

The Militia Acts



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- What is the role of militia in the United States?
- Why is the militia so important to freedom and liberty in America?
- Is the current militia structure constitutional?

Someone reached out on the website with an interesting question. They wanted my take on the Militia Acts of 1792 & 1903 and the National Defense Act of 1916. Specifically, he wanted to know about the constitutionality of the militia system within the United States, so I took a look. What I found was interesting, but maybe not what some people would have expected.

Militias

If we're going to talk about the militias, we need a good understanding of what they are, what they can do, and what legitimate authority the United States has over them.

The body of soldiers in a state enrolled for discipline, but not engaged in actual service except in emergencies; as distinguished from regular troops, whose sole occupation is war or military service. The militia of a country are the able bodied men organized into companies, regiments and brigades, with officers of all grades, and required by law to attend military exercises on certain days only, but at other times left to pursue their usual occupations.

[MILI'TIA – Webster's 1828 Dictionary](#)

So a militia is the able bodied men of a country, organized into companies, regiments, and brigades. They are distinguished from regular troops by the fact that they are only required to serve in emergencies. Why have militias? First of all, because the United States is not supposed to have a standing army.

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

U.S. Constitution, Article I, Section 8, Clause 12

The idea was pretty simple. After fighting a war with England, the new states didn't want the same type of military governorship they had as colonies. While the states didn't want a large and powerful army either, they realized during the war that while not as disciplined as the regular army, the militias could be a formidable force. This also explains the first part of the Second Amendment:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

U.S. Constitution, Amendment II

It was expected that each state would have their own militia, and that they were necessary to keep the individual states free. It could be security from other states, foreign governments, and yes, even the central government. By making sure the states could defend themselves, it gives the union a powerful and distributed defense force. Of course, that's not to say that the militia did not have a duty to the central government.

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

U.S. Constitution, Article I, Section 8, Clause 15

While the militia was to make sure their state was free, they could be called up to serve the union, but only to do three things: To execute U.S. law, suppress insurrection, and repel invasion.

It was important Congress not have complete control of the militia or they would not be able to provide one of their most important functions: Protecting the state from the central government. In order for this group of militias to be an effective national fighting force though, they would need to have some commonality.

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;

U.S. Constitution, Article I, Section 8, Clause 16

So Congress determines the organization, arming, and discipline of the militia. This would help them fight effectively when they were called into service of the United States. They also set the rules governing those parts of the militia when they are in active service to the union.

Notice that the states retain the power to appoint officers and to actually handle the training and discipline of the militia. Congress may set the rules, but the states still controlled their own militia until the units are called into actual service. Then, and only then, do they fall under the national command structure.

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States;

[U.S. Constitution, Article II, Section 2, Clause 1](#)

Militia Act of 1792

Doing some research, it appears there are two militia acts referred to as the Militia Acts of 1792. The first, passed in May 2nd, 1792, had an expiration date at the end of the Congress two years after it was passed. This was followed by another act that was passed on February 28, 1795. It was meant to enhance national defense by creating a uniform militia. This second of the two militia acts of 1792 established some rather concerning standards in U.S. law.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That each and every free able-bodied white male citizen of the respective States, resident therein, who is or shall be of age of eighteen years, and under the age of forty-five years (except as is herein after excepted) shall severally and respectively be enrolled in the militia, by the Captain or Commanding Officer of the company, within whose bounds such citizen shall reside, and that within twelve months after the passing of this Act.

[Militia Act of 1792](#)

Let's start with the idea that every man (since I think we can dispense with the racist part of this act), between the ages of 18 and 45 was to be enrolled in the militia. The problem with this is it violates the Fifth Amendment, which was ratified in December of 1791.

No person shall ... be deprived of life, liberty, or property, without due process of law;

[U.S. Constitution, Amendment V](#)

Involuntary servitude as described in this act would certainly be a deprivation of liberty without due process of law.

Granted, at that time, more people were probably willing to serve, but this section of the law does not make it optional. Militia members were expected to provide their own gear, weapons, and ammunition, and were expected to both exercise and serve with the company to which they were assigned. It should not surprise anyone that the Vice-President, members of Congress, the judiciary, and many other federal officeholders were exempt from service in the militia. Things get a bit more interesting though, in the second section.

