

“DEFEND THE GUARD” ACT

A SUMMARY PREPARED BY THE
COMMITTEE FOR RESPONSIBLE FOREIGN POLICY

INTRODUCTION

A Misuse of Our Nation's Guard Troops

For seven decades, Congress has shirked its constitutionally enumerated responsibility to declare war. Congress has acquiesced to the never-ending wars by voting to fund the wars but refusing to vote to authorize the wars. By funding unauthorized wars, Congress has eroded the Constitution's clear mandate for accountability surrounding war-making.

Not surprisingly, as Congress has taken a backseat in the authorization of war, we have witnessed an increase in the number of wars, as well as an expansion of the duration of wars. Our country is involved in an unprecedented number of unconstitutional and unauthorized military engagements, and we are mired in wars and conflicts that have no end in sight and no discernible definition of victory.

As Washington, DC's military industrial complex continues to advocate for endless wars, National Guard troops are increasingly forced to fight in these wars to compensate for the shortage of military personnel. Our National Guard troops are being maimed, wounded, and killed in wars that Congress has never authorized.

An Innovative Legislative Response

In response, an innovative idea has emerged to allow states to exercise their Constitutional role in federalism in the area of war-making: A state's National Guard troops may only be activated with the approval of the governor. A member of the West Virginia House of Delegates, Pat McGeehan, has introduced a bill to protect National Guard troops from being deployed in unauthorized wars. His bill has now been introduced in other states across the nation, as Americans have become increasingly alarmed by the human and financial costs of these endless wars.

The following packet includes the text of this vitally important bill, as well as articles demonstrating support for this idea.

ABOUT US

The Committee for Responsible Foreign Policy, a national 501(c)(4) non-profit organization, has endorsed this bill as one of the best ways to protect America's citizens from the devastating effects of endless, unauthorized, and failed wars.

➤ Learn more at ResponsibleForeignPolicy.org

WEST VIRGINIA LEGISLATURE

2019 REGULAR SESSION

HOUSE BILL 2732

By Delegate McGeehan, Angelucci, Brown, S., Butler, Dean, Doyle, Estep-Burton, Anderson,
Jennings, Paynter, Wilson, and Pyles

INTRODUCED JANUARY 30, 2019

REFERRED TO THE COMMITTEE ON VETERANS' AFFAIRS AND
HOMELAND SECURITY THEN THE JUDICIARY

A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new section, designated §15-1B-1a, relating to the West Virginia National Guard; requiring an official declaration of war or an action to call forth the state militia by the United States Congress before members of the West Virginia National Guard may be released from state control to participate in active duty combat.

BE IT ENACTED BY THE
LEGISLATURE OF WEST VIRGINIA:

ARTICLE 1B. NATIONAL GUARD.

(a) Short Title. This section shall be known and may be cited as the “Defend the Guard Act.”

(b) Findings. The Legislature finds that:

(1) Article I, Section 8 of the Constitution of the United States vests in the United States Congress the exclusive power of war;

(2) In spite of the clear language of the United States Constitution, vesting the power over war exclusively in the United States Congress, the United States Executive Branch has unconstitutionally assumed that power while the United States Congress has abdicated its constitutional duty;

(3) Although the United States Congress has not declared war in over 70 years, the nation has since gone to war repeatedly at the whim of the executive branch;

(4) When such unconstitutional actions are taken by the federal government, it is the proper role of the states themselves to take action to remedy such situations, as outlined in the Kentucky and Virginia Resolutions of 1798;

(5) A founder of this country, George Washington, once wrote: “The Constitution vests the power of declaring war in Congress; therefore, no offensive expedition of importance can be undertaken until after they shall have deliberated upon the subject and authorized such a measure”;

(6) The Father of the Constitution, James Madison, once wrote: “The Constitution supposes, what the History of all Governments demonstrates, that the Executive is the branch of power most interested in war, and most prone to it. It has accordingly with studied care vested the question of war to the Legislature”;

(7) The author of the Declaration of Independence, Thomas Jefferson, once wrote: “We have already given in example one effectual check to the dog of

war by transferring the power of letting him loose from the Executive to the Legislative body. . .” and “Considering that Congress alone is constitutionally invested with the power of changing our condition from peace to war, I have thought it my duty to await their authority for using force in any degree which could be avoided”; and

(8) Another Constitutional framer, Alexander Hamilton, once wrote: “The Congress shall have the power to declare war’; the plain meaning of which is, that it is the peculiar and exclusive duty of Congress, when the nation is at peace, to change that state into a state of war. . .”;

(c) Definitions. For the purposes of this section:

(1) “Active duty combat” means performing the following services in the active federal military service of the United States:

(A) Participation in an armed conflict;

(B) Performance of a hazardous service in a foreign state; or

(C) Performance of a duty through an instrumentality of war.

