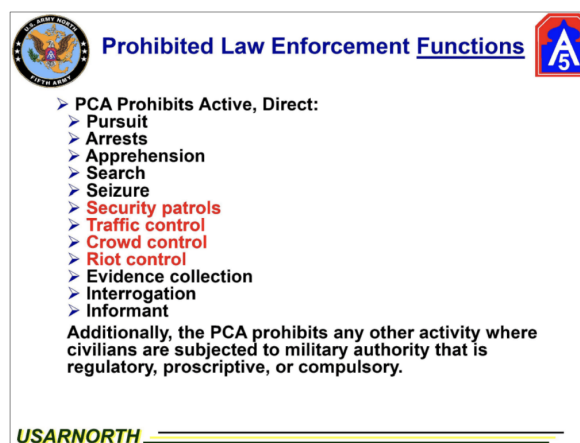


PETE HEGSETH COMMITTED A(NOTHER) CRIME BUT WE CAN'T THROW HIM IN PRISON

In a just United States, yesterday's ruling from Judge Charles Breyer that the government violated the Posse Comitatus Act by invading Los Angeles would result in Whiskey Pete Hegseth landing in prison for two years. That's the punishment for committing the crime of violating the PCA. And Breyer's opinion clearly implicates Hegseth, personally, in breaking the law in two ways.

First, the training given to deployed troops claimed there were four exceptions to prohibited law enforcement activities that – Breyer found – were incompatible with the PCA. According to trial testimony, those exceptions came “all the way from the top.”

But Major General Sherman's instructions were not absolute. For instance, the Task Force 51 training materials specified the law enforcement functions prohibited by the Posse Comitatus Act:



Task Force 51 Training Slides at 6. Although the training materials list twelve prohibited functions, Task Force 51 troops were orally instructed that the four functions listed in

red—security patrols, traffic control, crowd control, and riot control—were subject to a so-called constitutional exception to the Posse Comitatus Act. Id.; Trial Tr. Vol. II (dkt. 163) at 236:25–238:11; Trial Tr. Vol. I at 60:12–63:12, 63:17–25. This instruction came “all the way from the top of [the Department of Defense] down to Task Force 51.”¹

¹ Defendants objected to this testimony as privileged. Trial Tr. Vol. II at 280:12–13. By introducing evidence regarding legal advice given by Department of Defense lawyers, however, Defendants waived any assertion of privilege. E.g., id. at 244:19–245:12; see *Weil v. Inv./Indicators, Rsch. & Mgmt., Inc.*, 647 F.2d 18, 25 (9th Cir. 1981).

And Hegseth, by name, ordered an invasion of MacArthur Park that served no purpose other than invading MacArthur Park.

Nor was Task Force 51 deployed only in support of federal enforcement actions. On July 7, approximately 80 Task Force 51 troops participated in a DHS operation, titled Operation Excalibur,³ at MacArthur Park in Los Angeles. Id. at 35:3–24, 99:21–24; Operation Excalibur Slides (Trial Ex. 28). This was DHS’s third attempt at the operation, and Secretary Hegseth himself approved it. ⁴ Trial Tr. Vol. I at 35:8–14, 103:19–24; Trial Tr. Vol. II at 261:24–262:3. Operation Excalibur involved federal law enforcement officials marching across MacArthur Park while Task Force 51 remained stationed on the outside of the park in military vehicles—Humvees and tactical vehicles—including at two traffic control points to prevent vehicular traffic along a stretch of Wilshire Boulevard. Operation Excalibur

Slides at 5; Trial Tr. Vol. I at 35:25–36:1. DHS’s mission in executing Operation Excalibur was “to demonstrate, through a show of presence, the capacity and freedom of maneuver of federal law enforcement within the Los Angeles Joint Operations Area.” Operation Excalibur Slides at 4. And the operation’s purpose was to “enable and protect the execution of joint federal law enforcement missions in a high-visibility urban environment, while preserving public safety and demonstrating federal reach and presence.”

3 Excalibur is, of course, a reference to the legendary sword of King Arthur, which symbolizes his divine sovereignty as king.

