge just held that at a minimum for orders to be issued through the governor, they have to go to the governor and they have to be sent to the governor by the president. It's not just relying on well, hopefully the actual military commander here will hopefully show them to the governor. No, under the statute, it actually has to be delivered to the governor. And so, on the face of the statute, that requirement was not met. The question of what would have happened if the orders had been transmitted to the governor and the governor had refused to transmit them essentially was not yet before the court. That was basically what the judge was saying.

**[00:08:53.6] Jeffrey Rosen:** Thank you for an excellent summary of the core of Judge Breyer's opinion. Mike, the Trump administration has replied to Judge Breyer. It has argued that the president's determination of whether or not a rebellion or failure to execute the law exists is not reviewable by judges. He's also argued that on the facts, at a minimum, the conditions in Los Angeles qualify as a danger of a rebellion against federal authority. And he's said that he did issue his order through the governor by putting at the top of the order through the governor. Tell us more about President Trump's response to Judge Breyer's opinion.

**[00:09:41.3] Michael Ramsey:** Yeah, thanks, Jeff. I will focus, I think, mainly on what I think are the most effective arguments by the Trump administration, because as you say, they have multiple arguments on this. I think as to the authority to invoke the statute, by far the strongest argument is that there is a situation which makes it impossible to enforce the federal law by means of the regular forces, that is that second clause of the statute. I'm not terribly persuaded by the rebellion argument, and I don't think that, and it's important to see that the rebellion argument, it's not necessary for the Trump administration to win on that, that it's a much easier claim to make, I think, that the situation in LA was quite threatening to the immigration agents who were trying to enforce the law. You had crowds gathered, they were interfering with what was going on, they were surrounding federal buildings and so forth, and that's the kind of thing that that part of the statute is directed at. You don't need to show that it's a rebellion, and I kind of doubt that it actually was within the meaning of the statute, but that's beside the point.

**[00:10:53.6] Michael Ramsey:** So the first argument is that the statute gives the authority to use the federalized National Guard to enforce federal law, and I think it's worth noting that this all comes right from the Constitution in the sense that the president is the officer who's charged with enforcing federal law through the Take Care Clause, and Article I, Section 8 of the Constitution contemplates that Congress may provide for calling out the militia, the name, the 18th century

name for what we call the National Guard, to, among other things, enforce federal law, and then the statute that we're talking about, Section 12406, is an implementation of that power of Congress to provide for the calling out of the National Guard, and it gives the situation in which the president has that authority. The president acts pursuant to that authority in determining that it's necessary to have the Guard to protect the federal agents who are enforcing federal immigration law. So, as to the legal meaning of the statute, I think that's quite clear and not really contested. The contested point, as Liza said, is whether the circumstances on the street in Los Angeles justified this calling out. But on that point, I think the Trump administration says, and I find this persuasive, that that's the president's call.

**[00:12:23.3] Michael Ramsey:** It's not something that a judge removed from the situation can look at the facts and say, well, I think maybe the president's overreacting here. As long as the president has a plausible case... Now, I think if there was nothing going on in Los Angeles and just out of the blue, he decides to call out the guard on a whim, I think that would be a very different situation. But once you have this very substantial unrest in Los Angeles still continuing today, I think you have a situation where it's the president's judgment, it's the president's discretion to decide whether and to what extent additional security is necessary to protect federal agents. So that's sort of on the merits. And then there's this side question of whether the orders were issued through the governor. And the Trump administration's argument, as I understand it there, is that first of all, they were issued through the head of the California National Guard, who answers to the governor. So it's essentially through the governor's chain of command, even if it was not personally served on the governor, is the first step, the first argument. And the second argument is that in any event, issuing orders through the governor would be futile because the governor was not on board for this deployment and the president knew it. And so that's the more technical question about whether the statute was invoked in precisely the correct way.