(2) “Official declaration of war” means an official declaration of war made by the United States Congress pursuant to Article I, § 8, Clause 11 of the United States Constitution.

(d) Notwithstanding any other provision of this code, the West Virginia National Guard and any member thereof shall not be released from the state into active duty combat unless the United States Congress has passed an official declaration of war or has taken an official action pursuant to Article I, § 8, Clause 15 of the United States Constitution to explicitly call forth the West Virginia National Guard and any member thereof for the enumerated purposes to expressly execute the laws of the union, repel an invasion or suppress an insurrection. The Governor shall take all actions necessary to comply with the requirements of this section.

NOTE: The purpose of this bill is to require an official declaration of war or an action to call forth the state militia by the United States Congress before members of the West Virginia National Guard may be released from state control to participate in active duty combat.

SUPPORT FOR THE BILL

CHARLESTON GAZETTE - MAIL

Pat McGeehan • September 21, 2019

PAT MCGEEHAN: FOLLOW THE CONSTITUTION OR BRING OUR TROOPS HOME

About 1,600 years ago, in the year 410 AD, barbarian armies underneath King Alaric captured the ancient city of Rome, ransacking and pillaging the center of the Roman Empire. The fall of the once-great capital sent terrifying shockwaves throughout the Western world, triggering Saint Jerome to lament that it was like “the bright light of all the world was put out.”

Contrary to popular belief, no climactic battle preceded the fall of Rome. In fact, for years beforehand, Alaric and his Visigoths had already gone on a rampage up and down the entire Italian Peninsula, ravaging the countryside as they pleased—utterly unchecked and unchallenged. By the time this band of Gothic ruffians actually arrived at the gates of Rome, it seems that they simply walked into town.

All of this relentless chaos begs the question: Just where exactly were the famous Roman legions to stop them? In one of the curious mysteries of 5th century history, nobody really knows the particulars for sure. But one thing is certainly known, the Roman army was conspicuously missing in action. Decades of waging one expensive war after the next—its forces spread thin across the outposts of a vast frontier—Rome’s depleted military started to disintegrate.

Many of these same conceptual conditions that led to the fall of Rome persist here and now in the United States. Our overextended military, constantly bogged down in new foreign wars, is straining the nation’s finances—while at the same time, pushing many of our battle-weary men and women in uniform to the breaking point. Something has to give.

In an effort to reverse course, for years now, I have introduced a bill in Charleston that would prohibit our state’s National Guard units from being sent overseas into combat without an official Declaration of War from Congress. For just as the Roman civilization experienced a breakdown, so too has our American way of life. Ours does not entail barbarians at the gates, but rather, in a more abstract fashion, the collapse of constitutional law. And perhaps nowhere is this radical failure in our rule of law more obvious—with more disastrous results—than with the issue of perpetual, institutionalized warfare.

“Congress shall have power to declare war.” One simple line, but a provision our Founding Fathers carefully constructed. This section in the Constitution gives to the legislative branch—not the executive—the exclusive right to decide when this country

goes to war and when it does not.

With this war-powers clause, there can be little doubt of our Founders' intentions, for this can be easily understood from their own words. Of these, none are better than those written by the father of the Constitution himself, President James Madison: "The Constitution supposes, what the history of all governments demonstrates, that the executive is the branch of power most interested in war, and most prone to it. It has accordingly, with studied care, vested the question of war to the legislature."

Regrettably, it has now been over 75 years since our Congress voted to pass a Declaration of War, and after suffering nearly two decades of endless conflicts—with one president after the next ordering our troops into foreign combat without proper authorization—this essential phrase has more relevance in our country today than perhaps it ever did in the past.

Discarding this constitutional first principle that helped forge the backbone of our own republic has resulted in grave consequences. Thousands of American lives have been lost in unnecessary foreign conflicts, devastating our military families while fatiguing our country's defenses—all while draining trillions from the pockets of taxpayers.

In return, what have the American taxpayers actually received from this reckless spending? Not much more than the backwards reality of financing freshly paved roadways through obscure villages

in Afghanistan, while the main streets of their own hometowns are often so decrepit, they look like they belong to the Stone Age—a common fact of life both sad and absurd.

