

Senate Government Operations Committee and
House General, Housing and Military Affairs Committee
Roles of Vermont National Guard
Testimony of Ed Stanak
September 15, 2020 Joint Hearing

Introduction

My name is Ed Stanak and I am a resident of Barre City . Over the decades I have had cause to research the constitutional bases for, and subsequent federal and state legislative enactments concerning, the roles of the Vermont National Guard . I thank the chairs of the committees for convening this joint hearing in order to obtain input from the leadership of the Vermont National Guard and Vermonters. I appreciate this opportunity to provide perspective and frame issues of concern with respect to the potential uses of the Guard during the coming months as has been intimated in material statements made by President Donald J. Trump on the public record . The purpose of my testimony is 1) to assist the committees with a perspective on the erosion of state authority over the Vermont National Guard by the federal government perhaps in disregard of constitutional restrictions 2) to articulate concerns for the potential use of the Vermont National Guard to suppress rights of assembly and free speech protected under the Vermont Constitution and 3) to urge the committees to deliberate on actions that the General Assembly may take, in collaboration with the Governor, to forestall suppression of the fundamental democratic right of dissent through the possible illicit use of the Vermont National Guard by the executive branch of the federal government during the period between November 4, 2020 and January 20, 2021.

Historical Overview of the National Guard

Prior to the Revolutionary War, each colony had an organized militia whose main purpose was to maintain the public peace and protect colonists from Indian raids and other external threats. Negotiations over what became the “militia clauses” in the United States Constitution began at the Constitutional Convention in 1787 following unsuccessful arguments by Alexander Hamilton urging complete federal control over the militia. The final terms of the “militia clauses” represented compromises in establishing the parameters for federal and state control over the militias. The first significant compromise reserved from federal regulation was the appointment of officers in the militias and a second compromise involved the training of the militia. Thus, it appears to have been the intent of the Framers that the federal government would not have all power over militia matters . *

*For excellent analyses of the transformation of the American militias into the National Guard and the underlying constitutional and statutory provisions see “The BRAC Act, the State Militia Charade, and the Disregard of Original Intent” 27 Pace Law Review 364 (2007) and “The Militia Clauses, the National Guard, and Federalism : A Constitutional Tug of War” 57 George Washington Law Review 328 (1988) .

The development of the militia in the years following ratification of the US and Vermont Constitutions was by means of statutory authority. Not until the Federal Militia Act of 1792 did Congress attempt to codify a national policy regarding the militia and this congressional act did little more than establish a continuing military census to provide a role of ready reserves that could be called into federal service until the need arise. This system remained relatively undisturbed until 1903 when Congress enacted the Dick Act which represented the first real exercise of Congress's long-dormant power to organize the militia. The Dick Act labeled the state militia "National Guards" and, among other things, authorized federal funds for equipment and training . The Dick Act was followed in 1908 by the Militia Act which provided that the National Guard be available for federal use in the United States as well as outside its borders. Congress then moved to increase federal control over the militias in the National Defense Act of 1916 through increased federal funding and authorization for the Secretary of War to promulgate rules governing the National Guard. A significant component of the NDA of 1916 was the requirement that state units receiving federal funds had to acquire federal approval before any officer was commissioned. This last provision wrested from the states control over officer appointment standards and has yet to be challenged on constitutional grounds. *

The Armed Forces Reserve Act of 1952 codified the modern National Guard system. This Act provided that the President could call out the Guard for 15 days per year for any reason – subject to the consent of the Governor – and was the first incursion of the federal government into mustering the Guard during peacetime . The next two decades saw increased emphasis on the National Guard components of the military . The doctrine of "Total Force" was developed under which the all-volunteer force regular army would be augmented by the Army Reserve and the National Guard. This increased national role for the state Guard was necessarily met with a decrease in its state role. No longer was the Guard a state militia force with a secondary mission of federalizing in time of war. The Montgomery Amendment to the 1986 Defense Authorization Act effectively rescinded the right of state governors to withhold their consent to the federal use of the National Guard "because of any objection to the location, purpose, right, or schedule of such active duty."