4 Initially, Operation Excalibur was planned to take place on Father’s Day and to have Task Force 51 military vehicles stationed on the section of Wilshire Boulevard that runs through MacArthur Park. Trial Tr. Vol. I at 99:25–100:7. Major General Sherman objected to that request for assistance, expressing concern that (1) there would be a large number of people in the park for Father’s Day, (2) Wilshire Boulevard was in the middle of the Park (the operation’s law enforcement area), and (3) the initial proposal to use helicopters would attract large crowds in opposition to the operation. Id. at 100:8–10; Trial Tr. Vol. II at 263:22–264:15. Chief Bovino of the Department of Homeland Security criticized Major General Sherman for his opposition to the initial plan, questioning Sherman’s loyalty to the country. Trial Tr. Vol. I at 103:5–8. This is relevant because Chief Bovino’s accusations of disloyalty go to the state of mind of decisionmakers who are tasked with ensuring that the Posse

Comitatus Act is followed.

These were both included in Breyer's language finding that the *intent* of the invasion was to use military troops to conduct law enforcement.

In fact, these violations were part of a top-down, systemic effort by Defendants to use military troops to execute various sectors of federal law (the drug laws and the immigration laws at least) across hundreds of miles and over the course of several months—and counting. The instructions to train Task Force 51 on the purported constitutional exception and thereby excuse unlawful military conduct came “all the way from the top” of the Department of Defense. Trial Tr. Vol. II at 283:1–3. And as Major General Sherman testified at trial, federal law enforcement agencies “always wanted military there, and we had plenty of capacity to do that.” Trial Tr. Vol. I at 137:23–25. Accordingly, Secretary Hegseth himself ordered troops to MacArthur Park as a “show of presence” and to “demonstrat[e] federal reach and presence.” Id. at 103:24; Operation Excalibur Slides at 4. Troops drove over a hundred miles to Mecca, where they significantly outnumbered federal law enforcement agents, to support a drug enforcement operation. Trial Tr. Vol. I at 32:9–33:4, 80:19–23; Mecca Storyboard. Troops also drove nearly a hundred miles in a different direction to Carpinteria to set up traffic control points so that federal law enforcement agents could more efficiently execute their search warrant of a cannabis farm. Trial Tr. Vol. I at 84:7–20.24

23 By contrast, some individual examples of Task Force 51's conduct, like the detention of a veteran at the Wilshire Federal Building, are too isolated to

violate the Posse Comitatus Act. The Marines stationed at the Wilshire Building minimized their interaction with the veteran, turning him over to law enforcement authorities at the first possible occasion. Moreover, the record does not indicate that the military's presence at federal buildings in Los Angeles involved any impermissible law enforcement activity.

24 Even if there is a "constitutional exception" that authorizes the military to engage in law enforcement anywhere in the field under the label of "protection," these activities would not fall under such an exception. Troops do not serve a protective function when they act as a force multiplier at a "show of presence" (as in MacArthur Park), when they outnumber federal personnel by 100 at a remote location with a low risk of resistance (as in Mecca), or when they are deployed merely to speed up federal operations (as in Carpinteria).

So if the PCA means anything, some entity should throw Hegseth's sorry ass in prison.

The impossibility of that happening, the impossibility of even *considering* that happening (Breyer instead went through some hoops to enjoin further violations, treating it civilly) is a testament to how inapt the laws designed to prevent just this kind of invasion are to the moment. Even if there were an entity not subject to federal funding who could arrest Hegseth, even if there were a prison to put him in, Trump would simply pardon his Defense Secretary (as he has floated doing in the past), and Hegseth would be back in charge to illegally invade some other blue state again.

And all that's before you consider how a law criminalizing using the military to invade states intersects with SCOTUS' decision in Trump

v US, which would give Trump absolute immunity for ordering the military to violate the Posse Comitatus Act. It is a crime to do what Trump did in Los Angeles, but last year SCOTUS made it not a crime. And SCOTUS will soon have to figure out whether things like laws upholding federalism matter at all anymore.

So while Breyer's opinion is welcome and may give Trump pause, however brief, as he tests other legal theories under which to invade Chicago and Baltimore, the opinion is better understood as an opinion documenting how inapt all these tools are.

Indeed, the opinion is most interesting where Breyer pointed out the ridiculous implications of the Ninth Circuit opinion reversing his earlier order, which adopted a highly deferential standard to Trump's claims that he needed the Guard to help enforce Federal law.