For a nation already trillions of dollars in debt, this staggering level of spending is unsustainable. We must realize the lessons of history and heed the wisdom of our Founding Fathers, before—as the ancient Romans eventually did—we're forced to learn the hard way.

Next January, I will reintroduce this bipartisan "Defend the Guard" legislation, proposing once again that the National Guard of West Virginia shall not be sent into combat in foreign nations without constitutional authority, just as the Framers intended. Fellow like-minded lawmakers in other states have now joined me and, in a coordinated manner, will bring this same legislation to their own state capitols across the country—to uphold this constitutional principle as required by the Oath of Office, and to support this effort to Bring Our Troops Home.

If you agree, you can sign my petition at WVBringOurTroopsHome.com. You can also urge other state delegates and senators to support this bipartisan "Defend the Guard" legislation, which reaffirms our state's authority and demands that the federal government honor our constitutional rule of law—before bleeding more lives and money from West Virginia into the deserts of foreign conflicts.

Pat McGeehan is a four-term delegate in the West Virginia Legislature who has published numerous books and essays on economics, history and philosophy. A graduate of the US Air Force Academy, he has also served as a military intelligence officer. He lives with his daughter, Kennedy, in Chester, West Virginia.

MISES INSTITUTE

Ryan McMaken • August 19, 2019

WHEN STATE GOVERNORS TRIED TO TAKE BACK CONTROL OF THE NATIONAL GUARD

A West Virginia state lawmaker plans to re-introduce a bill next session that would require Congress declare war or call forth the state militia before the West Virginia National Guard could be released from state control and sent into combat. Currently, as *The Intelligencer* (of Wheeling) puts it: “the authority to activate the Guard rests with West Virginia’s governor.”

But this doesn’t quite describe the reality. State governors are expected to send state National Guard troops wherever and whenever the Pentagon orders.

So, in recent decades, whenever states or governors have attempted to have some say over what the Pentagon does with state troops, the Department of Defense has responded with threats.

For example, [in the case of McGeehan’s bill](#):

“Leaders with the West Virginia National Guard opposed the “Protect the Guard” measure, and said it could have cost the state millions as military missions would have been deferred to other states if the measure had been enacted.”

According to McGeehan, “After the success on Monday, the Adjutant General of the West Virginia National Guard (James

Hoyer)—along with the military brass at the Pentagon—aggressively worked behind the scenes to kill the bill,”

The Pentagon threatened to withdraw both federal military spending and materiel from the state, with a National Guard spokesman saying:

“If enacted, the (U.S. Department of Defense) couldn’t count on us to be deployable . . . Missions and projects would go to other states, and there would be a loss of millions of dollars to West Virginia.”

This isn’t the first time the Department of Defense has essentially bribed state politicians into buckling under demands for total state acquiescence to Pentagon demands.

The Governors’ Revolt of 1986

In the mid-1980s, the Reagan administration’s use of American troops in Central America had become increasingly controversial. The administration’s policy was being criticized for favoring brutal regimes in the region’s civil wars. Moreover, at barely more than a decade since the end of the Vietnam War, many Americans were less than enthusiastic

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about another round of US military intervention.

Consequently, many within the Democratic Party were both ideologically and politically motivated to find new ways to oppose the Pentagon's use of National Guard troops in Central America.

In a report for the US Army War College, Historian Col. James Burgess, Col. Reid K. Beveridge, and Lt. Col. George Hargrove write:

“Governor Joseph Brennan of Maine was the first to act. That year, he prohibited the deployment of 48 Maine Army Guardsmen to Honduras. . . . Brennan’s statement was immediately picked up by a number of other Democratic governors, who either stated they would refuse deployments of their troops or would refuse if tasked for a deployment. Principal among these were Governors Michael Dukakis of Massachusetts, Madeline Kunin of Vermont, Rudy Perpich of Minnesota, Bruce Babbitt of Arizona (although Arizona Guardsmen ultimately deployed), Richard Celeste of Ohio, Richard Lamm of Colorado and [Toney] Anaya of New Mexico. Expressing some reservations at the time also were governors Mario Cuomo of New York and Mark White of Texas.”

Needless to say, this was inconvenient for the Pentagon which was used to using state troops to supplement deployments with a minimum of fuss, or any of the checks and balances that are supposed to be used in a federal system.