*References to judicial decisions which have considered the state/federal "tension" inherent in the constitutional language are not included in this submittal but upon request can be provided. One interesting decision by the US Supreme Court, as was discussed in 57 George Washington Law Review at page 331 (footnote 28) , is US v Miller 307 US 174 (1939) . " Although on its face this [Second] amendment appears to be an affirmative protection of the people's right to bear arms in order to maintain the militia, it has been read rather as an affirmation of the importance the Framers placed on the local character of the military forces belonging to the states ."

Constitutional Provisions

A) The origins for the National Guard are found in Article I, section 8 of the United States Constitution:

The Congress shall have the power...

(clause 15) *To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;*

(clause 16) *To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress; [and]*

(clause 18) *To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.*

B) Comparable provisions in the Vermont Constitution read:

(Chapter II Article 59). *The inhabitants of this State shall be trained and armed for its defense, under such regulations, restrictions, and exceptions, as Congress, agreeably to the Constitution of the United States, and the Legislature of this State, shall direct.*

(Chapter I Article 16) *That the people have a right to bear arms for the defence of themselves and the State--and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to and governed by the civil power. [and]*

(Chapter II Article 20 clause 9) *The Governor shall be Captain-General and Commander-in-Chief of the forces of the State, but shall not command in person, in time of war, or insurrection, unless by the advice and consent of the Senate, and no longer than they shall approve thereof.*

Applicable Statutory Provisions

Below are excerpts of federal and Vermont statutory provisions pertinent to the National Guard .

A) General provisions in federal law regarding the National Guard are found in Title 32 Chapters 1, 3 ,5, 7, and 9 of the United States Code.

32 USC 102 states the federal general policy for the National Guard :

In accordance with the traditional military policy of the United States, it is essential that the strength and organization of the [Army National Guard](#) and the [Air National Guard](#) as an integral part of the first line defenses of the United States be maintained and assured at all times. Whenever Congress determines that more units and organizations are needed for the national security than are in the regular components of the ground and air forces, the [Army National Guard of the United States](#) and the [Air National Guard of the United States](#), or such parts of them as are needed, together with such units of other reserve components as are necessary for a balanced force, shall be ordered to active Federal duty and retained as long as so needed.

32 USC 304 provides the enlistment oath for all members of the National Guard:

Each person enlisting in the National Guard shall sign an enlistment contract and subscribe to the following oath:

"I do hereby acknowledge to have voluntarily enlisted this ___ day of ____, 19__, in the _____ National Guard of the State of _____ for a period of __ year(s) under the conditions prescribed by law, unless sooner discharged by proper authority.

"I, _____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and of the State of _____ against all enemies, foreign and domestic; that I will bear true faith and allegiance to them; and that I will obey the orders of the President of the United States and the Governor of _____ and the orders of the officers appointed over me, according to law and regulations. So help me God."

32 USC 312 provides the appointment oath administered to officers in the National Guard :

Each person who is appointed as an officer of the National Guard shall subscribe to the following oath:

"I, _____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of _____ against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will obey the orders of the President of the United States and of the Governor of the State of _____, that I make this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office of ____ in the National Guard of the State of _____ upon which I am about to enter, so help me God."

10 USC 1206 states the circumstances under which the Congress has authorized the President to call the National Guard into federal service:

Whenever—

- (1) the United States, or any of the Commonwealths or possessions, is invaded or is in danger of invasion by a foreign nation;*
- (2) there is a rebellion or danger of a rebellion against the authority of the Government of the United States; or*
- (3) 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. Orders 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.*

B) General provisions in Vermont law regarding the National Guard are found in 20 VSA Chapters 21 , 23, 25, 27, 29, 31, 33, 35, 37, 39, 63 and 65 . Chapter 61 covers a separate entity known as the State Guard.

20 VSA 601 specifies when and by whom the Vermont National Guard may be called out for state service :

The Commander-in-Chief or, in his or her absence, the Lieutenant Governor, or, in the absence of both, the Adjutant and Inspector General, in case of riot, rebellion, or insurrection within the State, or in case of great opposition to the service of legal process, whether civil or criminal, or in case of invasion or imminent danger thereof, or in case of disaster, or emergency proclaimed by the Governor, may call out the National Guard, or such parts of the National Guard as he or she deems necessary, and may order this force into camp for instruction and drill. Until discharged by order of the Commander-in-Chief, the force shall be subject to his or her order and shall be governed by the regulations prescribed for the U.S. Army; and the Commander-in-Chief may order the same into camp for instruction and drill when in his or her judgment the interests of the State require.