**[00:13:56.7] Jeffrey Rosen:** Thank you so much for that. Liza, in your great post on this case, "Unpacking Trump's Order Authorizing Domestic Deployment of the Military," which was posted on the Brennan Center site on June 10th, you note that the law in question was enacted in 1903 to allow the president to call up the National Guard if there's a rebellion or danger of rebellion, or if the president is unable with regular forces to execute the laws of the United States. You note that presidents in the past have treated this law as a technical call-up authority that accompanies the Insurrection Act's substantive grant of power. Here, the president has chosen not to invoke the Insurrection Act. You suggest that if he did, that would make it much more legally solid, but the fact that he's invoked this 1903 law without invoking the Insurrection Act, you think, allows judges to decide whether or not the president is unable to execute the laws, and here you think that he isn't. So tell us more about that core substantive point. Why do you believe that under this 1903 law, the judges are empowered to decide whether or not the president can execute the laws of the United States, and why do you think the factual situation here does not support that authority?

**[00:15:14.1] Liza Goitein:** Well, it's actually two separate questions. There's the question of whether 12406 provides any substantive authority at all versus a mobilization authority. And I will fully admit that the relationship between 12406 and the Insurrection Act is a bit baffling. There is a lot of overlap between the two of them. Why Congress enacted this law in 1903 after the Insurrection Act was passed and what Congress thought, how Congress thought it was

supposed to interrelate with the Insurrection Act is unfortunately pretty obscure. What I was pointing to is the practice that evolved, and the practice that has evolved, with one exception that I'm aware of, but that was a very different circumstance, the practice that has evolved is that presidents have not relied on 12406 on its own when federalizing the National Guard to quell civil unrest or to enforce the law, and that in those situations, presidents have also invoked the Insurrection Act on this theory that one is a mobilization authority to call up the guard and then the other one provides a substantive authority to actually deploy the guard to do certain things. Now, the court did not look at that question, right?

**[00:16:30.6] Liza Goitein:** And as I said, it is quite unclear, and I was referring in my blog post to historical practice, historical interpretation, what the court would have ruled if it had looked at that question, I really don't know, it was not really before the court, but if the court had held, yes, this is only a mobilization authority, and you can mobilize the troops when these conditions are present, but that doesn't mean that they can actually sort of execute the responsibilities that they are, or the tasks they have been given in Los Angeles, in some ways, that would have mooted the question of whether these criteria are met at all. There is a separate question about why it is that I believe that the criterion of being unable to execute the law with regular forces was not met, why Judge Breyer felt that it was not met, and in response to what Mike said, yes, it is absolutely the case that the Constitution gives Congress the power to provide for calling forth the militia to execute the law. 12406 is not, does not take a wholesale approach there saying we hereby authorize the president to deploy the militia to execute the law full stop. It puts, as Congress is absolutely allowed to do under the calling forth clause, it puts some conditions on that.

**[00:17:52.8] Liza Goitein:** And the main condition here, of course, is that the president has to be unable with the regular forces to execute the law. And I don't think that everyone is in agreement on what that means prior to the question of whether the facts actually were there on the ground. There was a question before the district court. What does it mean to be unable to execute the law without with the regular forces? And Judge Breyer basically took the position that the president has to be unable to execute the law at all. It may seem implausible that that is what Congress meant. However, it is literally what the statute says. The requirement for deployment is that the president is unable with regular forces to execute the laws of the United States. Now, you might say, well, Congress could not have meant that literally. Fine. But if the court is going to deviate from the plain text of the law, it seems pretty clear that the court should deviate as little as possible. So whatever test the court comes up with should be pretty close to completely unable to execute the law, or at least on that side of the spectrum.

**[00:19:09.7] Liza Goitein:** And I do think that it would be hard for the administration to meet any sort of reasonable reading of that requirement. ICE was able to conduct more than 100 arrests of migrants during these two days. In their briefs, the Trump administration said, oh, we could have conducted more. There was no evidence in the declarations of a raid that was attempted and thwarted. And quite notably, there was no attempt to even try to deploy other resources that the federal government had at its disposal the regular forces short of federalizing the National Guard. In Portland in 2020, for example, we saw the first Trump administration deploying over 100 DHS officials, CBP officials to try to address the protests there. Now, I don't think that was an appropriate deployment, but it's something that the federal government is able to do, has the resources to do. In this case, there was nothing like that. There was absolutely no

effort to try anything short of deploying, federalizing the National Guard. Now, of course, there's not an express exhaustion requirement in the statute, but it's clearly relevant to the question of whether the president was unable with the regular forces to execute the law.

