What is the Defend the Guard Act?

The Constitution vests the power to declare war exclusively in Congress. Despite this clear language, Congress has repeatedly abdicated its duty by unconstitutionally delegating that authority to the executive branch. At other times, presidents have simply assumed that power on their own.

As a result, although Congress has not declared war since World War II, presidents have repeatedly sent American troops overseas into combat anyway.

The Defend the Guard Act is state-level legislation to prohibit the overseas deployment of a state's National Guard units without a congressional declaration of war.

What Is the Constitutional Basis for Defend the Guard?

Under the Constitution in Article 1 Sec. 8 Clause 11, Congress is delegated the power to declare war. The power to wage war once it has been declared is delegated to the president as commander-in-chief in Article 2 Sec. 2.

These are two separate and distinct roles. Congress makes the decision to enter into war. The president then has the authority to prosecute the war, within the limits Congress places on him. The designation of commander in chief does not delegate to the president power to take America into war or initiate any offensive military expeditions.

Founding-era discussion on war powers makes it clear that the framers and ratifiers wanted the authority to take America into war placed in the legislative branch because it was the deliberative body most closely representing the will of the people. They did not want the authority to drag the U.S. into war placed at the discretion of one individual. Madison makes this clear in a letter to Thomas Jefferson.

"The constitution supposes, what the History of all Governments demonstrates, that the Executive is the branch of power most interested in war, & most prone to it. It has accordingly with studied care, vested the question of war in the Legislature."

Madison wrote in detail about war powers in his Letters of Helvidius.

"*In the general distribution of powers, we find that of declaring war expressly vested in the congress, where every other legislative power is declared to be vested; and without any other qualification than what is common to every other legislative act. The constitutional idea of this power would seem then clearly to be, that it is of a legislative and not an executive nature … Those who are to conduct a war cannot in the nature of things, be proper or safe judges, whether a war ought to be commenced, continued, or concluded. They are barred from the*

latter functions by a great principle in free government, analogous to that which separates the sword from the purse, or the power of executing from the power of enacting laws."

Alexander Hamilton noted the limits on presidential war powers in Federalist #69.

"The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the DECLARING of war and to the RAISING and REGULATING of fleets and armies, all which, by the Constitution under consideration, would appertain to the legislature.1 The governor of New York, on the other hand, is by the constitution of the State vested only with the command of its militia and navy."

Article I, Section 8, Clauses 15 and 16 make up the "militia clauses" of the Constitution. The Constitutional Charter for the Guard confirms that Article 1 Sec. 8 serves as the basis for the National Guard.

"The Army National Guard's charter is the Constitution of the United States. Article I, Section 8 of the U.S. Constitution contains a series of 'militia clauses,' vesting distinct authority and responsibilities in the federal government and the state governments."

Clause 15 delegates to the Congress the power to provide for "calling forth the militia" in three situations only:

1. to execute the laws of the union,
2. to suppress insurrections, and
3. to repel invasions.

The Constitution requires Congress to declare war before the president can commit troops to any offensive military action. It logically follows that under the "laws of the union," a constitutional deployment of National Guard troops to an overseas combat zone can only occur after a congressional declaration of war.

Restricting National Guard troops to foreign deployments only after a declaration of war merely follows the constitutional requirement laid out in Article 1 Sec. 8.

What is the role for the states?

When the federal government engages in such blatantly unconstitutional actions, the states' proper role is to take action to remedy the situation. As James Madison wrote, in case of a deliberate, palpable, and dangerous exercise of powers not granted by the Constitution, the states "have the right, and are in duty bound, to interpose for arresting the progress of the evil."

The authority to activate and deploy National Guard units ultimately rests with the governor.

When the federal government attempted to nationalize state militias during the war of 1812, Danile Webster stood on the floor of Congress and urged states to do their duty and resit.

"The operation of measures thus unconstitutional and illegal ought to be prevented by a resort to other measures which are both constitutional and legal. It will be the solemn duty of the State governments to protect their own authority over their own militia, and to interpose between their citizens and arbitrary power. These are among the objects for which the State governments exist."

But the National Guard isn't the Militia!

Article I, Section 8, Clauses 15 and 16 make up the "militia clauses" of the Constitution. Clause 16 authorizes Congress to "provide for organizing, arming, and disciplining, the Militia."

Some argue that the National Guard is not the militia described by the Constitution. But the creation of the National Guard was based on the power delegated to Congress by the militia clauses.

During the founding era, the militia was, as George Mason described it, "the whole people, except a few public officers."

In practice, the militia was made up of every able-bodied adult-male between 16 and 45 to 55.

In the Dick Act of 1903, Congress exercised its delegated power and organized the militia into today's National Guard, limiting the part of the militia that could be called into federal service rather than the "entire body of people," which makes up the totality of the "militia."

In practice,, today's National Guard is governed by the "militia clauses" of the Constitution, and this view is confirmed by the National Guard itself.

