



The National Guard and the Militarization of D.C.: A Constitutional Crisis?

Fox News recently published a story entitled “Defense Secretary Austin overruled National Guard chief on keeping troops at the Capitol: memo.” To many readers, this may have appeared to be a sensationalized article throwing fuel on the embers of an already charred military issue in our nation’s capital.

But the story captures a troubling divide between the new defense secretary and the chief of the National Guard Bureau on the appropriate use of the Guard. Yet, amid this break in ranks, the story suggests a much larger and more concerning dilemma.

And it is what the Founding Fathers feared most.

The article references a defense memo or coordination sheet normally used to “concur” or “non-concur” on issues within the Defense Department. In this instance, a policy memo from the defense secretary’s office requested an “Extension of NG [National Guard] support to U.S. Capitol Police” with an additional 2,280 guardsmen to support the U.S. Capitol Police security detail beyond March 12. However, there are several issues with the request.

From my experience in the Pentagon, this type of appeal is not easily granted. It usually requires a stringent justifying rationale and reason that explains the request’s urgency. Each submission is officially petitioned through a formal request-for-assistance and sent to the DoD’s executive secretary, where it is staffed for coordination — an arduous process involving rigorous approval criteria that can take weeks.

Here is where the problem begins.

The latest Capitol Police request to extend Guard support was coordinated in two days and failed to give a convincing case for approval. Laying out its rationale, the Capitol Police referenced the Department of Homeland Security’s National Terrorism Advisory System, particularly the January 27, 2021 threat bulletin, as the chief reason for the augmented security support.

The bulletin summary describes a “heightened threat environment” using words such as “believes” or “suggests” that “ideologically-motivated violent extremists [domestic violent extremists] ... could



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continue to mobilize to incite or commit violence” — a somewhat anemic threat assessment to justify the continued military presence in our Capitol.

Also, federal statutes and defense directives come into play when the military is used in direct support of law enforcement, which is the case here. The Posse Comitatus Act of 1878 and other federal laws limit the powers of the government to use U.S. troops to “execute the laws,” including “search, seizure, arrest or other similar activity” — a concerning legal quandary.

What is more, the defense department’s support of civil authority’s directive provides ruling guidance for any assistance in missions normally carried out by civil authorities. The defense regulation has six approval criteria to “examine” and “assess” the need for support. If we use the regulation’s six criteria — legality, lethality, risk, cost, appropriateness, and readiness — an argument can be made that any one of them would disqualify the Capitol Police application.

Yet, as disturbing as these shortfalls are, it is not the main concern.

The National Guard Bureau chief’s objection to the Capitol Police demand gave two reasons: (1) the National Guard is already busy with supporting COVID-19 relief, natural disasters, and ongoing overseas deployments; and (2) to involuntarily activate the National Guard for any defense support of civil authorities, the defense secretary must have the governors’ consent. But, as the memo mentioned, “numerous Adjutants-General and Governors have expressed their unwillingness to order the involuntary mobilization of National Guard personnel.”

And here lies the larger problem.

Within the Fox News article is a related story indicating that the Defense Department has considered issuing involuntary activation orders to keep Guard troops at the Capitol. The issue here is the defense secretary alone possesses no legal authority to involuntarily activate the Guard. Any attempt would be unlawful and create a constitutional crisis.

The defense secretary can **request**, from the governors, Guard members to perform “other duty” in “support of [defense department] operations or missions.” But the defense secretary cannot **order** them to perform “other duty” in “support of [those] operations or missions.”

Only a governor can order a non-federalized Guard member to perform such duty. To avoid the need for governors’ consent and Posse Comitatus restrictions would require an Insurrection Act declaration — a rare presidential decree allowing federal troops to quell rebellion and enforce laws.

Therefore, if attempted, the defense secretary’s orders would constitute an unlawful end-run around Posse Comitatus and congressional legislative powers. The secretary would have to ignore Congress’s constitutional authority under Article I to “make all laws,” including Posse Comitatus, and the exception to this law, the Insurrection Act.

So, where does this bring us?

The risk the defense secretary is taking, either by attempting to involuntarily activate the National Guard to support the Capitol Police without the governors’ consent or by ordering them to “execute the laws” without an Insurrection Act declaration, sets a worrying precedent that undermines U.S. law.

The coopting of a states’ sovereign militia by the federal government, to be used as an unlawful domestic police force, distorts the vertical balance of power between state and federal governments — an essential diffusion of power. Further, it abdicates the states’ responsibility, granted by the



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Constitution, to protect the liberties and freedoms of their citizens.

The defense secretary is ignoring the law, circumventing regulations, and potentially spawning an unnecessary constitutional crisis — a decision that should strike fear into the hearts of freedom-loving Americans.

What our Founding Fathers feared most was a president or military chief indiscriminately coalescing military forces to police its citizens — just one of history's tragic paths to tyranny and oppression.



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