

Defend The Guard – And the Constitution

By Darin Gaub / Armed Forces Press / February 21, 2023



Madam Chair and members of the House State Administration Committee. My name is Darin Gaub. I stand in support of this bill as an individual, a 7-deployment combat veteran, a 28-year-in-service retired senior Army officer, co-founder of veteran-founded Restore Liberty, founder of the Global Veterans Coalition, and also on behalf of Montanans for Limited Government. I would like to thank the sponsor and twenty-five co-sponsors for bringing this bill.

I would like to start by discussing my military, foreign policy, and strategic experience. I hope you will be able to see that it is extensive and of great value to this discussion.

I served in the military from the rank of Private to Lieutenant Colonel. Even as a Private, I worked at the White House, the Pentagon, and in many of the nation's highest security areas requiring the most sensitive security clearances. After becoming an officer my primary duty was as an aviation officer flying helicopters. During my career, I served on seven overseas deployments — four in Afghanistan,

one in North Africa, one in East Asia, and one in Europe. These deployments combined with my experience gained state-side allow me to speak to this bill with what I hope is enough authority to gain your respect and trust.

Officers in the military are also “generalists” in that we will work in many areas of government that are not related to those primary duties. While dedicated to my primary aviation duties I commanded army organizations of up to 3,500 personnel. I worked within Title 32 and Title 10 requirements, and with civilians to build successful teams. My ability to build high-performing teams spoke for itself across the Army Aviation community. But my experience as a generalist is what is most applicable to this testimony.

As a generalist, I served as a national strategic planner where I developed plans for many regions around the world, including plans for homeland security missions. I worked within the constraints and limitations defined in United States Code (U.S.C) and within many regulations and departmental policies. Those regulations

and policies were produced by the Department of Defense, Department of State, and many others. Not all these efforts can be made public or published in unclassified environments, many of those efforts dealt with multi-national and multi-state security environments. My duties required me to brief national leaders, congressional representatives, and department heads across the full range of government activities. I also worked with foreign military and government leadership on four continents and across multiple countries.

Now, as a retired officer, I volunteer as an executive coach, foreign policy advisor, and military strategy advisor. I also co-founded a nationwide non-profit where we instruct people of all ages about our constitutional form of governance, with a focus on bringing our nation back to higher constitutional principles as the supreme law of the land. I travel the country to speak to numerous groups and routinely appear on national media outlets. I also founded the Global Veterans Coalition and run this organization across eight countries. Finally, I work as a peer-to-peer counselor with veterans suffering from Post-Traumatic Stress Disorder and serve alongside of numerous veteran and liberty-focused organizations. Our collective goal is to return to the Constitution and Restore Liberty.

What is the “Defend the Guard Act?”

This act is a necessary step to realign the Government of Montana and the Federal Government back to the U.S. Constitution. It is state-level legislation to prohibit the overseas deployment of the state's National Guard units without a Congressional declaration of war.

What does it do?

More specifically, the act says the Department of Defense serving as the executive agent for the federal government un-

der the President of the United States must abide by the U.S. Constitution's requirement that only the U.S. Congress has the power — pursuant to Article I, Section 8 — “to declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.”

Why is it Needed?

The U.S. Constitution as the supreme law of the land vests the power to declare war exclusively in the U.S. Congress. This clear letter of the law has been bypassed or ignored for years. Congress has repeatedly abdicated its duty by unconstitutionally delegating its authority to the executive branch. This violates the separation of powers. We need to return to the design of the U.S. Constitution. If we are willing to ignore the letter of the law on the most crucial decision a nation makes, then what else will we ignore?

To put it simply, Congress declares war and the President executes the war as Commander in Chief (Article II, Section 2). The two functions were never meant to be delegated in either direction. The President cannot declare and execute the war on their own. That's something you see in dictatorships. This is a constitutional republic, and those decisions are made by the people through representatives. The law is clear on this, we all must accept the risk of war and stand behind that effort. Today's expeditionary military mindset looks more like the time of the Roman Empire, where those in uniform served at the whim of the emperor, not at the will of the people.

What is its Foundation?

The Constitution of the United States of America is the foundation for this resolution. Again, Article I, Section 8 does not leave any wiggle room. Congress and Congress alone has this power, it cannot be delegated. The reason is that our Founders were wise enough to know that Congress is the body of government closest and therefore most responsive to the people.

The U.S. Constitution, therefore, does the following:

- a. Requires Congress to declare war.
- b. Requires the President (Commander in Chief) to prosecute the war.
- c. Requires by logical extension that through the laws of this union that the National Guard only be deployed to overseas combat by approval of Congress and no other.

The other critical component of the foundation of this argument is the Tenth Amendment of the U.S. Constitution. It is

the duty of the states to interpose between the states and the federal government when the federal government takes part in unconstitutional actions. To violate Article I, Section 8 of the constitution is an unconstitutional action.

Defining the Guard/Militia

In the U.S. Constitution, Article I, Section 8, the militia is also addressed—specifically in Clauses 15 and 16. These same clauses are the basis for the formation of the National Guard. The Army National Guard even emphasizes this fact in their charter.

“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 for the calling forth of the militia (National Guard) in three situations:

- a. to execute the laws of the union,
- b. to suppress insurrections, and
- c. to repel invasions.

The militia was formerly known as “the whole people, except a few public officers.” This was further understood as all able-bodied males between 16 and 45 and up to 55 years of age. The Dick Act of 1903 then limited the scope and scale of this definition to control the extent to which militias could be called into Federal Service.

Therefore, the militia is the National Guard and is governed by Clauses 15 and 16 as it pertains to the role of the U.S. Congress and the states.

What about Authorizations for the Use of Military Force (AUMFs)?