And be it further enacted, That whenever the laws of the United States shall be opposed or the execution thereof obstructed, in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act, the same being notified to the President of the United States, by an associate justice or the district judge, it shall be lawful for the President of the United States to call forth the militia of such state to suppress such combinations, and to cause the laws to be duly executed.

Militia Act of 1792

Does this mean any law of the United States can be enforced by the militia? That if a state were to find the law unconstitutional and nullify it within their borders, could the President simply call up the militia to enforce it? Possibly. After all, Article I, Section 8, Clause 15 of the Constitution does give Congress the power to call up the militia to execute the laws of the United States. If a single state stands up against a law they find unconstitutional, then the President did have the power to call up the militia to enforce the law. What if that state's militia refused to execute the law in question though?

*And if the militia of a state, where such combinations may happen, **shall refuse**, or be insufficient to suppress the same, it shall be lawful for the President, if the legislature of*

the United States be not in session, to call forth and employ such numbers of the militia of any other state or states most convenient thereto, as may be necessary, and the use of militia, so to be called forth, may be continued, if necessary, until the expiration of thirty days after the commencement of the ensuing session.

Militia Act of 1792

Should a state militia refuse to execute federal law in their state, the President or Congress had the authority to call up militias from other states to enforce the law. This may be one reason why the Virginia and Kentucky resolutions against the Alien and Sedition Acts never went anywhere. Only two of the states opposed it, but if a larger group of states were able to nullify an unconstitutional law, it would be harder for the President or Congress, both logistically and politically, to call up the militia of others states to enforce the law. Those who wrote this act probably assumed that before it came to the calling up of militias, the courts would offer their opinion on the law. With the corruption, politicization, and ignorance of the Constitution that runs rampant through our federal judiciary, I'm not sure the courts' opinion would be much help. Just look at all of the unconstitutional opinions we've reviewed over the past few years.

Militia Act of 1903

In 1903, Congress updated the laws regulating the militia.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the militia shall consist of every able-bodied male citizen of the respective States, Territories, and the District of Columbia, and every able; bodied male of foreign birth who has declared his intention to become a citizen, who is more than eighteen and less than forty-five years of age, and shall be divided into two classes-the organized militia, to be known as the

National Guard of the State, Territory, or. District of Columbia, or by such other designations as may be given them by the laws of the respective States or Territories, and the remainder to be known as the Reserve Militia .

Militia Act of 1903

Now we have an organized militia and an unorganized militia. Was this law constitutional? Remember, Congress has the power:

To provide for organizing, arming, and disciplining, the Militia, ...

U.S. Constitution, Article I, Section 8, Clause 16

So Congress can organize the militia how they want. This division between the organized and unorganized militias are, I believe, attempts to deal with a problem we noted in the 1792 act.

That the regularly enlisted, organized, and uniformed active Organized militia in the several States and Territories and the District of Columbia ... whether known and designated as National Guard, militia, or otherwise, shall constitute the organized militia .

Militia Act of 1903

The organized militia is the one regularly enlisted, organized, and uniformed. In other words, the National Guard we know today. The Reserve Militia is every other able bodied male who has not volunteered to serve.

National Defense Act of 1916

Which leaves us with the National Defense Act of 1916,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Army off the United States shall consist of the Regular Army,

the Volunteer Army the Officers' Reserve Corps the Enlisted Reserve Corps , the National Guard while in the service of the United States, and such other land forces as are now or may hereafter be authorized by law .

National Defense Act of 1916

This law was enacted on June 3, 1916, right in the middle of World War I. This was six months before Germany proposed an alliance with Mexico against the United States, and ten months before the United States entered the war. It's reasonable to assume that this was Congress making preparations for a war in which the United States had declared to be neutral, but some politicians were lobbying to join.

This law gives us the organization of the militia we have today.

COMPOSITION OF THE MILITIA.-The militia of the United States shall consist of all able-bodied male citizens of the United States and all other able-bodied males who have or shall have declared their intention to become citizens of the United States, who shall be more than eighteen years of age and, except as hereinafter provided, not more than forty-five years of age, and said militia shall be divided into three classes, the National Guard, the Naval Militia, and the Unorganized Militia.

