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# National Guard could mobilize in Portland depending on appeals court ruling: What's next

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The matter now is before the 9th U.S. Circuit Court of Appeals on whether to put a hold on Oregon U.S. District Judge Karin J. Immergut's initial temporary restraining order barring the federal



By [Maxine Bernstein](#) | [The Oregonian/OregonLive](#)

Now that a federal judge has issued two [temporary orders](#) blocking the Trump administration from [deploying National Guard troops](#) to Portland, U.S. government lawyers have asked an appeals court to put a hold on the first one and expect to do the same for the second.

The 9th U.S Circuit Court of Appeals may take up the requests immediately and could issue a decision as early as Monday.

If the 9th Circuit puts a hold on U.S. District Judge Karin J. Immergut's orders, then President Trump will be able to deploy National Guard members to the U.S. Immigration and Customs Enforcement building in Portland as the government's full appeal is pending.

"We'll keep litigating, of course, but there will not be a court order stopping the deployment short-term, at that point," said Jenny Hansson, spokesperson for Oregon Attorney General Dan Rayfield.



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If the court upholds Immergut's temporary orders, it's unclear how the Trump administration would respond.

Federal lawyers on Sunday urged the 9th Circuit in a court filing to take up their request to place a stay on Immergut's orders on an "emergency timeframe."

They claimed Immergut “impermissibly second-guessed the Commander in Chief’s military judgments.”

Attorneys for the state and Portland have submitted briefs, asking the 9th Circuit to keep the orders in place until the court hears the federal government’s full appeal.

They argue the 9th Circuit should maintain the status quo and “prevent unlawfully federalized soldiers from engaging the public and patrolling Portland streets.”

“Defendants’ actions infringe on Oregon’s sovereign power to manage its own law enforcement activity and its own National Guard and cause economic and other harms to the city of Portland,” the attorneys for the state wrote in a brief to the 9th Circuit. “What is worse, they do so based entirely on inaccurate information.”

The Trump administration lawyers replied to the state’s argument, in a filing Monday, contending the state of Oregon and Portland have failed to acknowledge the “continuing, often-violent unrest on the eve of the President’s federalization decision.”

They argued in filings that Trump and Defense Secretary Pete Hegseth are “entitled to a presumption of lawfulness.”

“There is no statutory requirement that the President’s determination must be made in a written decision cataloguing its factual basis,” wrote J. Kain Day, a federal government appellate lawyer.

He further argued that the Portland Police Bureau, even after Trump ordered the mobilization of National Guard troops to the city, “was both unable and unwilling to protect federal officers and property.” Leaving the status quo would threaten federal officers and property, he wrote.

Immergut slammed the Trump administration actions Sunday night, saying her order made it clear that she found no justification for federalizing National Guard troops in Portland based on the “current conditions” on the ground in the city.

The latest legal wranglings followed a weekend of court maneuvers between the state and the Trump administration.

Immergut, who was nominated to the federal bench by Trump in 2019, held a nearly two-hour hearing Friday morning after the state sought a temporary restraining order to bar the Sept. 28 federalization of 200 Oregon National Guard troops in Portland for 60 days.

The judge issued her first order Saturday about 4:30 p.m., finding Trump's mobilization of the state National Guard unlawful and that the president had not met any of the criteria under Title 10, Section 12406 of the federal code to invoke such an order.

She ruled that there was no threat of rebellion in Portland and that the sporadic protests outside the ICE Enforcement office in South Portland were sporadic and could be handled by local law enforcement.

Less than 12 hours later, Hegseth mobilized California National Guard to deploy in Portland. Sometime after midnight early Sunday, 101 California National Guard members landed in Oregon at the Portland Air National Guard base and another 99 were set to arrive later Sunday.

The Oregon attorney general's office moved quickly to file an amended lawsuit in federal court Sunday afternoon with the state of California, seeking an emergency motion for a new restraining order to block federalized out-of-state National Guard troops in Portland.

"The President is trying to out hustle us in this process, and so we're trying again to get in front of a court to prevent this," Rayfield said at a news conference.

As Immergut scheduled an evening hearing by phone Sunday night, the Trump administration then called up Texas National Guard to deploy to Portland, as well as to Chicago.

Immergut late Sunday issued a broader temporary restraining order barring the redeployment of any National Guard members from any state to Oregon.

## **If the ban on National Guard holds**

If the Trump administration is barred from federalizing any National Guard troops to Oregon, he could send in active-duty military personnel, said professor Tung Yin of Lewis & Clark Law School.

Then the legal question would be does that violate the state's rights and what are the troops being used for at the federal building, he said.

"If it's just stationing them in front of the ICE building, looking intimidating, that's maybe OK," he said, noting that Immergut didn't delve into what the actions of federalized National Guard troops would be once on the ground in Portland.

But if Trump sends in Marines to follow ICE officers who are trying to round up and arrest people who may be in the U.S. unlawfully, that would likely violate the Posse Comitatus Act, Yin said.

The act prohibits the use of the military for domestic purposes and bars military forces from direct “involvement in the execution of laws” or actions that “pervade the activities of civilian authorities.”

Yin said he wondered if the president would risk calling up active troops only to have Immergut “see that as another too-clever of an attempt to evade her ruling.”

But if he sends active military units -- or if he gets a favorable court ruling to send in National Guard troops -- it likely would increase tensions on the street, Yin said.

That, in turn, could provide the exact fodder for the Trump administration to justify federalizing National Guard troops, he said.

“If the president does get to deploy the National Guard, and as a result of that, it inflames those on the street, and it actually leads to widespread violence, then the President could point to that and say, ‘see I told you Portland is a war zone,’” Yin said.

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“It’s almost the president manufacturing the very war-like conditions he’s been asserting give him the right to do this,” he said.

That’s why Portland Mayor Keith Wilson, Gov. Tina Kotek and other city and state leaders have repeatedly urged demonstrators in Portland not “to take the bait,” Yin said.

During Sunday’s afternoon virtual joint press conference, Rayfield again said, “We ask, as this case continues to progress through the court systems, that everybody remains peaceful as they exercise their right to be heard in this process.”

**[Maxine Bernstein](#)**

Maxine Bernstein covers federal court, law enforcement and criminal justice issues after spending two decades covering Portland police. She joined The Oregonian in 1998 after a seven-year stint working for The... more

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