The United States has not declared war since World War II. Yet we spend decades at war anyway. Korea, Vietnam, Iraq, Afghanistan, Syria, Somalia, Libya, the Philippines, and other locations around the world have seen Americans in conflicts Congress never truly authorized. Even post-9/11, no war was declared. Presidents Bush, Obama, and Trump have all leveraged these authorizations.

The simple answer is the AUMF subverts the constitutional process by having Congress delegate powers to the president it is not allowed to delegate.

What about H.J.Res.542 – The War Powers Resolution?

The War Powers Resolution of 1973 is itself not constitutional. Here's the

timeframe:

a. The President must inform Congress within 48 hours of committing armed forces to action.

b. Forces are prohibited from remaining in combat for more than 60 days without congressional approval.

c. There is a 30-day withdrawal period if Congress does not authorize those forces to remain deployed.

d. This means forces can remain in combat for up to 92 days without congressional approval.

The resolution was intended to give the president the ability to respond rapidly to situations that might be of concern to the United States' national security. In fact, it gave the president the power to embroil America in conflicts to the point where we would be a nation at war and only have the choice to win or lose considering how much can happen in 92 days.

Engaging in an armed conflict based on the discretion of only the president is not how America is supposed to work. To call the National Guard into such a conflict based on the War Powers Resolution is to build a decision on the sand. We did not authorize the three branches of government to have the power to delegate their sole responsibilities to other branches of government. This resolution only highlighted the violations of the separation of powers.

The Threats Used Against this Constitutionally-Based Bill

a. Base Realignment and Closure

There might be threats from the Pentagon to close bases in Montana if we follow through. This is called Base Realignment and Closure (BRAC). The real threat they are trying to leverage is the economic impact on locations that have federal military bases. Having been through this process more than once, I can guarantee it is not as easy as a phone call. It is a large movement of many agencies of government and Congress. Not only are there many people involved in these decisions that can take years, but the cost and logistics of a base closure also make the threat nearly an empty one. For Montana specifically, Malmstrom AFB is a significant strategic base with responsibilities that would be near impossible to move.

Montana has an opportunity to lead and could show other states that the clear direction of the constitution matters. In doing so other states might follow the same path and send a message that will be clearly understood. We should not bow to bullying and call their bluff instead.

b. National Security is At Risk

It is not. In fact, Congress over the last few years rarely showed up for in-person votes and used modern technology to work and vote remotely. If we need to go to war overseas immediately, then Congress can vote immediately too.

This resolution means that the National Guard can be activated when Congress does its job. If the U.S. is invaded then the National Guard will respond, as in this bill we are only focused on overseas combat deployments.

The greater risk to our nation's security is to continue to allow Congress to "pass the buck" and ignore the constitution.

c. The Courts

The Supreme Court has not settled this, and as the weakest of the three branches of government, it can render an opinion only. However, what is case law now is that the federal government can activate the National Guard for overseas training but does not address activating the National Guard for combat. See *Perpich v. The Department of Defense*.

Even if Congress did try to create legislation to add that the federal government can activate the National Guard for overseas combat, the Governors would have to block that activation until Congress made a formal declaration of war. Again, technology can make this a fast process and if governors saw the declaration as more likely than not they are free to issue warning orders to the state's National Guard units to prepare them for mobilization.

d. Funding and Equipment Restrictions or Removal, to include Pay and Benefits removal for those still serving and the retired

Much like the threats to close bases, this threat is not convincing or likely to realize.

More importantly, the constant threat of removing funds is driving bad decisions and policies across America. Funds come with strings attached. The Montana legislature should not too quickly toss aside the foundational tenets of the U.S. Constitution because of threats concerning money or equipment.

Again, call their bluff and do not be bullied, threatened, or coerced.

e. Does not conform with the U.S. Constitution

You will likely hear that this bill does not conform to the U.S. Constitution, this is a false statement. The Supremacy Clause does not mean that the federal government is supreme in all things. It means that laws that are passed "in pursu-

ance of" and abiding by the Constitution are supreme. House Bill 527 is before this committee specifically because the federal executive authority is operating outside of constitutional limits and Congress continues to allow this despite the clear reading of the highest law.

You may also hear that this bill would raise issues of constitutional conformity issues. Yes, it will. This bill is intended to place government back into the bounds of constitutional authority, therefore the question of conformity to the Constitution is the whole point.

The Higher Principles

The U.S. Constitution is the highest legal authority in the land. Article I, Section 8 of the Constitution is clear. We the people are the enforcers of the contract that is the U.S. Constitution. We as principal agents delegate power, and those who delegate power can remove that power. The government is our agent and cannot operate against our contract, or further delegate the powers we've limited them to in the first place. Montana can and should lead in this effort. I call on the legislature and the Governor to instead rise in courage and let the Constitution be enforced as it is the highest law of the land. This is what it looks like to exercise the Tenth Amendment. Montana should lead this effort, not follow.

The Oath of Office. To all who have worn the uniform and still do, you recited the Oath of Office, I remind us all of that oath:

"I do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion. So help me God."

We are sworn to support and defend the Constitution, not Congress, not the president—only the Constitution. When we took that oath, we were never allowed to ask if doing so would be easy. The legislature should know that those who take this oath back this House bill as it is part of us holding to our oath and not being swayed by bribery, or coercion.

Key Quotes

"The safest way to make laws respected is to make them respectable." -- Frédéric Bastiat

"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." -- James Madison

"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." -- James Madison

"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." — Alexander Hamilton

The states "have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights, and liberties appertaining to them." — James Madison

"The executive has no right, in any case to decide the question, whether there is or is not cause for declaring war." -- James Madison