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The Current podcast

**“What’s the president’s legal basis for sending
National Guard troops to DC streets?”**

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ANDERSON: We are seeing outside National Guard units from red states, primarily, states with Republican governors, where they’re volunteering them to be deployed to D.C. where they’re then being placed under the direction of federal officials, but they’re not technically being federalized. ... It’s a tricky balancing act to understand exactly what level of risk and how far the Trump administration is willing to push the envelope.

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DEWS: Hi, I’m Fred Dews, and you’re listening to *The Current*, part of the Brookings Podcast Network. On August 11th, President Donald Trump issued an executive order titled "Declaring a Crime Emergency in the District of Columbia," putting the federal government in charge of the local police force. A second executive order ordered members of the D.C. National Guard into active federal service.

Today, over 2,000 National Guard members from D.C. and other states are mobilized in the nation’s capital. A similar effort in Los Angeles over the summer was just ruled illegal by a federal judge, citing the Posse Comitatus Act of 1878 that bars the military from enforcing domestic laws absent permission from Congress.

Joining me to talk about these developments, their constitutional and legal bases, and what this expansion of federal military power by the Trump administration could mean for other U.S. cities is Scott Anderson, a fellow in Governance Studies, plus general counsel and senior editor for Lawfare.

Scott, welcome back to *The Current*.

ANDERSON: Thank you for having me.

DEWS: So can you briefly describe the Trump administration’s legal basis for deploying National Guard troops in D.C.?

[1:34]

ANDERSON: So I can. It is different between D.C. and the rest of the country. So Los Angeles, Illinois potentially is being discussed as the next possible location for this very different legal story. D.C.'s unique because it has a unique relationship with the federal government on a lot of different fronts, and that includes a lot of the laws that set up its core institutions, including its National Guard, which operates a lot like a state national guard, but instead of reporting to a state governor, like most state national guards, it reports to the president.

That means that the president has the authority to mobilize the National Guard without technically federalizing the National Guard. With most state national guards, the president can call upon them and direct them to do certain tasks, but he has to federalize them first under pursuant to specific statutory authority enacted by Congress.

And once he federalizes them, they become the same as active duty troops, meaning they're subject to lots of legal limitations, and that includes the Posse Comitatus Act, a law that limits the use of federal military forces in law enforcement activities, or at least actually makes it a crime to use them for that purpose, except where it's expressly authorized by Congress or the Constitution.

But D.C. National Guard, when they're mobilized by the president pursuant to his role as their commander, not as the president federalizing them, they are not technically federalized, they're still D.C. National Guard. That means they're not subject, at least in the views of the executive branch, although it's been a longstanding view at this point, they're not subject to Posse Comitatus Act limitations in the same way and they can participate in different types of law enforcement.

There are federal laws that govern when D.C. National Guard can be called up. One allows them to be called up in various cases of unrest, kind of as a generalized term, but kind of a list of different sorts of activities that can arise, but it requires a request by the mayor, by the U.S. Marshal for D.C., or by certain other officials. And we haven't seen reports of any of those requests actually happening.

So I suspect that might not be what the Trump administration's actually relying on. A separate provision, which says essentially that the commander of the D.C. National Guard can mobilize them for drills, exercises, and, quote, "other duties" has been interpreted by the executive branch for many decades super broadly to encompass all sorts of potential activities in a way that arguably subsumes the the first rule, the request rule, but nonetheless has been relied upon reliably by the executive branch for a long time. I suspect that's what they're relying on.

So it's this idea that what they're doing right now is an "other duty" under that statute, that the president and as the commander of the D.C. National Guard can mobilize them to do in their National Guard status not as federalized troops.

DEWS: Okay. My understanding of the D.C. Home Rule Act of '73, which the president invoked in his executive orders, has a 30-day limit on this kind of federal control unless Congress passes a joint resolution to extend it. The August 11th executive order reaches that limit very soon, in a few days. But we've also just seen

D.C. Mayor Muriel Bowser issue her own executive order requiring local coordination with federal law enforcement perhaps beyond that deadline. So what happens legally if the August 11th deadline passes without congressional resolution? What are the political dynamics in Congress around the the D.C. National Guard troops and other troops in the capital city? And how does Mayor Bowser's order change all these calculations?

[4:52]

ANDERSON: So what the Home Rule Act provides is that the Metropolitan Police Department has to provide services to the president when he requests them, quote unquote, "for federal purposes" up to 48 hours or up to 30 days if the president notifies Congress and congressional committees of a particular request, which he did in this case. So that's where this 30-day limit comes through.

After that point, in theory, the mayor, who is the head of the Metropolitan Police Department, along with the police chief, is not actually obligated to comply with that request as a matter of that law. That said, perhaps the president might be able to make subsequent requests and repeated requests over a certain period. There's a question as to how they might be able to structure requests in a way that might evade that sort of time limit necessarily without having to go back to Congress.

So it's not a hundred percent clear how it would work if a president really wanted to, say, exercise substantial control over the police department and did so by making 30-day requests, followed by a 30-day request, followed by a 30-day request. Perhaps the city would challenge it, perhaps they would win. But there's probably a good reason to believe that the president could make some sort of repeated request, particularly if he made them more narrowly tailored or made them slightly different from each other.

