

TO: The Members of the House Judiciary Committee
RE: House Bill 2732 (Defend the Guard Act)
FROM: Eli Baumwell, ACLU of West Virginia Policy Director
DATE: February 16, 2020

MEMORANDUM

The American Civil Liberties Union (ACLU) of West Virginia is a non-partisan nonprofit organization. Our mission is to protect and expand the rights guaranteed under the United States Constitution and the West Virginia Constitution. The ACLU of West Virginia supports the Defend the Guard Act as an appropriate assertion of Congress's sole authority to wage war. The following memo is meant to explain key legal considerations that have been raised in response to this bill.

I. INTRODUCTION

At its core, House Bill 2732 (Defend the Guard Act) asks a simple question: Should the power to pursue war in our democracy be under the authority of the President?

Article 1, Section 8 of the US Constitution clearly says otherwise, granting that power to Congress. The same Section grants Congress the authority to raise and support armies, to make rules for the governance and regulation of the militia, and to call forth the militia.

If the analysis stopped there – and arguably, the analysis should stop there – this would be a straightforward question with a straightforward answer. However, the legislation raises issues that go to the core of the American system; it highlights the tensions in both the vertical and horizontal separation of powers. It raises a legal question that has not been resolved by the courts. It has secondary policy questions with potential fiscal impacts.

In the interest of brevity, this analysis does not include a historical overview. This perspective helps to inform an understanding of debates about the role of a standing army versus militias, and the concern the Framers had about granting too much authority to make war to the executive. It also helps to trace an understanding of the early state militias through the development of a standing Army, the changing role of the militia during war, and the expansion of Presidential powers to declare war. Nor will this analysis include the staggering number of times the National Guard has been deployed to active combat duty absent a Congressional declaration of war.

Instead the analysis focuses on the current law and relevant court cases.

In brief, the analysis makes the following findings: (1) The federal government has significant control over the National Guard. (2) A plain-language reading of the Constitution, and the bulk of federal law and jurisprudence makes it clear that Congress has significant say over military affairs. (3) Congress has attempted to legislate away much of this authority. (4) Whether Congress can legislate away the authority to make war, and whether that legislation is desirable is the central policy question of the proposed bill. (5) Concerns about loss of federal funding are overstated.

II. DISCUSSION

Article 1, Section 8 of the US Constitution grants Congress the power to declare war. It also grants Congress the power to make rules for the government and regulation of land and naval forces, to call forth the militia and to organize, arm and discipline the militia.

Under federal law, members of the National Guard are sworn simultaneously into the state national guard, and the federal national guard. They are under the jurisdiction of the state unless ordered into federal duty and they revert to state status when relieved of federal duty.¹

Several sections under Title 10 of the US Code address the authority to transfer state National Guard to active (federal) duty. Section 12301(a) states that active duty may be initiated “[i]n time of war or of national emergency declared by Congress, or when otherwise authorized by law...”² Subsection (b) of that section allows for up to 15 days per year of active federal duty.³ Subsection (b) requires the consent of a governor for state National Guard, however that is superseded by subsection (f), also known as the Montgomery Amendment, which prohibits a governor from withholding consent for location, purpose, type or schedule of active duty.⁴ Section 12304 grants the President broad authority to move the National Guard to active duty to augment active duty forces for any “named operational mission”, in response to the use or threatened use of a weapons of mass destruction, or in response to a terrorist attack or threatened terrorist attack in the United states. The section limits this to no more than 200,000 Reserve units, limits active duty to no more than 365 days, and requires congressional notification within 24 hours.⁵ The section also contains subsection (h) which states, “Nothing contained in this section shall be construed as amending or limiting the application of the provisions of the War Powers Resolution.”⁶ Section 12304a allows the National Guard to be activated to respond to a national emergency at the request of a governor.⁷ Section 12304b allows for a call to active duty to augment active forces, for a preplanned mission, including for combat. The section limits the number of troops that can be called, requires budgeting in the prior fiscal year for this call, and requires a report to congress. Like the previous section it too references the War Powers Resolution.⁸ In the portion of the US Code specifically related to the National Guard, the general policy states:

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.⁹

¹ 10 U.S.C. § 12301; 32 U.S.C. § 102; *see also* Perpich v. DOD, 496 U.S. at 335 (1990).

