

MEMORANDUM

To: The Honorable J. Sandy Bartlett, Chair
The Honorable Debra M. Davis, Vice Chair
Members of the House Judiciary Committee
Maryland House of Delegates

From: Dan McKnight
Chairman, Bring Our Troops Home
National Sponsor, Defend the Guard
U.S. Marine Corps, U.S. Army Reserve, and Idaho Army National Guard Veteran
Global War on Terror Veteran (Afghanistan)

Re: Constitutionality of “Defend the Guard” Legislation

Date: 3/5/2026

Questions Presented

1. Whether a state may enact legislation providing that its National Guard units shall not be deployed into active combat absent a declaration of war or specific statutory authorization from Congress.
2. Whether such legislation would conflict with federal law, including the Title 10 activation authorities codified at 10 U.S.C. §§ 12301–12304a, and Supreme Court precedent including *Perpich v. Department of Defense*, 496 U.S. 334 (1990).
3. Whether the legislation is consistent with the Constitution’s allocation of war powers, principles of federalism, and the dual-status structure of the National Guard.

Brief Answers

1. Yes. The Constitution assigns to Congress the exclusive authority to declare war and authorize sustained hostilities. U.S. Const. art. I, § 8, cls. 11–16. A state may enact legislation aligning its militia policy with that constitutional structure, particularly where Congress itself has conditioned its broadest activation authority on a declaration of war or national emergency declared by Congress. 10 U.S.C. § 12301(a). The Framers deliberately vested the war power in the legislature,^[1] and the War Powers Resolution codifies that structural requirement. 50 U.S.C. § 1541(c).

2. Properly drafted, no. The legislation does not nullify federal law, invalidate federal activation orders, nor criminalize federal action. It governs the enacting state’s use of state-controlled Guard forces and state resources unless and until Congress has satisfied its constitutional role. The supplemental activation authorities in 10 U.S.C. §§ 12302, 12304, and 12304a do not displace § 12301(a)’s foundational predicate; read *in pari materia*, they constitute a coherent statutory scheme whose cornerstone is congressional authorization. Under anti-commandeering doctrine, the federal government may not require states to administer or implement federal programs using state legislative or executive machinery. See *Printz v. United States*, 521 U.S. 898 (1997); *Murphy v. NCAA*, 584 U.S. 453 (2018).

3. Yes. The measure reinforces the Constitution’s separation of powers and democratic accountability framework while operating within established federalism doctrine, the Guard’s dual-status structure, and retained state sovereign authority under the United States Constitution and applicable state constitutions. See U.S. Const. amend. X; U.S. Const. art. I, § 8, cls. 15–16.

Background: Constitutional Structure and the National Guard’s Dual Status

A. War Powers Allocation

Article I, Section 8 of the Constitution grants Congress the power to declare war, raise and support armies, provide and maintain a navy, make rules for the armed forces, and call forth the militia. U.S. Const. art. I, § 8, cls. 11–16. These powers were deliberately vested in the legislature to ensure that the gravest national decision—committing the nation to war—would require deliberation and democratic accountability.^[2] Hamilton confirmed this structural allocation, explaining that the President’s commander-in-chief authority was fundamentally different from a monarch’s power to declare war.^[3]

Article II designates the President as Commander in Chief of the armed forces “when called into the actual Service of the United States.” U.S. Const. art. II, § 2. The President commands forces once lawfully employed, but the authority to initiate sustained hostilities rests with Congress.

The Supreme Court has long recognized this division. In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the Court struck down presidential action taken without congressional authorization. Justice Jackson’s influential concurrence established a three-category framework under which presidential authority is at its zenith when supported by Congress (Category One), exists in a “zone of twilight” when Congress is silent (Category Two), and is “at its lowest ebb” when contrary to the expressed or implied will of Congress (Category Three).^[4] Current deployments of National Guard forces into overseas combat zones without a

congressional declaration of war or specific statutory authorization fall squarely within Jackson’s third category—or, at best, the uncertain twilight of Category Two.