Regardless, what happened in this case is that instead of going back to Congress to try and take over the Metropolitan Police Department, which is what he would've had to do to kind of buck this formal 30-day limit, the president has essentially reached a deal with the mayor, where the mayor has said, look, I can get more done. It's better for us if we work with the president to try and federal law enforcement to try and reach our mutual law enforcement goals.

And I'm not surprised to hear Mayor Bowser do that. This is a police department that we have to remember is under a lot of financial strain. This city of D.C. saw its budget slashed substantially due to some provisions that snuck their way in into related bills and that the Trump administration actually supports changing. But that has not made its way through Republicans in Congress as of yet. And therefore D.C. is still facing a major funding deficit, and that's included over time for police officers.

So they were facing pressure on a lot of these fronts already. And I think Mayor Bowser sees that she has limited cards to play in her ability to buck federal control of D.C. because it is ultimately under a lot of federal authority.

Now notably, they did push back in one important way. At one point, the Attorney General Bondi, who's kind of heading up this effort for the Trump administration, did try and actually appoint her own interim chief of police, essentially, or commissioner

for the police, saying that, oh, this ability to request services for federal purposes for up to 30 days means I can just control the police department. And that's a description that we often hear reiterated in the press where people talk about the federalization of police department.

But Mayor Bowser and her team in court filed a lawsuit and pointed out and — and I would say more or less win, technically it was a negotiated settlement, but it was one that they came on the better side of — basically saying that's actually not what the statute says. Statute says you can request services, and we have to provide them. We can see that, but it doesn't mean you can make personnel decisions, set internal policies, or otherwise take all these other roles away from our commissioner and chief of police and instead appoint your own.

And the Trump administration eventually walked back that demand and basically said, okay, the person we were gonna make the effective commissioner of the police department who's the current DEA head, instead, he's gonna be our liaison. And his job is to make much more targeted requests of you for specific services. And that's the arrangement that appears to be ongoing in that regard.

Notably, though, that really is about federal law enforcement, it has less directly to do with the National Guard deployment or some of the other activities happening in the city.

DEWS: Now, I know listeners to this might be asking a lot of questions about these issues around what is the crime rate, and what are the National Guard soldiers doing in Washington, D.C.? What were they doing in Los Angeles? I do want to set those aside because I want to focus on the legal and constitutional issues. And so again, back to the case of California or potentially Illinois or potentially Maryland and other places, when the president mobilizes the National Guard in a place like California, what is the kind of legal relationship, and how is it different compared to D.C. when the president takes an action like this, but for the state national guard? Who is the commander in chief of the California National Guard that was mobilized and sent to Los Angeles?

[8:58]

ANDERSON: So state national guards are what are called dual hatted. This is a novel arrangement that was implemented early in the 20th century and basically replaced the old militia system that the Framers envisioned and were familiar with when they wrote the Constitution, which talks a lot about militias instead of National Guard units.

National Guard units' default is that they operate under the command of the governor, but they are organized with the federal government in a variety of capacities to do similar training, similar armaments, basically to ensure interoperability so that if and when they are federalized to fight a war, they are effective in coordinating and integrating with the broader national military.

And then the president has certain circumstances where Congress has authorized him to call forth the National Guard under the authority that the Constitution gives to Congress to, to set the limits about when he can call forth the militias. And he can

call forth the National Guard to do certain things like combat insurrections, combat domestic violence, combat invasions. And that is what's authority that's provided for in the Insurrection Act being the most clearest and well-known example, a law that has its origins back to the Second Congress, way back at the end of the 18th century. Or in certain other statutes.

In this case, in what happened in California, which it is likely, most likely model, in my view, for what they will try to do in other states, is that there's a statute at 10 U.S.C. 12406, Title 10 of the U.S. code, section 12406, which says essentially in certain circumstances including invasion, domestic violence, or insurrection, which the Trump administration determined the protest in Los Angeles rose to that level — and I think one of the other conditions is something where a group of organized men coordinates to refuse to comply with federal law, something to that effect — they say essentially, look, under these provisions, the president can call up National Guard units. It doesn't actually authorize them to do anything specific with those soldiers. That's different from the Insurrection Act, which says the president can call up these soldiers and then use them to enforce federal law.

So instead what the president ended up doing in California is he used 12406 to federalize the troops. And then he said he gave them a mission under something called the "protective principle." This is an inferred theory that the executive branch has advanced for the last several decades, really dating back almost more than a century at this point, that's rooted in a couple of Supreme Court cases that have very different factual circumstances. But essentially says there is an implied authority within the executive branch within the president that he can take steps to protect federal personnel and property when they're engaging in their lawful duties.

And that's what the federal soldiers in Los Angeles were doing in the views of the executive branch of the Trump administration. They were there defending federal property and defending federal law enforcement officers, including ICE agents while they're going about their duties. And they did this by setting up blockades, by providing additional security for those soldiers, by essentially stopping people from coming into federal facilities.