National Defense Act of 1916

Here we have the two organized militias, the National Guard and the Naval Militia, and the Unorganized Militia. This can be found in U.S. law under Title 10 §246:

▪ 246. Militia: composition and classes

(a) The militia of the United States consists of all able-bodied males at least 17 years of age and, except as provided in section 313 of title 32, under 45 years of age who are, or

who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are members of the National Guard.

(b) The classes of the militia are-

(1) the organized militia, which consists of the National Guard and the Naval Militia; and

(2) the unorganized militia, which consists of the members of the militia who are not members of the National Guard or the Naval Militia.

10 U.S.C. §246

Conclusion

So where does all of this research leave us? Is the National Guard a constitutional entity? What about the Naval Militia? Is the division of the militias into organized and unorganized legitimate? Yes, because Congress has the power under [Article I, Section 8](#), Clause 16 to provide for the organizing, arming, and disciplining the militia. Does the Congress have the authority to call up a state's militia to enforce federal law? Yes, under [Article I, Section 8](#), Clause 15.

This still leave us with a couple of sticky situations. First, what happens if a state finds that a federal law was not made pursuant to the Constitution and refuses to execute said law within their borders? Is it possible for the President to call on that state's militia to enforce the law. This is where we need to look very closely at a particular situation. Mostly, for a law of the United State to be part of the supreme law of the land, it must be made pursuant to the Constitution, according to the Supremacy Clause:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States,

shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Constitution, Article VI, Clause 2

Now if Congress or the President disagree with the state about the constitutionality of the law, we are supposed to have a neutral arbiter of the situation, the federal judiciary.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;... –to Controversies to which the United States shall be a Party;

U.S. Constitution, Article III, Section 2, Clause 1

Unfortunately, the judicial branch of the federal government long ago substituted their objectivity and fidelity to the Constitution in favor of their own opinions. While I have given many examples of the dangers of such a situation, the dispute between a state and the federal government over the constitutionality of a law is possibly the most dangerous. How far would a state, or the federal government, go to pursue their positions? Would a state attempt to secede from the union? Would the federal government use military force to exercise their will? Would this lead to another civil war?

The other sticky situation comes from the involuntary nature of the federal government's definition of the militia. I would need to do more research, but I believe that being considered a part of the militia is the legal justification for the Selective Service Registration and the conscriptions of the past. As I've already pointed out, these deprivations of liberty without due process are a violation of the [Fifth Amendment](#). Some may blame this on the twisted caricature of the constitutionally created government that now resides in Washington, D.C., but we find this forced enlistment going all

the way back to 1792. Which brings another thought to mind.

The Senate in 1792 had such members as Roger Sherman, Richard Henry Lee, and James Monroe, while the House of Representatives had Elias Boudinot and James Madison, and let us not forget George Washington was President. These men had fought for independence; they had seen the destructive elements of military rule and forced service by the British. So why would they establish a law that could be used to conscript men into military service? I cannot read their minds, but I have an possible answer.

We often talk about our right to be free, but we rarely consider the duties that freedom places on us. We have the right to vote, but does that not include the duty to vote for people of character, who will fulfill their oaths to support the Constitution? We also talk about our right to a trial by jury, but doesn't that imply a duty to not only serve on a jury, but to seek justice in the case that we hear? We call ourselves the land of the free, but does that not include the duty to fight to defend that freedom? When someone wants to be naturalized as a citizen of the United States, they take an oath that includes:

that I will bear arms on behalf of the United States when required by the law; that I will perform noncombatant service in the Armed Forces of the United States when required by the law; that I will perform work of national importance under civilian direction when required by the law;

[Naturalization Oath of Allegiance to the United States of America](#)

Could it be, that membership in the militia is a duty all Americans should willingly fulfill? In several countries around the world, military service is compulsory. Under American law, it's only necessary to be part of the militia, to be willing, if necessary, to fight for your state and your

nation. If the men who brought us the Fifth Amendment did not think it too much to ask of the citizens of the United States and the Several States that they be numbered for their defense, can we refuse to answer the call when the need arises?

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