The Virginia code defining the state's militia helps clarify the distinction.

"The militia of the Commonwealth of Virginia shall consist of ***all able-bodied residents*** *of the Commonwealth who are citizens of the United States and all other able-bodied persons resident in the Commonwealth who have declared their intention to become citizens of the United States, who are at least 16 years of age and, except as hereinafter provided, not more than 55 years of age.* ***The militia shall be divided into three classes: the National Guard, which includes the Army National Guard and the Air National Guard; the Virginia Defense Force; and the unorganized militia.****"* [Emphasis added]

What About AUMFs?

Combat operations in the so-called War on Terror have been based on broadly worded Authorizations to Use Military Force (AUMFs) passed by Congress after 9/11 and before the 2003 invasion of Iraq.

In practice, these resolutions authorize the president to decide if and when he wants to take military action. The AUMF passed after 9/11 to authorize the invasion of Afghanistan remains in effect today. Presidents Bush, Obama and Trump have all used it to justify their independent decisions to take military action in the Middle East, not just in Afghanistan, but also in countries such as Somalia, Syria and Libya.

AUMFs are not the same as a declaration of war. They flip the constitutional process on its head by placing decision-making power in the hands of the president. This violates the constitutional separation of powers.

As James Madison put it, “The executive has no right, in any case to decide the question, whether there is or is not cause for declaring war.”

What About the War Powers Act

Many people justify presidential troop deployments under the War Powers Resolution of 1973. But the act itself fails to pass constitutional muster.

Under this congressional act, the president must inform Congress within 48 hours of committing armed forces to military action and it prohibits them from remaining in combat for more than 60 days without congressional approval. The law also provides a 30-day withdrawal period, meaning troops can theoretically remain in combat for up to 90 days with no legislative approval.

The War Powers Resolution effectively handed the executive branch the power to engage the U.S. military in combat anywhere in the world without first getting a declaration of war from Congress, as required by the Constitution. Congress took a power delegated to it in the Constitution and transferred it to the president. In effect, it amended the Constitution.

In fact, the law disregards Congress’s explicit and sole authority to declare war and reduces it to a mere suggestion. In practice, the president only has to consult with Congress, when possible – if it suits him.

No constitutional provision authorizes Congress to transfer its delegated powers to another party, including the president. In fact, doing so violates basic legal rules of construction. In contract law, when a principal (the people) delegates power to an agent (the federal government), the agent cannot transfer its delegated power to another party without specific

direction within the contract. No such authorization exists in the Constitution. So, Congress can't legally give the president a blank slate to make decisions about war at his own discretion. Congress must make that call and make it specifically before the initiation of military action.

Separation of powers wasn't merely an academic exercise in legal construction. The framers delegated specific powers to each branch of the government for a reason. They didn't want another branch exercising that power. Could the judiciary transfer its authority to try cases to Congress? Could the president re-delegate his power to appoint Supreme Court justices to the Supreme Court? Of course not. This would be absurd. And its equally absurd to think Congress can just transfer its authority to declare war to the president. As James Madison wrote, "In no part of the constitution is more wisdom to be found than in the clause which confides the question of war or peace to the legislature, and not to the executive department.

But it's not really a war, is it?

Some argue that limited military strikes don't rise to the level of "war," and the president has the authority to authorize such actions without any congressional input at all -- even under the War Powers Act.

But under the Constitution, a war is a war whether they call it a war or something else. Constitutional scholar, Rob Natelson, wrote about the legal meaning of the word "war" in March, 2011:

*"Founding-Era dictionaries and other sources, both legal and lay, tell us that when the Constitution was approved, "war" consisted of **any** hostilities initiated by a sovereign over opposition. A very typical dictionary definition was, 'the exercise of violence under sovereign command against such as oppose.' (Barlow, 1772-73). I have found no suggestion in any contemporaneous source that operations of the kind the U.S. is conducting were anything but 'war.'"* [emphasis added]

All U.S. military actions qualify as "violence under sovereign command." And attacks, whether for strategic, political, or humanitarian purposes, are always "over opposition."

What If the Pentagon Threatens to Close Our Guard Bases?

When Rep. Pat McGeehan introduced Defend the Guard in West Virginia, the Adjutant General of the West Virginia National Guard claimed he got a call from the Pentagon threatening to put every West Virginia National Guard bases on the Base Realignment and Closure (BRAC) list. If that were to happen, communities around these bases would take a significant economic hit, the state will lose revenue and the Department of Defense would simply move units to other states.

You shouldn't fold under this bullying tactic.

It remains unclear just how legitimate this threat really is. Closing bases and moving Guard units would put a significant logistical and financial strain on the DoD. It's easy for an official to threaten to close every National Guard Base in the state. It's another thing to actually do it.