Congress codified its understanding of the war powers allocation in the War Powers Resolution of 1973. That statute provides that the constitutional powers of the President to introduce United States Armed Forces into hostilities exist 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. 50 U.S.C. § 1541(c). Critically, the statute further provides that authority to introduce forces into hostilities shall not be inferred from any appropriation act or general statutory language absent specific authorization.^[5]

B. The Militia Clauses and the Guard’s Dual Status

The Militia Clauses grant Congress authority to call forth the militia for three limited purposes—executing the laws of the Union, suppressing insurrections, and repelling invasions—while reserving to the states the appointment of officers and authority over training according to the discipline prescribed by Congress. U.S. Const. art. I, § 8, cls. 15–16. The Framers understood the militia as a state institution subject to federal call-up only under carefully defined circumstances. Madison described state militias as a structural counterbalance to any concentration of federal military power.^[6]

The modern National Guard occupies a constitutionally unique dual status. Members simultaneously hold state Guard status and federal reserve status under dual enlistment. When not in federal service, the Guard operates under state authority and the command of the governor. When ordered to federal active duty under Title 10 of the United States Code, it becomes part of the federal armed forces under presidential command. This distinction between Title 32 (state) status and Title 10 (federal) status is central to the constitutional analysis, because the Guard operates exclusively within the Guard’s state status and the state’s retained sovereign authority.

In *Perpich v. Department of Defense*, 496 U.S. 334 (1990), the Supreme Court upheld Congress’s authority to order Guard units to federal training duty without gubernatorial consent under the Montgomery Amendment. The Court acknowledged the Guard’s dual enlistment structure and Congress’s power to provide for organizing, arming, and disciplining the militia. *Id.* at 345–53. As discussed in Section V of the Argument below, *Perpich* addressed training deployments—not the commitment of Guard forces to sustained combat operations—and does not foreclose the legislation at issue here.

C. Title 10 Activation Framework: A Statutory Scheme Rooted in Congressional Authorization

Title 10 of the United States Code contains multiple provisions authorizing activation of reserve components. These provisions do not exist in isolation. Read together, as they must be, they

constitute a coherent statutory scheme whose foundational premise is congressional authorization for sustained military operations.

Section 12301(a): The Cornerstone Provision. 10 U.S.C. § 12301(a) provides that “[i]n time of war or of national emergency declared by Congress, or when otherwise authorized by law,” members of a reserve component may be ordered to active duty for the duration of the war or emergency plus six months. This is the broadest activation authority Congress has enacted. It is expressly tied to a congressional predicate: war or a congressionally declared national emergency. The statute’s language is not incidental—it reflects a deliberate legislative judgment that the most sweeping mobilization authority requires the most explicit form of congressional authorization.

Sections 12302, 12304, and 12304a: Supplemental Authorities. Congress subsequently enacted narrower activation provisions, each with significant built-in constraints:

- **10 U.S.C. § 12302** authorizes the President to order up to 1,000,000 members of reserve components to active duty for no more than 24 months when the President determines it necessary to augment the active forces for any operational mission.[\[7\]](#)
- **10 U.S.C. § 12304** authorizes the Secretary of Defense, with presidential approval, to order up to 200,000 Selected Reserve members to active duty for no more than 365 days to augment active forces for any named operational mission.[\[8\]](#)
- **10 U.S.C. § 12304a** authorizes the Secretary of Defense to order reserve component members to active duty for disaster or emergency response under specified conditions.[\[9\]](#)

The structural significance of these constraints cannot be overstated. Congress placed durational limits (24 months, 365 days), numerical caps (1,000,000 and 200,000), and purpose restrictions on each supplemental authority. These are the hallmarks of temporary augmentation provisions—not standalone authorities designed to supplant the Declare War Clause or to authorize indefinite commitment of the nation’s reserve forces to sustained overseas combat. The statutory relationship between § 12301(a) and the supplemental sections is addressed at length in Section III of the Argument below.

D. State Sovereignty: Constitutional Principles and Retained State Authority

The Constitution’s structural provisions establish a clear framework of state sovereignty over militia forces. The federal government has a constitutional duty to protect states against invasion and domestic violence, U.S. Const. art. IV, § 4, and states retain sovereign authority to defend themselves when that duty is not fulfilled, U.S. Const. art. I, § 10, cl. 3. This authority is exercised by the governor as commander-in-chief of the state militia.[\[10\]](#)

The Constitution’s invasion and self-defense provisions create dual protection, ensuring states are not left without recourse if federal action is absent or ineffective. This principle supports the

broader constitutional proposition underlying Defend the Guard: state authority over the militia is not extinguished by federal inaction and exists as a structural check within the federal system.