Washington, DC politicians certainly regarded the governors' resistance as a significant problem, with Congressman Sonny Montgomery of Mississippi recalling:

“General Walker was telling me six-seven months before all this came to a head that they were having trouble with the governors. Even the governor of Mississippi was reluctant to let troops go into Central America. So I knew there was a problem developing there.”

Montgomery noted “the commanders over in the Defense Department” were concerned the governors' actions “did affect the force structure of the military. They couldn't send people ... [the Pentagon] felt if they couldn't use these Guardsmen where they were needed in Central America, the whole force structure was in trouble.”

Moreover, James Webb, the assistant secretary of defense for reserve affairs warned: “the governors' authority has become a vehicle to debate or influence foreign policy.” Webb also noted that there are historical precedents for governors refusing to send troops when called up, even in times of war.¹

The response in Congress consisted of passing what is now known as the Montgomery Amendment.

Congress was reluctant to totally void a governor's authority over deployment of state troops, as such powers had been recognized since the earliest days of the republic. But in an effort to further limit these powers, the Amendment stated that no governor could withhold a unit from deployment on account of “location, purpose, type or schedule of such deployment.”

Governors did retain powers to deny deployment if that deployment would

interfere with state needs for troops, such as quelling civil unrest or providing disaster-relief activities.

But this didn't end the debate. On January 22, 1987, Governor Rudy Perpich of Minnesota filed suit in US District Court of St. Paul challenging the constitutionality of the Montgomery Amendment, asserting it violates the Militia Clause of the Constitution.

Events Escalate in Ohio

While *Perpich v. Department of Defense* was working its way toward the US Supreme Court, the controversy between the Pentagon and the governors reached its most tense point in Ohio.

In 1987, the Pentagon ordered the Ohio National Guard adjutant general to deploy survey and engineering teams to Honduras in early 1988. Governor Richard Celeste then intervened and ordered the Guard to not deploy. Given that the state's adjutant general answers to the governor as his commander-in-chief, the Guard declined the Pentagon's order.

The Defense Department responded by playing hard ball.

Defense Department personnel began to develop a plan to remove all but a single unit of the National Guard from Ohio. Specifically:

“the Ohio Guard grossly underestimated what [National Guard Bureau Chief Lieutenant General Herbert R.] Temple had in mind for them. Most of them apparently believed they stood to lose the engineer

brigade headquarters (including one general officer as the commander) and perhaps the subordinate engineer battalions. None, however, dreamed—it seems—that the Ohio National Guard could be made to disappear over a period of a very few months except for only the 73rd Infantry Brigade. And, in particular, that the Ohio Air National Guard could be made to cease to exist.”

The primary purpose of all of this was to use the Pentagon's financial power to take resources out of the state, thus reducing state revenue and economic activity generated by federal spending inside the state. The local media began running stories about how the move would lead to lost jobs.

Moreover, the Pentagon's move would have forced the state to fund all of its own remaining National Guard units. The bill would have been \$256 million.

Eventually, the governor caved, and the Ohio National Guard deployed as the Defense Department wished.

In 1990, the US Supreme Court sided with the Department of Defense, and ruled the Montgomery Amendment was binding.

For the moment, the matter was settled.

Why the Pentagon Has so Much Power Over State Troops

Today, when the militia clause of the Second Amendment is mentioned, it is not uncommon to hear the claim that “the National Guard is the militia.”

This stretches the truth, to say the least.

Today's National Guard is nothing like the independent state militias that existed throughout the nineteenth century up until the adoption of the Militia Act of 1903. Prior to the 1903 act, state militias were primarily state funded, and were not integrated into the federal government's military structure except in times of declared war.

The Militia Act created a new type of "militia" which replaced the old decentralized model with a new system in which state National Guard units were to receive federal funding and were to be integrated into the national military as a permanent reserve force.

But even after 1903, the state National Guards retained a high degree of independence compared to today. That was further eroded with the National Defense Act of 1916 which allowed National Guard units to be deployed outside their own states—and even outside the country—for much longer periods of time than had been previously allowed. The 1916 Act further increased federal funding—and thus federal control—over National Guard units.

Another major change came in 1933. At that time, new amendments to the National Defense Act were passed which made members of the National Guard units members of both their state's National Guard, and the federal military.

Further integration occurred throughout the following decades, culminating with the adoption of the "Total Force Policy" in 1970. According to Burgess, et al., this meant National Guard units became fully "woven into the fabric of the Defense establishment."