**[00:20:26.9] Jeffrey Rosen:** Mike, the Trump administration notes a case from 1827 called *Martin v. Mott*, which arose when a militiaman didn't want to enter federal service to fight in the War of 1812. And the Supreme Court held that the authority to decide whether the exigency has arisen belongs exclusively to the president. And his decision is conclusive upon all other persons. Tell us more about the *Mott* case, about why President Trump thinks that this case is non-justiciable. In other words, judges shouldn't second-guess the president's determination about whether he's unable to execute the law. And tell us on the facts why you believe that there should be deference to the president's decision.

**[00:21:13.2] Michael Ramsey:** Yeah, well, thanks for that. I think, actually, before that case, there was a case called *Marbury v. Madison* that people are probably familiar with. And *Marbury* said, this was the case, of course, that famously established judicial review. And *Marbury* said that it's the province of the court to say what the law is. And that's the part of *Marbury* that's usually quoted. But *Marbury* also made a very important point which was that in areas where the President has discretion, it's not for the court to second guess the president's discretion, because that's the President's executive power. And Chief Justice Marshall made that point in *Marbury* several times to emphasize the narrowness of the decision that he was making, even though it's a very important decision about the court's power to interpret the law. And so the *Mott* case, I think, just follows from that, that when the president makes a discretionary determination under a statutory standard, then it's the president's call. And it's not for the courts to second guess the way the president sees the facts on the ground and decides whether the use of the militia, the use of the guard in this case, is necessary.

**[00:22:32.1] Michael Ramsey:** And I think that then that goes to the current question of we can debate whether the situation in Los Angeles was so out of control that the president wasn't able to appropriately enforce the law. I'd like to point out that although Liza used the word completely unable, that's not in the statute. It's just unable. And I think a reasonable understanding of unable means that when the federal operations are being interfered with and that there are threats against the safety of federal agents, that the president is entitled to bring in additional force. Now, what additional force should he bring in? Maybe there's other federal forces that are available, but it's, again, a discretionary determination as to whether those forces are actually available or whether they're tied down doing other things. This is all a very complicated assessment that I think is completely inappropriate for judges to make.

**[00:23:37.9] Michael Ramsey:** Once we get past the legal point that the president has an authority granted by the statute, granted by the Constitution, and I'm satisfied that he does. And then the question of when it's disputed whether the facts indicate that the best move, the safest move to protect the federal agents is to use the guard versus some other option, maybe there's not enough of threat, maybe we let the federal agents go out and see what happens and see if they get attacked. These are the kinds of things I think are entirely inappropriate for judges to be doing and that is I think the core Trump administration argument that I find most persuasive in terms of

how there should be deference from the judiciary to the president's factual determinations as to the necessity on the ground.

**[00:24:32.8] Jeffrey Rosen:** Liza, Judge Breyer said that a classic example of the president being unable with regular forces to execute the law, the only other time in the country's history that the president has exclusively relied on this section is the 1970 postal strike. In that case, the mail system was incapacitated, the regular forces of letter carriers were on strike. Here, the regular forces are still very much on duty. Tell us more about the history of the invocation of this statute and the Insurrection Act. Again, you've examined the relationship between the Insurrection Act and this statute. The Insurrection Act has been invoked just sporadically throughout American history. It was invoked in response to the secessionist violence that sparked the Civil War. It was invoked after Reconstruction in the violence arising out of 1874 and the Ku Klux Klan violence of the '20s. It was last invoked by President George H.W. Bush in response to the Rodney King riots. Tell us about the history of the invocation of the Insurrection Act and your broader fear, which you expressed in your blog post, that if the president can invoke federal troops under circumstances like this, it will challenge this country's tradition of not deploying the military to enforce the law.

**[00:26:02.0] Liza Goitein:** Sure. So just starting with the history of the invocation of 12406, I think really you covered it. I mean, it has been used on its own on that one occasion to deal with the postal strike where, in fact, the president was unable to execute the law. And on other occasions, it has been used in conjunction with the Insurrection Act, such as when President Eisenhower invoked the Insurrection Act and 12406, which at the time was codified in a different part of the U.S. Code, to federalize the Arkansas National Guard, order them to stand down, and send active duty troops to Little Rock, Arkansas to enforce the Supreme Court's order. So that's the history of 12406. As you can see, there's very little to go on here in terms of interpreting 12406 as a stand-alone authority. One brief response to something Mike said that he thought a better interpretation, rather than interpreting it literally as unable to execute the law, it should be interpreted as if there's interference with the execution of the law. I would say that proves way too much. There are often federal law enforcement faces interference to their efforts all the time. That interference has to have an impact, some kind of impact, on the actual ability of the federal government to execute the law, of the president to execute the law.