20 VSA 641 specifies when and by whom the Vermont National Guard may be called out for federal service :

Upon the requisition of the president of the United States, and in case of war or invasion, or to prevent insurrection or invasion, the commander in chief may call out from time to time, for the actual service, by draft or otherwise as many of the entire national guard as the necessity of the case requires. The enrolled national guard, when so ordered for preparation for actual service, shall be administered and trained according to the laws of this state and of the United States. On the termination of the emergency all persons discharged from the military service who were, upon draft into federal service, members of the national guard of Vermont shall resume their membership in the national guard, and shall continue to serve in the national guard until the dates upon which their enlistments prior to their draft would have expired if uninterrupted.

The Vermont National Guard Mission Statement and Strength

The mission statement for the Vermont National Guard, as provided on its web site , reads :

To provide ready forces to defend our nation and serve our communities.

An organization that is fully ready, values-based, professional and connected to our communities.

Integrity: Always do what is right, in and out of uniform.

Excellence: In all we do.

Selfless Service: Dedication to the mission & betterment of the organization before self.

Best available information from the Vermont National Guard web site is that the authorized total strength of the Guard is 3,718 members and that current membership is approximately 2,438 “traditional” Guardsmen/women and 1,121 full time employees.

Recent media reports based upon information released by the Guard on July 31, 2020 indicate that approximately 1,000 members of the Guard will be deployed in federal service over the period from Fall 2020 into 2021 and lasting for an estimated one year period . This is the largest such “Army mission” in the last ten years.

The Dilemma

Over the last several months President Donald J. Trump has made numerous public statements suggesting that he may utilize military forces (as well as other federal agents) within the United States to address what he sees as “anarchy”, “treason” and “insurrection” . The president has asserted that he believes he has unconstrained powers to do so . The apparent criteria – based on his comments – to take such action include threats to federal property and civil unrest in cities that have Democratic mayors. I ask that I be allowed to stipulate to the committees that my summary of the these representations by the president are accurate but if necessary I will supplement my testimony with documentation.

In addition to an array of other powers granted to the president, some of which I summarized above and 136 other “emergency action” authorizations scattered throughout the US Code, , in

1976 the Congress enacted the National Emergencies Act as codified in 50 USC Chapter 34 and granted extensive powers to the executive branch. The Brennan Center for Justice has identified approximately 50 “ Presidential Emergency Action Documents “ (PEADs) which are executive orders, proclamations, and messages to Congress that are prepared in anticipation of a range of emergency scenarios, so that they are ready to sign and put into effect the moment one of those scenarios comes to pass. First created during the Eisenhower Administration as part of continuity-of-government plans in case of a nuclear attack, PEADs have since been expanded for use in other emergency situations where the normal operation of government is impaired. As one recent government document describes them, they are designed “to implement extraordinary presidential authority in response to extraordinary situations.” PEADs are classified “secret,” and no PEAD has ever been declassified or leaked. Indeed, it appears that they are not even subject to congressional oversight. <https://www.brennancenter.org/our-work/research-reports/presidential-emergency-action-documents>

Vermonters have assembled over the centuries to speak out on a vast range of issues . Often times they have assembled at federal properties - such as the federal buildings that house the judiciary and other agencies – across the Green Mountains. It is reasonable to assume that they may do so in coming months should there be disputes associated with the tabulation and results of the national election for president .

Conclusions

What can be expected should the the Vermont National Guard be activated under such circumstances as President Trump has threatened ? What actions might be taken by the General Assembly in collaboration with the Governor to forestall a confrontation between Vermonters – the Guard acting at the behest of the president to suppress rights extended to other Vermonters under Chapter I of the Vermont Constitution ? To whom will the officers and members of the Vermont National Guard owe fidelity under their oaths ?

Perhaps committee members will be able to discern a tangible basis for an optimistic outcome under the circumstances outlined above . But I am less than optimistic due to the usurpation of federal authority over the Vermont militia – the Vermont National Guard . It appears that the last remaining power of a state governor over the militia is the ability to call out the Guard during a “state emergency” . We now face a situation where an American president in his capacity as Commander in Chief may be able to turn Vermonter against Vermonter should he attempt what was once the unthinkable in his quest to retain political power . Will history then reflect that the Vermont National Guard “only followed its orders” as the torch of democracy was extinguished ?