By 1986, the idea of an independent state National Guard was all but dead. As we have seen, some governors briefly tried to revive the idea, but it was struck down by the courts, and by the Pentagon's immense power over military resources within each state.

This isn't to say that state governments, if they wanted to be, couldn't still be a nuisance for the Pentagon. The Defense Department's threats against West Virginia in the case of the McGeehan bill helps to illustrate this.

The Pentagon is used to state governors asking "how high?" whenever being told to jump. But the Pentagon keeps an ace up its sleeve in case any state politicians get uppity. The Pentagon will simply threaten to remove millions of dollars worth of spending from any state which refuses to immediately comply.

So long as most Americans blithely accept whatever new wars and invasions the Pentagon plans, this strategy will probably keep working.

¹ During the War of 1812, the states of Connecticut and Massachusetts both refused to respond to federal demands for state troops. During the Civil War, the governor of Kentucky—which had declined to secede—nonetheless withheld troops from federal service. This was eventually reversed when pro-Lincoln politicians took control of the state government.

Ryan McMaken is a senior editor at the Mises Institute. Send him your article submissions for *Mises Wire* and *The Austrian*, but read article guidelines first. Ryan has degrees in economics and political science from the University of Colorado, and was the economist for the Colorado Division of Housing from 2009 to 2014. He is the author of *Commie Cowboys: The Bourgeoisie and the Nation-State in the Western Genre*.

TENTH AMENDMENT CENTER

Mike Maharrey • November 14, 2019

DEFEND THE GUARD: WHAT IF THIS IDEA SPREADS?

West Virginia state Rep. Pat McGeehan participated on a panel with Wyoming state Reps. Tyler Lindholm and Andi Clifford to talk about the Defend the Guard Act during the Bring Our Troops Home National Press Club event in Washington D.C. He asked a compelling question: what if this idea spreads?

Defend the Guard legislation would ban the overseas deployment of National Guard troops by the federal government without a congressional declaration of war. McGeehan has introduced a Defend the Guard bill in the West Virginia House every year since 2015. The coalition hopes to have the bill introduced in 20 states this year.

During the panel discussion, McGeehan explained the pushback he's gotten on the bill. He said the opposition tells him the bill would be effective.

McGeehan talked about the first time he got the bill on the House agenda. He said there was this "frantic chaos that sort of broke out." The Adjutant General of the West Virginia National Guard called the speaker of the House and demanded an immediate meeting. McGeehan said the adjutant general showed up to that meeting in "full military get-up" – as McGeehan describes it, "Sort of looking like Jack

Nicholson did in a Few Good Men." The general claimed he got a call from the Pentagon threatening to put all of the West Virginia National Guard bases on the Base Realignment and Closure (BRAC) list.

"One thing that really signaled to me though is that kind of overreaction is very disproportionate. I think they don't like this idea. And what if this idea was to spread?"

McGeehan went on to say, "I don't believe they can maintain the sort of military 'empire' around the world without this reserve force, resting in part on the Guard. So, if you have enough states that are refusing to relinquish their state militias..."

McGeehan also defended the constitutional basis of the legislation. He pointed out that the Constitution only authorizes the federal government to activate state militias for enumerated purposes – to repel an invasion, to put down an insurrection or to enforce the laws of the union.

"I don't believe any one of those categories covers invading sovereign nations."

At the end of the discussion, McGeehan spent some time explaining the difference between a congressional declaration of war and an authorization to

to use military force (AUMF), saying it's more than just semantics.

He said the declaration of war has a long history in Western tradition. The just war doctrine culminated with Thomas Aquinas. In order for a war to be just, he said there had to be a declaration from a lawful authority—in the U.S. that's Congress. The declaration should be very specific and spell out the reasons for the war. McGeehan compared the specificity of a declaration of war to the requirements for a search warrant. In

a nutshell, there are certain specifics that go with a declaration of war that a mere authorization for the president to use force at his discretion doesn't meet. McGeehan said politicians today have abandoned the just war doctrine because it just isn't convenient.

“I don't think any conflict since the Second World War has actually met all the criteria for traditional Western just war doctrine. There is a very big difference between a declaration of war and these authorizations for military force, which can sometimes...just last forever.”

Michael Maharrey is the Communications Director for the Tenth Amendment Center. He is from the original home of the Principles of '98 - Kentucky and currently resides in northern Florida. He is the author of the book, *Our Last Hope: Rediscovering the Lost Path to Liberty*. You can visit his personal website at MichaelMaharrey.com.



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