**[00:27:26.0] Liza Goitein:** And again, there was no evidence in the record. There was a lot of evidence of what was happening on the ground, but no evidence that it actually prevented any arrests of migrants or any of this execution of the law. So moving on to the Insurrection Act. The Insurrection Act is the primary exception to the Posse Comitatus Act, which is, of course, the law that prohibits federal armed forces from participating in law enforcement unless expressly authorized by Congress or by the Constitution. The Insurrection Act, on its face, gives the president very broad discretion to deploy federal armed forces and to federalize the National Guard and deploy National Guard forces to suppress insurrections or rebellions, to quell domestic violence, and to execute the law when it's being obstructed. Now, even though the terms of this law are extremely broad, broader actually than the terms of 12406, and there is no requirement that the orders be issued through the governor of the state, the Department of Justice has historically interpreted the Insurrection Act more narrowly in keeping with the Constitution and tradition.

**[00:28:49.7] Liza Goitein:** And what the Department of Justice has said is that the law should not be invoked unless the state has requested assistance to suppress an insurrection, essentially, where there is active obstruction or defiance of a federal court order, or where state and local law enforcement have completely broken down. And in practice, what that has meant, that last prong, is that either state and local law enforcement are trying very hard to control the situation, but they're overwhelmed, in which case they almost always ask for assistance, or the state and local law enforcement are part of the problem, they are the problem. They are either not making any attempt to control violence or a threat of violence directed against a certain class of people, as we saw during the civil rights era, or they are actively defying or obstructing a federal court order. So that has been the interpretation by the Department of Justice of this very broad law in the past. It's been a much more narrow interpretation, again, in keeping with this principle that quelling civil unrest, enforcing the law, that these are responsibilities of civilian law enforcement. For quelling domestic violence, it's really the responsibility of state and local law enforcement under the Constitution in all but the most extreme cases. And so federal deployment of federal military troops should be an absolute last resort.

**[00:30:22.0] Liza Goitein:** That's been the understanding, that's been the Department of Justice's interpretation. Obviously, the Insurrection Act was not relied on here, but if the president were to invoke the Insurrection Act, I would be making a very similar argument to the argument I'm making about 12406, which is that the facts on the ground simply do not justify deployment of federal military forces under these principles.

**[00:30:48.3] Jeffrey Rosen:** Mike, in your post, you wondered why the president didn't invoke the Insurrection Act. And Liza suggests it may be because there's a Justice Department tradition saying that it shouldn't be invoked unless, as she said, the state requests it, unless there's an issue of compliance with a federal court order, or state and local law enforcement are completely overwhelmed. Talk about the history of the invocations of the Insurrection Act, which, as I mentioned, either have been invoked in response to what the historian Jefferson Cowie calls white resistance to federal power, that was the Civil War, the Reconstruction era, and the Civil Rights era, and then a separate strain of black resistance to state and federal power, beginning with slave rebellions in Virginia, violent protests against racism responded to by President Roosevelt and Lyndon Johnson and George H.W. Bush. Broadly, is this a new invocation of federal power, not requested by state authorities in cases where it's contested whether or not the law has broken down and where the states are not part of the problem, or is this within the American tradition?

**[00:31:58.3] Michael Ramsey:** Well, the first thing I'd say on the Insurrection Act is that the Insurrection Act has been used in various ways over history, but the Insurrection Act itself doesn't contain any of these limitations. The Insurrection Act simply says that the president can use federal forces to enforce federal law, and then again that just follows directly from the Constitution that has the president being the primary person responsible for enforcing federal law and the commander-in-chief of U.S. Forces, and as to the National Guard, as the militia, the commander-in-chief of the militia when called into federal service, and Congress authorizes the calling into federal service. So there isn't a constitutional limitation on the use of federal forces to enforce federal law, and there may be a prudential idea that it should be used sparingly, and I



entirely applaud that. I don't disagree with the proposition that this sort of use of military forces against civilian populations should be only in extraordinary circumstances, and we've seen extraordinary circumstances over history that you mentioned, and I think this is an extraordinary circumstance we have here. It's different from the ones that we've seen in the past, but it's nonetheless I think an extraordinary circumstance in the sense that we're talking about federal law that the state and local authorities have specifically said they are not going to cooperate in enforcing, that they do not believe should be enforced, and that they believe is an unjust law.