The impact of Defendants' argument is largely due to the Ninth Circuit's reading of § 12406(3) in its order staying this Court's temporary restraining order pending appeal. In that order, the Ninth Circuit held that courts can review the President's invocation of § 12406 only to determine (1) if it has a colorable basis and (2) if it is made in good faith. Newsom, 141 F.4th at 1050–51.¹¹ The Ninth Circuit did not clarify these standards further. For example, it did not explain how a plaintiff could challenge—or how a district court could evaluate, especially on an expedited basis in proceedings for preliminary injunctive relief—a presidential invocation of § 12406 for lack of a colorable basis or good faith. Nor does the Ninth Circuit suggest that courts are well positioned to evaluate whether the President acted in good faith, rather than as pretext for federalizing the National Guard.¹² The Ninth Circuit also suggested that

the President can invoke § 12406(3) if his ability to execute federal law has been “significantly impeded,” rather than the stricter statutory requirement that he be “unable with the regular forces to execute the laws.” *Id.* at 1052. Thus, under the Ninth Circuit’s test, the President could federalize the National Guard in any number of cases:

- *The President, relying upon IRS data showing that a sizeable percentage of corporations and individuals are using tax shelters to avoid paying taxes, could claim that he is unable to execute the tax laws.*¹³
- *The President, relying upon EPA studies showing that pollution in a river cannot definitively be traced back to a specific manufacturing plant, could claim that he is unable to execute the Clean Water Act.*
- *The President, relying upon health data showing the number of individuals who present to hospitals with narcotic-related symptoms, could claim that he is unable to*

execute the federal drug laws.

- *The President, relying upon anecdotes from state election officials that voting machines are glitching, or that fraud exists, could claim that he is unable to execute the election laws.*

In each instance above, the President would have asserted a colorable, good-faith claim. Under the Ninth Circuit's test, that is all he would need in order to call the National Guard into federal service—and then, under Defendants' urged interpretation of § 12406(3), use those troops to execute domestic law. Though Defendants initially did not disclose the implications of reading § 12406(3) as a grant of significant presidential discretion (those implications being Defendants' current position that § 12406(3) is an exception to the Posse Comitatus Act), they have now fully fleshed out their views. In doing so, they make plain the consequences of the Ninth Circuit's highly deferential reading of the statute

11 This standard purportedly comes from the Supreme Court's decision in *Sterling v. Constantin*. Id. (citing 287 U.S. 378, 399–400 (1932)). In *Sterling*, the Court determined that the governor of Texas had acted lawfully when he restricted oil production across the state. 287 U.S. at 387. Though the Court found that the governor had acted in good faith, it did not set forth any actual test for evaluating executive discretion. Id. at

399–400. Rather, it relied on earlier cases holding that the Executive has inherent discretion by virtue of his role as Commander-in-Chief and his obligation to “take care that the laws be faithfully executed.” *Id.* (citing *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 29–32 (1827), and *Luther v. Borden*, 48 U.S. (7 How.) 1, 44–45 (1849)). Neither of those cases instructed courts to evaluate whether the Executive had a colorable basis for his actions or whether he acted in good faith. *Martin*, 25 U.S. at 31; *Luther*, 48 U.S. at 43–44. Furthermore, as explained below, *Martin*, *Luther*, and *Sterling*’s reliance on the Commander-in-Chief and Take Care Clauses conflicts with the Supreme Court’s more recent interpretation of those Clauses in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

12 For instance, the Ninth Circuit’s test would likely enable a President to use federal law enforcement agents to stoke tensions and then use any resistance as justification to call forth the National Guard. As long as the President actually believed that the resistance significantly impeded his ability to execute federal law, it is hard to see how a court could find that he acted in bad faith, especially under the Ninth Circuit’s deferential standard of review. See *Good Faith*, *Black’s Law Dictionary* (12th ed. 2024).

13 Incidentally, when Congress debated the Militia Act of 1792—a distant predecessor to § 12406—Representative Abraham Clark posited in opposition that the law would make it “so that if an old woman was to strike an excise officer with her broomstick, forsooth the military is to be called out to suppress an insurrection.” 3 *Annals of Cong.* at 575 (1792).

Yesterday, a judge ruled that evidence presented at trial showed that Pete Hegseth broke the law in ordering troops to take actions that amount to law enforcement. He criminally ordered troops to help invade MacArthur Park – and tried to ruin Father's Day as part of the plan!

But the only way in which that law will mean anything is if SCOTUS stops permitting presidents, this President, to invent any bullshit excuse in the service of fascism.

Opinions

Original Breyer opinion

Ninth Circuit opinion

New Breyer opinion

Trump v US opinion