State constitutions typically reinforce this framework. Most states designate the Governor as commander-in-chief of the state's military forces except when those forces are called into the service of the United States,^[11] and separately define the composition of the state militia.^[12] These provisions confirm that each enacting state exercises independent constitutional authority over its militia forces when those forces are not in federal service—the precise space in which Defend the Guard operates.

Argument

I. Defend the Guard Reinforces the Constitution's Allocation of War-Initiation Authority to Congress

The Constitution's structure places the decision to move the nation from a state of peace to a state of war in Congress. The Declare War Clause was deliberately assigned to the legislative branch to ensure deliberation, public debate, and democratic accountability before the nation commits to sustained hostilities.^[13] Hamilton confirmed that the President's role as Commander in Chief did not include the power to initiate war.^[14]

While the President retains authority to repel sudden attacks and respond to immediate emergencies—a principle recognized from the earliest days of the Republic^[15]—no constitutional text grants a general unilateral authority to initiate prolonged hostilities absent congressional authorization. Presidential power in such circumstances is “at its lowest ebb.”^[16]

The War Powers Resolution reflects Congress's insistence that sustained hostilities require legislative authorization. 50 U.S.C. § 1541(c). Congress has never repealed this requirement, and successive administrations of both parties have at least formally acknowledged its existence, even when disputing its scope.

Defend the Guard does not adjudicate foreign policy merits, question military strategy, or challenge operational decisions. It simply aligns the enacting state's Guard policy with the constitutional baseline that sustained armed conflict requires congressional authorization—the same baseline reflected in the War Powers Resolution and in the cornerstone federal activation statute, 10 U.S.C. § 12301(a).

II. The Legislation Aligns State Policy with Congress's Own Activation Framework

The strongest statutory support for Defend the Guard comes from the structure Congress itself created. The broadest involuntary activation authority, 10 U.S.C. § 12301(a), is conditioned on “war or national emergency declared by Congress, or when otherwise authorized by law.” Congress placed this predicate at the foundation of large-scale mobilization because it understood that committing the nation’s reserve forces to extended service required the imprimatur of the legislative branch.

By requiring a declaration of war or specific statutory authorization before state Guard units may be deployed into active combat, the legislation mirrors Congress’s own framework rather than contradicting it. The state is not creating a novel condition; it is reinforcing the very condition Congress identified as the proper predicate for large-scale mobilization.

The measure therefore cannot reasonably be characterized as a nullification of federal law. A state law that aligns with the structure Congress enacted is not in conflict with that structure—it is in harmony with it. See *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (recognizing that the purpose of Congress is the “ultimate touchstone” of preemption analysis).

III. The Supplemental Activation Authorities Do Not Displace §12301(a)’s Congressional Predicate: A Statutory Construction Analysis

The most significant legal challenge to Defend the Guard is the argument that 10 U.S.C. §§ 12302, 12304, and 12304a provide independent, freestanding executive authority to deploy reserve components—including National Guard forces—into sustained overseas combat without a declaration of war or specific congressional authorization for hostilities. This argument fails under established principles of statutory construction, constitutional avoidance, and structural constitutional interpretation.

A. In Pari Materia: The Activation Statutes Must Be Read as a Coherent Whole

Under the canon of *in pari materia*, statutes that address the same subject matter must be read together and harmonized as parts of a unified statutory scheme. See *Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303, 315–16 (2006); *Erlenbaugh v. United States*, 409 U.S. 239, 243–44 (1972) (“[T]he meaning of doubtful statutory language may be determined by reference to other statutes on the same general subject.”). Sections 12301 through 12304a all address the same subject: activation of reserve components. They were codified in the same chapter of the same title of the United States Code. They must be read as an integrated framework, not as isolated free-standing authorities.

Section 12301(a) is the cornerstone of this framework. It establishes the foundational principle: involuntary activation of reserve components for the broadest scope and longest duration is conditioned on war or a national emergency declared by Congress, or other specific legal

authorization. This congressional predicate is not an accident of drafting—it is the deliberate legislative judgment upon which the entire mobilization scheme is built.

Sections 12302, 12304, and 12304a were enacted after § 12301(a) as supplemental authorities. They do not exist in a vacuum. They exist within a statutory scheme whose cornerstone is congressional authorization. Their structural relationship to § 12301(a) is analogous to exceptions or supplements built upon a foundational rule: the supplements operate within the framework the cornerstone establishes, not in replacement of it.