**[00:33:56.4] Michael Ramsey:** And of course it's their right in a federal system to say that they're not going to cooperate with the federal forces, but when there's then violent resistance to the use of federal agents to enforce the federal law, it's reasonable for the president to think that he's not going to get support from the local authorities. And initially the local authorities were quite slow in responding on this. Now the local authorities have been more mobilized over the course of the last week and the last few days, but even just today I think I saw that the local authorities in Los Angeles, the state authorities said that they were really overwhelmed by the amount of violence and rioting that was going on. They were not able to contain it. And so I think it's an extraordinary situation. Again, it's different from what we saw with the... I think the most analogous is indeed the calling out of the National Guard and the regular troops to enforce civil rights laws in the 1960s. It's different from that, but it is a situation where the local authorities are at least somewhat resistant to the idea of the federal law being enforced.

**[00:35:23.0] Michael Ramsey:** Just a quick word on the Insurrection Act. I think it lies right that there's some question about what the relationship between Section 12406 and the Insurrection Act is, but I don't see that there's a necessary connection between the two. It seems to me that 12406, which doesn't make any reference to the Insurrection Act, is better read as a separate authority. Now, why Congress thought it needed to have a separate authority when the Insurrection Act already gives the authority to the president to call out the National Guard to enforce federal law, I don't know what Congress was thinking there. My understanding is that the legislative history is quite unhelpful on that point. But as far as the Insurrection Act is concerned, I don't know why President Trump didn't invoke the Insurrection Act. I think he would have been justified in invoking the Insurrection Act in the same way that he is justified in invoking Section 12406 on the grounds that federal law is not being enforced and he needs the additional force to protect the agents that are actually enforcing the federal law.

**[00:36:37.4] Michael Ramsey:** I think, as a further aside, I think it's important to note here that my understanding is that the National Guard and the regular troops are not being used directly to enforce law in the sense of going out and making arrests, either of the people who are unlawfully present in the United States or people who are participating in violent rioting and attacks. The military forces aren't being used for that purpose. They're simply being used to guard federal buildings and institutions and provide protection for the agents that are enforcing. So I think it is a very limited call-out right here. I don't know if that's why the Insurrection Act was not used. I don't have any insight on that particular point. I do think that if he had used the Insurrection Act, we wouldn't be having the conversation about whether he needed to go through the governor because the Insurrection Act doesn't provide anything like that. The Insurrection Act is actually quite clear that it doesn't require the consent of the governor. And indeed, the presidents who enforced civil rights laws in the 1960s did not have the consent of the governors. So I don't know

where the Insurrection Act fits in and why it's not being used, but I think it's actually cleaner to understand Section 12406 as a separate grant of authority. That's the way the Trump administration is reading it, and that is the way the statute reads on its face.

**[00:38:11.8] Jeffrey Rosen:** Well, let's talk now about the question of Governor Newsom's consent. In his opinion, Judge Breyer held that the Trump administration failed to meet the procedural requirement that the president issue his order through the governor. President Trump responds that they did comply because at the very top of the DOD order was the label through the governor of California. There's a separate question of if the president had issued his order through the governor, whether or not Governor Newsom has an opportunity to provide or withhold his consent. Judge Breyer, although he's not entirely clear on this, did say the following. He said defendants say that the statute says nothing about obtaining a governor's consent as a prerequisite for federalizing the National Guard. They are correct, said Judge Breyer. Section 12406 does not expressly require consent or approval of a governor to federalize that state's National Guard, unlike similar statutes. Liza, what's at stake here? If the president just reissued the order and sent it to Newsom, would that satisfy Judge Breyer's concern? Might the appellate court hold that he did satisfy the requirement because he put "through the governor" at the top? And is anyone strongly arguing at this point that Governor Newsom could have withheld consent if given the opportunity?