² 10 U.S.C. § 12301(a).

³ 10 U.S.C. § 12301(b).

⁴ 10 U.S.C. § 12301(b), (d). *Active duty was originally limited to periods of national emergency until 1952, when Congress authorized orders to active duty or training without an emergency, but with the consent of the Governor. After Governors began withholding consent, the Montgomery Amendment was added in 1986 saying a Governor cannot refuse because of location, purpose, type, or schedule of such duty* (Perpich v. DOD, 496 U.S. at 334).

⁵ 10 U.S.C. § 12304.

⁶ Id.

⁷ 10 U.S.C. § 12304a.

⁸ 10 U.S.C. § 12304b.

⁹ 32 U.S.C. § 102.

While the laws describing when the National Guard can be activated are contained in Title 10 of the Federal code, Title 32 is specifically about the National Guard. Section 108 deals with forfeiture of federal funds. The text reads:

If, within a time fixed by the President, a State fails to comply with a requirement of this title, or a regulation prescribed under this title, the National Guard of that State is barred, in whole or in part, as the President may prescribe, from receiving money or any other aid, benefit, or privilege authorized by law.¹⁰

The War Powers Resolution reasserts Congress's authority to declare war. The resolution declares that in order to bring the US Military "into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."¹¹ The Resolution proceeds to require the President to confer with Congress before engagement in hostilities, to make regular reports to Congress, and for Congress to take action.¹² Pursuant to the War Powers Resolution, Congress has granted the President broad authority to utilize the military under specific Authorizations for Use Military Force on numerous occasions.¹³

West Virginia law is not particularly informative on this issue. The Article controlling the National Guard gives the Governor authority over the Guard. It broadly says the National Guard will follow the Constitution and relevant federal law.¹⁴

The Courts have not tested the question of whether deployment of the National Guard to active duty combat can be limited to Congressional declarations of war.

The most relevant case is Perpich v. Department of Defense in which the Governor of Minnesota unsuccessfully challenged the constitutionality of the Montgomery Amendment by refusing to allow the National Guard to be sent to Central America for a peace-time training mission.¹⁵ The Court summarized the case, "The question presented is whether the Congress may authorize the President to order members of the National Guard to active duty for purposes of training outside the United States during peacetime without either the consent of a state governor or the declaration of a national emergency."¹⁶ The Court held, "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. Pp. 496 U. S. 347-355."¹⁷

¹⁰ 32 U.S.C. § 108.

¹¹ 50 U.S.C. § 1541.

¹² 50 U.S.C. § 1542-44.

¹³ See e.g. "Authorization for Use of Military Force Against Iraq Resolution of 2002" Pub. L. 107-243, (Oct. 16, 2002); "Introduction of United States Armed Forces Into Central America for Combat" Pub. L. 98-525 (Oct. 19, 1984).

¹⁴ WV Code 15-1B-1 *et. seq.*

¹⁵ Perpich v. DOD, 496 U.S. at 334.

¹⁶ Id. at 336.

¹⁷ Id. at 335.

In the Supreme Court's opinion several other cases with potential bearing were discussed. The Court reiterated the understanding that national defense fell within the purview of the federal government and that there was a presumption that federal control over the armed forces was exclusive.¹⁸

Extensive citations to the Selective Draft Law Cases appears throughout Perpich. That case was the aggregation of legal challenges to the implementation of a military draft during World War I. The draft was upheld, along with the President's power to draft members of the National Guard into the Regular Army.¹⁹ In his discussion of this early case, Justice Stevens wrote:

"This view of the constitutional issue was presupposed by our decision in the Selective Draft Law Cases, 245 U. S. 366 (1918). Although the Governor is correct in pointing out that those cases were decided in the context of an actual war, the reasoning in our opinion was not so limited. After expressly noting that the 1916 Act had incorporated members of the National Guard into the National Army, the Court held that the Militia Clauses do not constrain the powers of Congress "to provide for the common Defense," to "raise and support Armies," to "make Rules for the Government and Regulation of the land and naval Forces," or to enact such laws as "shall be necessary and proper" for executing those powers. 245 U.S. at 245 U. S. 375, 245 U. S. 377. The Court instead held that, far from being a limitation on those powers, the Militia Clauses are -- as the constitutional text plainly indicates -- additional grants of power to Congress."²⁰

Another ruling challenging the draft laws during World War I also found the draft constitutional and rejected a limited interpretation of the militia clauses within the Constitution. Notably, the decision emphasized the role of Congress in declaring war:

...the constitutional power of Congress to compel the military service which the assailed law commanded was based on the following propositions: (a) That the power of Congress to compel military service and the duty of the citizen to render it when called for were derived from the authority given to Congress by the Constitution to declare war and to raise armies. (b) That those powers were not qualified or restricted by the provisions of the militia clause, and hence the authority in the exercise of the war power to raise armies and use them when raised was not subject to limitations as to use of the militia, if any, deduced from the militia clause. And (c) that, from these principles, it also follows that the power to call for military duty under the authority to declare war and raise armies and the duty of the citizen to serve when called were coterminous with the constitutional grant from which the authority was derived, and knew no limit deduced from a separate, and for the purpose of the war power, wholly incidental, if not irrelevant and subordinate, provision concerning the militia, found in the Constitution.²¹

III. ANALYSIS

A. The Defend the Guard Act provides an appropriate, lawful vehicle for the West Virginia legislature to pressure the federal government to reestablish the constitutional requirement that only Congress may declare war.

The primary question is whether a state can refuse to grant federal authority to the National Guard for deployment to a foreign conflict absent a Congressional declaration of war. This becomes a two-part

¹⁸ Id. at 353; citing Table's Case 13 Wall. 397 (1871).

¹⁹ Selective Draft Law Cases, 245 U. S. 366 (1918).

²⁰ Perpich v. DOD, 496 U.S. at 349.

²¹ Cox v. Wood, 247 U.S. 3, 6 (1918).

question: (1) What is the balance of power between the state and federal government with regards to the National Guard? (2) What is the authority of the President to conduct prolonged military operations without a Congressional declaration of war?

The Supremacy Clause of the US Constitution would seem to grant the federal government power over the states. The Supreme Court has held that the federal government has significant control of the armed forces.²² Federal law makes members of the state National Guard, members of the Federal Guard at the same time.²³ Notably, the Court upheld Congress's decision to revoke a governor's ability to refuse to provide the guard in some circumstances.²⁴ West Virginia's own law regarding the Guard cedes authority to the federal government.²⁵ Therefore, it is likely that the federal government has broad authority over the Guard.

In addition to the plain language reading of Article 1, Section 8 of the Constitution, the bulk of legislation and legal decisions seem to affirm Congress's primacy in authorizing military force. Congress has repeatedly reasserted their authority over these matters.²⁶ The relevant rulings repeatedly refer to Congress's authority to declare war, and the powers to draft and activate the National Guard for combat under a declaration of war. In fact, Justice Stevens in Perpich, acknowledges that the Governor of Minnesota was correct in the President's authority to activate the Guard because it was during war-time; Justice Stevens goes on to describe the power that Congress has over the military during peace-time, but says nothing about executive power.²⁷ While the president has limited authority in exigent circumstances, Congressional action is necessary.

The question then becomes how much Congressional action is necessary? In practice, the last half-century has seen the Legislative and Executive branch repeatedly grapple with this issue. At times the Legislative branch has seemed eager to abdicate responsibility. It has explicitly given the executive power, not only to use active duty military for prolonged operations, but to run such prolonged missions that it is necessary to activate the Guard to augment the military.²⁸ Specific Authorizations for Use of Military Force have similarly allowed Congress to avoid the difficult task of a formal declaration of war, while effectively allowing the President to make war.²⁹

Can Congress legislate away its Constitutional responsibility to have the sole power to make war? Although practice has allowed this to occur, the Constitution supersedes federal law. Should Congress legislate away this authority? In other words, despite the plain language of the US Constitution, should the power to pursue war be under the authority of the President? As this memorandum noted in the beginning, this is the central policy question of House Bill 2732. Will the West Virginia Legislature continue to be complicit in the use and abuse of the military under the Executive Branch, or will the Legislature assert that this authority lies with Congress and require Congress to take appropriate action?