And the more states that pass Defend the Guard, the more difficult it will be for the Pentagon to make good on this threat. There is strength in numbers. As James Madison wrote about state action to stop unwarrantable federal acts in Federalist #46, "The embarrassment created by legislative devices, which would often be added on such occasions, would oppose, in any State, very serious impediments; and were the sentiments of several adjoining States happen to be in Union, would present obstructions which the federal government would hardly be willing to encounter."

Will Defend the Guard threaten National Security?

Opponents will argue that prohibiting the deployment of National Guard troops overseas will threaten national security. But this is not an unequivocal prohibition on Guard deployment. It simply requires Congress to do its job and issue a formal declaration of war before a state's National Guard troops can be federalized. If Congress follows the constitutionally prescribed process for engaging in war, National Guard troops will be available to join the fight.

Also, the Defend the Guard Act would not prohibit the immediate deployment of Guard units in the event of an invasion of the United States itself.

Passage of this legislation would pose no threat to national security. It would simply restore the constitutional process for engaging in overseas military operations.

Hasn't The Supreme Court Settled This Issue?

During the 1980s, some governors refused to activate their states' National Guard units for deployments to Central America for training purposes. In response, Congress passed the "The Montgomery Amendment" to the National Defense Authorization Act for Fiscal Year 1987. It didn't completely strip the governors' power over their state's Guard units, but it does prohibit any governor from "withholding consent to a National Guard unit's active duty outside the country because of an objection to the site, purpose or schedule of the duty."
This was intended to stop governors from obstructing overseas training.

Minnesota Gov. Rudy Perpich sued, arguing that the Montgomery Amendment unconstitutionally infringed on the governor's power to withhold consent to federal training missions outside the U.S. during peacetime.. *Perpich v. The Department of Defense* went all the way to the Supreme Court.

In 1990, the US Supreme Court sided with the Department of Defense, ruling that the Montgomery Amendment was a constitutional exercise of congressional power. In a nutshell, the Court held that “Article I's plain language, read as a whole, establishes that Congress may authorize members of the National Guard of the United States to be ordered to **active federal duty for purposes of training outside the United States** without either the consent of a State Governor or the declaration of a national emergency.” [Emphasis added]

From a practical standpoint, the Supreme Court decision in *Perpich* does limit the governor’s power to block a state’s National Guard units deployment for training purposes. This follows from the militia clauses in the Constitution. You find the constitutional authority to provide for the training of the militia in Article I Sec. 8 Clause 16. But while the federal government can dictate training, even overseas, this does not authorize the federal government to activate state National Guard units for other purposes. The feds can’t call up the Guard to regulate commerce, deliver mail or enforce a bump stock band. These are all outside of the constitutional parameters.

In a nutshell, under the Montgomery Amendment and the SCOTUS decision in Perpich, the feds can train National Guard units overseas and the governors can’t block the deployment. But calling up a National Guard unit for combat operations is an entirely different matter that isn’t touched by the Supreme Court opinion. And nothing in the Montgomery Amendment prohibits a governor from blocking deployment of National Guard units without the constitutional requirement of a declaration of war.

Dual Enlistment

The concept of “dual enlistment” also creates constitutional issues.

Amendments to the National Defense Act of 1933 made members of the National Guard units members of both their state's National Guard and the federal military.

In effect, this erases the line between the militia and the standing army. It renders the militia clauses as if they do not exist.

Federal courts have taken a different view.

"The spectre of pressing the dual-enlistment rationale to its logical limit is matched by the counterpoint that if the Militia Clause is interpreted as limiting Congress' power to order the militia to active duty as part of the Army, then the Armies Clause would be without practical application because the states could enlist all citizens in the organized militia and thereby ‘abolish’ the Army."

But this contradicts the Dick Act, which organizes the constitutional militia into the National Guard with all the limits imposed by Article I Sec. 8.

The federal government can't have it both ways. Either members of the National Guard are members of the state militia as described by the Constitution - as the Dick Act says they are or they are part of some new entity totally under federal control.

If the National Guard really is the modern incarnation of the constitutional militia - and again the law that created the Guard claims that it is - Guard members can only be called to active duty in the three situations outlined in Article I, Section 8, Clauses 15. There is no constitutional or statutory authority for "dual enlistment."

In short, either there's an organization that's only authorized for those three purposes in the Constitution, or there isn't. In practice today, there isn't.

Additional Talking Point to Be Aware Of

Rep. McGeehan received the following email:

"U.S. Army War College did extensive paper on the subject of your legislation, concluding that if states ever succeeded in passing such legislation, the Pentagon would simply transfer all military assets belonging to a state's National Guard to the U.S. Army Reserves and other federal reserve components, which they could then mobilize at their discretion without interference from state officials."

At this point, we recommend ignoring this argument. If it gets to that point .and the Pentagon starts unilaterally dictating these things like a game of chess, we will know we are winning the battle. Just the mere fact that the brass' think-tank are contemplating this seems to indicate our strategy is being taken as a serious threat to the status quo.