**[00:39:38.3] Liza Goitein:** I really think we have not arrived at that point. I don't read Judge Breyer as saying that the statute should not be read to require some degree of cooperation, possibly even consent. I read him as saying the words aren't there, it's not express. That doesn't mean it's not inherent in the requirement that these orders be issued through the governor. And the judge just simply hasn't looked at that question. I think that if the orders were issued to the governor, and I think that's clearly required under the statute, I don't think there's any reasonable way to read it as saying that it could be instead sent to the commanding general, partly because the same statute says that for the District of Columbia, it can be sent to the commanding general. So if that were also the case for other states, presumably Congress would have said so. So I think the by far the most natural reading is that it has to be sent to the governor and the governor is supposed to then transmit that or that's certainly that would be the Trump administration's argument. If the governor doesn't what happens next? I think that it is a reasonable argument for California to make that because the issues must be ordered through the governor that that implies consent on the part of the state.

**[00:41:12.1] Liza Goitein:** That doesn't mean I think that that is the conclusion that courts will reach. But I think the Trump administration, I keep saying the government, we have two governments here, but the Trump administration seems to think that its strongest response to that is, but that would give states a veto power over the president's ability to deploy troops in these circumstances. And the answer to that is no, it doesn't because we have the Insurrection Act. There is a statute that doesn't require orders to be issued through the governor. So maybe the answer is 12406 is an authority that is contingent on consent by the governor and the Insurrection Act is a broader authority that is not so contingent. So I think there's a real, a very difficult legal issue that's presented here. And the courts have not, Judge Breyer has not yet really engaged on that issue.

**[00:42:08.4] Jeffrey Rosen:** Mike, what's your read on the question of whether or not the statute requires consent and how the appellate courts are likely to hold on that issue? And it sounds like all these questions could be cured in the views of the state by President Trump simply invoking the Insurrection Act. Is that where this might be heading if courts continue to give any pushback?

**[00:42:35.7] Michael Ramsey:** Yes, I would have to say that I largely agree with what Liza said about this point. I think this is the weakest part of the president's argument here. I do not think that simply putting the title issued through the governor on the top of your document when in fact nothing has been issued or even shown to the governor. I don't think that's a strong argument. Indeed, I think that's the sort of argument that kind of gives lawyers a bad name. And I wish they would not make that argument. I think that the proper way to do this would indeed have been to give the orders through Governor Newsom and see what he did. And if he refused, then to say that in light of the governor's refusal to transmit the orders, because the statute can't plausibly be read to give the governor a veto, and I'll get back to why I think that, because the statute can't plausibly be read to give the governor a veto on this, then he... the president can issue orders directly. And I think that would have been the correct procedural way to go forward. And as I recall, that is the way that the president's, at least President Eisenhower, when he was federalizing the guard, did proceed in the civil rights protests that he told the governor to issue the orders and the governor refused, and then the president did it himself.

**[00:44:17.0] Michael Ramsey:** And perhaps the president, I think the president does make the argument that it would have been futile because he knew the governor was going to refuse, but I don't know that that's so obvious. I'm not sure what Governor Newsom would have done. So I think that on this technical point, I think the Trump administration is not on the strongest ground. I do think, though, that it really doesn't matter very much for two reasons. First of all, I do think that if the president had issued the orders to Governor Newsom and Governor Newsom had refused to transmit them to the guard, then that the president could just have gone around him, because I don't think the statute can be read to give the governor a veto, because that's inconsistent with the way the Insurrection Act reads, which doesn't give the state any veto. And it's inconsistent with the way this section has been used in the past in the civil rights era. And it's not consistent generally with the idea that the federal government, including through the National Guard, through the militia, is responsible for enforcing federal laws. States don't get vetoes on how federal forces and the National Guard in this situation is employed as a federal force as permitted by Article I, Section 8 of the Constitution.

**[00:45:51.2] Michael Ramsey:** The states don't get vetoes on how federal law is used to enforce federal law. What the states do have a veto on, including in the Insurrection Act, is whether the federal forces are going to be used to enforce state law. That's an entirely different matter and very distinct from what we're looking at here. So in any event, I think that if Governor Newsom had refused, that President Trump would have been entitled under Section 12406 to just issue the orders himself. And then in any event, as Liza says, and I completely agree, that this whole thing could be solved by the President invoking the Insurrection Act, which basically has the same standard for using the Guard to enforce federal law. And so although I think in sum, although I think that the President, in my opinion, did not follow exactly the procedure that's authorized, that's set forth in the statute, I don't think it's of great substance. And it could be something that

the President could cure if the Court of Appeals were inclined to hold that that's what he needs to do. And then as to your question about what the Court of Appeals will do, I'm extremely bad at predicting what courts are going to do, so they'll probably do the opposite.