²² See FN. 16 *supra*.

²³ See FN. 1 *supra*.

²⁴ See FN. 13 *supra*.

²⁵ See FN. 12 *supra*.

²⁶ See FN. 9 and 11 *supra*.

²⁷ See FN. 18 *supra*.

²⁸ See FN. 5 *supra*.

²⁹ See FN. 13 *supra*.

B. It is unlikely that West Virginia would lose significant federal funding if it passed the Defend the Guard Act.

This bill raises a secondary issue. Opponents of House Bill 2732 have noted that pursuant to Section 108 of Title 32 of the US Code, West Virginia stands to lose significant federal funding for the National Guard. While the possibility exists, the risks are over-stated.

There are technical issues that may render this inoperable. Section 108 authorizes forfeiture of funds when a state fails to comply with the requirements of Title 32. The code sections that authorize the Executive to activate the National Guard for combat duty are all contained in Title 10. In fact, Title 32 specifically notes that Congress has the authority to call the National Guard, and limits this to matters of national security.³⁰ While this incongruity may be dismissed as a technicality, it raises a barrier to denying funds for refusing to accede to deployment of the National Guard to combat duty absent a Congressional act. More broadly, this disconnect is a demonstration of the way in which authority has slowly been usurped by the Executive – the very issue this legislation seeks to remedy.

Finally, Section 108 does not result in an immediate forfeiture of funds. Instead, the President must first give the state a timeframe in which to remedy the failure to comply. Even if the state did not yield, the President still has the discretion to determine if, and how much funds will be held up. As a practical matter, fully defunding a state Guard unit would be politically unpopular and risk the ability to respond to national and state emergencies. This would be a particularly untenable position for a President to take in retaliation for a state's eminently reasonable demand that before the National Guard, the military reserves, are called to active duty, the President seek and obtain a Congressional declaration of war.

IV. CONCLUSION

The Defend the Guard Act seeks to use the limited power of the state over the National Guard to pressure the Congressional and Executive branches of the federal government to reverse the trend of multiple, long-term military operations, which any lay-person would understand to be “war” without a Congressional declaration of war as required by Article I, Section 8.

It is clear, from multiple sources of law that the power to declare war lies with Congress. Congress has attempted to legislate much of that authority away, both in broad federal code, and through specific Authorizations for the Use of Military Force. It is not clear whether Congress can duly give away Constitutional authority in such a manner. Whether it is wise to do so, is the policy question behind House Bill 2732.

While this legislation does, by design, raise unanswered questions of law, the suggested consequences are over-stated.

V. STATEMENT OF THE ACLU-WV'S POLICY POSITION

The ACLU of WV supports House Bill 2732. The decision to initiate war is one of the gravest a nation can make, and is a decision with critical implications for civil liberties. Historically, war has fostered a domestic atmosphere hostile to civil liberties. The Constitution is clear in giving Congress the sole authority to declare war. This is the branch of government that is most capable of providing the

³⁰ See FN. 9 *supra*.

American people with a full, open and diverse debate before committing them to undertake the burdens of war. While limited circumstances may exist where the President may be able to use the Armed Forces to respond to emergency situations, these are narrow in scope and in time. Any exercise of this authority that would necessitate activating the Guard for a foreign conflict is inherently contradictory to this limitation. To maximize the prospect for public debate prior to engaging the nation's armed forces abroad, the Congress must vigilantly assert its decisional authority. Following these principles, it is appropriate and preferable for the State to put pressure on the federal government. The Defend the Guard Act provides just such a vehicle.

Respectfully submitted,

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