This has become a question though as to whether those activities intrude too far on the sorts of law and enforcement activities troops are prohibited to participate in under the Posse Comitatus Act. That's what's being litigated right now in the Federal District Court in California, and that's the issue on which the Trump administration just lost. A, a single federal district court judge, is Judge Breyer, the brother of former Supreme Court Justice Breyer, he ruled essentially, look, these things you're doing in California are too close to law enforcement activities and are prohibited by the Posse Comitatus Act, and 12406 is not an exception to the Posse Comitatus Act. You still have to comply with that.

That decision is now gonna go on to appeal up to the Ninth Circuit. We'll have to see how it fares there. I think there's a chance it might survive, but I'm not a hundred percent sure. It really will depend on what panel it draws. And then that issue set may ultimately go all the way to Supreme Court. The one thing that might stop that among other things is that the troop deployments in California have really shrunk. There's only 300 troops there and they're not doing a lot of the same things. So there's at least an argument that some of this stuff is mooted out. And I think a lot of

judges are likely to want to avoid to reach the really difficult constitutional and statutory question this implicates and may use that as an out to avoid ultimately resolving the dispute.

DEWS: Well, so as we look ahead to what this activity in D.C. and Los Angeles over the summer, what it means for the, the future possible use of federalizing National Guard, and other federal law enforcement and sending them into various cities, I'm struck by this idea that, not only the Trump administration, but you indicated previous administrations have broadly interpreted a lot of these old statutes — not only the the D.C. Home Rule Act of '73, but the Posse Comitatus Act and the Insurrection Act, in their definitions of insurrection or, or domestic disturbance. What are you thinking in terms of what are the red lines that you're watching for legally, constitutionally, as the Trump administration potentially expands this use of federal power to other places in America?

[13:46]

ANDERSON: It's a tricky balancing act to understand exactly what level of risk and how far the Trump administration's willing to push the envelope. The thing I'm really looking for in potential deployment, for example in Illinois or other locations, it might be a slight variation on the model of what happened in California to what is happening to some extent in D.C. where we are seeing outside National Guard units from red states primarily, states with Republican governors, where they're volunteering them to be deployed to D.C., where they're then being placed under the direction of federal officials, but they're not technically being federalized. That is what's known as a Title 32 or hybrid mission. This is kind of a well-established practice in a lot of contexts like disaster relief or COVID relief contexts.

But the Trump administration used this in 2020 to bring the same National Guard units or many of the same ones to D.C. in the context of Black Lives Matter protests, and now we're seeing them do it again here. That's how you see these foreign, quote unquote, "foreign," out of state National Guard units operating here. And notably because they're in Title 32 status because they are technically still under the command of their governors, even though that governor is saying but follow the directions of federal officials in this case, they are arguably not subject to the Posse Comitatus Act.

I think we will see people contest that in the courts, but that's the current view at least the executive branch is taking, meaning they can do a lot more range of law enforcement activities in a way that if they federalize troops, they can't, unless they use the Insurrection Act or some other exception.

So the question is, is the president gonna be satisfied with deploying troops in other locations like he did in California where those troops were limited by the protective principle to sticking close to federal law enforcement officials and couldn't directly engage in law enforcement activities themselves, and may even be more limited in what they can do if Judge Breyer's views end up taking hold and establishing a precedent or a practice where other courts say, no, we're actually gonna be a little more specific about what you can do, constraining on what you can do?

Or is this gonna be a case where they say, let's try and use Title 32 In these cases where we're not subject to PCA limitations.

But then that raises a very novel constitutional question we've never encountered before that dates back and really predates the Constitution, which is that, remember National Guard units, these are the armies of the states, these are the militias of the states. When the states came together to form a union, they each had their own militia, which was their own military. So what happens when the army of one state deploys into another state without that state's permission? That's an invasion, at least by, I think it's colorably an invasion. It's something one argues is an invasion.

Well, that's something that the federal government's obligated to protect states against actually by another provision of the Constitution. Because it raises this very novel question. Can one state volunteer its own National Guard troops to be deployed against the will of the governor in another state to be used for this sort of mission? That would be the biggest constitutional question that could be tipped up by another mission if they choose the 502F routes. If they choose the 12406 route, the route they pursued in California, then it's a little bit more established ability to mobilize troops and deploy them, at least in that more limited, constrained protective principal role.

But then the question will be, well, how far can they push the envelope towards law enforcement activities? Where exactly is the line gonna be drawn? All the same questions that are coming up in the California litigation. Maybe we're gonna see very similar litigation in federal district court in Chicago or elsewhere in Illinois, or at other places where these troops are deployed. And it's gonna be a whole set of legal questions that again, may ultimately end up with Supreme Court.

DEWS: Okay, we're all watching very closely. Scott, thank you. I appreciate you spending the time trying to explain some of this to us. If listeners and viewers want to take a deeper dive, where can they find you?

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ANDERSON: They can find my writing on these topics at Brookings, Brookings dot edu, and also at Lawfare, Lawfare Media dot org.

DEWS: Thank you.

ANDERSON: Great. Thank you.