**[00:47:13.4] Michael Ramsey:** But I wouldn't be surprised if that is indeed what they held, if they hold that the procedure wasn't followed. And if the procedure is followed correctly, then the Court will defer to the executive, but because the procedure wasn't followed here, the President's got to go back and do it over again.

**[00:47:33.6] Jeffrey Rosen:** Liza, Mike made a point about federalism. He said the federal government is responsible for enforcing federal laws. States don't get vetoes on how federal laws are used to enforce it. They only have a veto on whether federal forces are used to enforce state law. Do you agree with that or not? And what's your response to his claims about how the states are refusing to provide assistance? What is the proper role for the state in providing sanctuary cities or otherwise in resisting being commandeered by federal authority?

**[00:48:05.0] Liza Goitein:** Yeah, so no, states don't have a veto power over federal law. But on the other hand, the President doesn't have a blank check to deploy the military to execute federal law. He's restricted by the laws that Congress has passed. And Congress in its judgment may decide that when we're talking about federalizing the state guard and taking the state National Guard away from the governor, that there are circumstances in which Congress will require consent by the state. Now, again, this is not something that Congress did in the Insurrection Act. And Mike said previously, these are separate statutes. So it doesn't make a lot of sense to say, well, they can't have meant that the governors have to consent because here in this other statute, they didn't say that, right? If they're separate statutes, they're separate statutes. But that is certainly something Congress can do. And the argument is that that's what Congress did in 12406. In terms of Mike's point that California and some of the jurisdictions in California have laws limiting cooperation with federal immigration enforcement, that, of course, is the right of the states as their constitutional right under the 10th Amendment. They cannot be commandeered to help with enforcing federal immigration law.

**[00:49:21.8] Liza Goitein:** Needless to say, there is a big difference between refusing to cooperate and assist versus actual obstruction, which is what we were seeing during the civil rights era. And nothing in the response of the LAPD or the LASD could possibly suggest that they were refusing to do anything about the protests or that they were somehow being lackluster in their response. I mean, the one thing I've heard is that they were somewhat late to respond. It was certainly within two hours. What the state of California said in their briefs is no one told us, no one coordinated with us about where these raids were happening. If there had been any coordination, we would have been in a better position when something like this happened and that there were real issues with getting to those areas in a timely fashion, that they moved as quickly as they could. And certainly no one can dispute looking at the video footage. Just believe your own eyes of what the LASD and LAPD were doing that Friday and that Saturday. I mean, we saw police officers, they were shooting rubber pellets, they were using flashbang grenades, they were using tear gas, pepper spray.

**[00:50:39.8] Liza Goitein:** Even if you look at the federal government's declarations in this case, you see some of these very strong actions that were taken by the police in this case. So this is not even remotely comparable to the civil rights era when state and local law enforcement were refusing to protect African American students who were trying to attend desegregated schools or trying to desegregate the schools or civil rights activists who were marching and were under threat of violence by white mobs and state and local law enforcement were sitting on their hands and not helping. This is nothing even close to that. In terms of sort of statements that state and local law enforcement have made about the current situation and how difficult the current situation is, that is what Governor Newsom predicted. He said, if you actually federalize the National Guard against the objections of the governor, of the mayor, of the people of Los Angeles, if you deploy the military in our streets, this is going to inflame tensions. This is going to be escalatory rather than de-escalatory. And I think it is true that we have seen some of that. Finally, on this issue of whether or not federal forces have been used to directly enforce the law versus just protecting federal property and federal functions, those two things are not necessarily separate.

**[00:51:58.6] Liza Goitein:** There can be an action that is both done to protect federal property that is also one of the actions that courts have held is a core law enforcement action that is prohibited under the Posse Comitatus Act. And what we have seen is that U.S. Marines, at least in one case, have temporarily detained a civilian. They have, U.S. Marines on the steps of the federal building in Los Angeles have physically pushed a crowd of people down off the stairs. These are the kinds of direct face-to-face physical interactions that courts have routinely held do trigger the protections, the prohibitions of the Posse Comitatus Act. It is not simply a purpose test. One of the tests under the Posse Comitatus Act is that the military is subjecting civilians to a power that is compulsory in nature, regulatory, prescriptive, or compulsory in nature. When a U.S. Marine detains a civilian and that civilian is not free to go, that is an exercise of compulsory power over that civilian. So I do think that the issue of whether the Posse Comitatus Act has been violated will be before the district court tomorrow. It was not as of last Thursday because these actions I'm talking about, the detention of a civilian, pushing people down the stairs, those were not yet in the record.

**[00:53:20.8] Jeffrey Rosen:** Thanks so much for that. Mike, it's time for closing thoughts in this great discussion. Liza has suggested that the Posse Comitatus Act, which generally forbids the military from enforcing federal law, may become an issue in this case. In your view, is the traditional line that prohibits the military from enforcing federal law, except in narrowly circumscribed emergency situations, being challenged or not? And how do you see this situation continuing to evolve?

**[00:53:53.6] Michael Ramsey:** Well, I think as to the Posse Comitatus Act, I think that question is really derivative of the question of whether the president has the authority under the Insurrection Act and Section 12406. So if the president has that authority, then those are exceptions to the Posse Comitatus Act. And I don't think that the Posse Comitatus Act adds anything here. What I would, I guess, say in closing is to bring it back really to the question of who decides. I think that's the critical question that we're faced with here because we can debate what the situation on the ground was. And I don't know what the situation on the ground was. Liza doesn't know what the situation on the ground was. Judge Breyer doesn't know what the

situation on the ground was. And I certainly mean no disrespect to the law enforcement in California, which is great, and they've had a very tough job to do here. The question is, if the president looks at the situation and concludes that federal law enforcement needs additional protection, that federal facilities need additional protection because of violent riots and disorder, and there's really no dispute that there are violent riots and disorder in Los Angeles, then the president has discretion under the statutes to decide that military force is needed.

**[00:55:25.4] Michael Ramsey:** And the president has used, I think, very limited military force in terms of not just protecting buildings. Sure. Protecting buildings entails pushing back people who are trying to storm the buildings as just I think also today the protesters stormed the federal building in Portland as well. So the danger's there and the president makes the call. And then the question is, does that call get second guessed by a judge who doesn't really know the situation? And I think that that's not the judge's role. I think the judge's role is decide what do the statutes mean as a legal matter. And then it's the discretion is to the president to decide, given what the statutes mean, does the situation on the ground justify the invocation of the statute. And I think that's the line of authority that's drawn between the president and the judiciary, going all the way back to Barr Rivers Madison.

**[00:56:30.5] Jeffrey Rosen:** Thank you so much, Liza Goitein and Mike Ramsey, for a thoughtful, thorough, and illuminating discussion of the important questions raised by Trump v. Newsom. Liza, Mike, thank you so much for joining.

**[00:56:42.7] Liza Goitein:** It was my pleasure. Thank you.

**[00:56:44.8] Michael Ramsey:** Thanks so much.

**[00:56:50.3] Jeffrey Rosen:** This episode was produced by Griffin Richie, Samson Mostashari, and Bill Pollock. It was engineered by Bill Pollock. Research was provided by Griffin Richie, Samson Mostashari, Cooper Smith, and Gyuha Lee. Please recommend the show to friends, colleagues, or anyone anywhere who's eager for a weekly dose of constitutional learning and light. Who wouldn't be? Check out the Constitution 101 course at [constitutioncenter.org/khan101](https://constitutioncenter.org/khan101). Wait for the thrilling interactive declaration. Friends, I'm so excited in September we're launching this amazing civic toolkit with America's greatest scholars and historians on the big ideas of the Declaration of Independence. Can't wait to share with you. Sign up for the newsletter at [constitutioncenter.org/connect](https://constitutioncenter.org/connect). And always remember in your waking and sleeping moments, which presumably is most of the day, that the National Constitution Center is a private nonprofit. This podcast and all our work is only possible thanks to the generosity of people like you from across the country who are inspired by our nonpartisan mission of constitutional education and civil dialogue and debate. Please consider supporting our efforts by donating today at [constitutioncenter.org](https://constitutioncenter.org) forward/donate. On behalf of the National Constitution Center, I'm Jeffrey Rosen.