This reading is confirmed by the constraints Congress placed on each supplemental provision. If Congress intended §§ 12302 and 12304 to serve as independent authority for committing the nation to sustained war without legislative authorization, it would not have imposed durational limits (24 months, 365 days), numerical caps (1,000,000 and 200,000), or purpose-based restrictions. These limitations are the hallmarks of temporary augmentation authorities—designed to fill operational gaps within a broader framework of congressionally authorized military activity, not to serve as vehicles for open-ended war-making that bypasses the Declare War Clause.

The executive branch's practice of serially renewing activations under §§ 12302 and 12304 to sustain multi-decade combat operations does not validate a reading of those statutes as war-authorizing instruments. Sustained practice cannot transform a temporary augmentation authority into a constitutional substitute for a declaration of war. The limits Congress wrote into these provisions demonstrate that Congress understood them as something fundamentally different from war authorization.

B. Constitutional Avoidance Requires the Narrower Reading

The canon of constitutional avoidance requires courts to prefer a statutory interpretation that avoids serious constitutional questions over one that raises them.^[17] If §§ 12302 and 12304 are interpreted as granting the executive branch unilateral authority to deploy hundreds of thousands of reserve component members—including citizen-soldiers of the National Guard—into sustained overseas combat without any congressional authorization for hostilities, that interpretation raises grave constitutional concerns under the Declare War Clause, the separation of powers, and the Militia Clauses.

The constitutionally sound reading is that these sections authorize augmentation of active forces for operations within a framework Congress has already sanctioned—not that they serve as standalone war-making authorities that render the Declare War Clause a dead letter. Under this reading, the supplemental authorities empower the executive to call up reserve forces to support military operations for which congressional authorization already exists (through a declaration of war, an AUMF, or other specific statutory authorization), and to respond to genuine emergencies of limited scope and duration. They do not empower the executive to substitute its own judgment for Congress's on the fundamental question of whether the nation should be at war.

C. The Major Questions Doctrine Forecloses an Expansive Reading

The Supreme Court's major questions doctrine holds that agencies and executive officials may not claim authority over questions of vast economic and political significance without clear congressional authorization.^[18] Committing the nation to sustained hostilities is arguably the single most consequential governmental decision. The Framers treated it as such by requiring legislative authorization.

Reading §§ 12302 and 12304 as delegating to the President the authority to commit hundreds of thousands of reserve component members to indefinite combat overseas—bypassing the Declare War Clause and Congress's own war-authorizing role—would claim for the executive branch a power of enormous consequence based on statutory provisions that contain no express delegation of war-initiating authority. This is precisely the kind of claim the major questions doctrine was designed to scrutinize. Congress must speak clearly if it intends to confer authority of this magnitude, and it did not do so in these supplemental provisions.

D. Expressio Unius: Congress Knew How to Require Congressional Authorization and Did So in §12301(a)

Under the canon of *expressio unius est exclusio alterius*, the express mention of something in one provision implies its deliberate exclusion in another. Congress knew how to condition activation on a declaration of war—it did so explicitly in § 12301(a). The absence of a war declaration requirement in §§ 12302 and 12304 does not mean Congress intended to eliminate the requirement for large-scale sustained hostilities. It more plausibly means those sections were designed for a different, narrower purpose: limited-duration augmentation within an already-authorized operational framework, not the initiation of war.

This reading is consistent with the legislative history and evolving structure of Title 10. Section 12301(a) was enacted first, establishing the baseline principle. The supplemental provisions were added subsequently to address specific operational needs—not to undermine the foundational predicate upon which the entire mobilization framework rests.

IV. The Legislation Is Supported by Anti-Commandeering Doctrine and Federalism Principles

The Tenth Amendment provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. Const. amend. X. The Supreme Court has developed a robust anti-commandeering doctrine holding that the federal government may not compel states to enact or administer federal regulatory programs:

- *Printz v. United States*, 521 U.S. 898, 925–33 (1997) (Congress may not compel state executive officers to implement federal regulatory schemes).

- *New York v. United States*, 505 U.S. 144, 161–66 (1992) (Congress may not commandeer state legislative processes).
- *Murphy v. NCAA*, 584 U.S. 453, 470–78 (2018) (Congress may not dictate what state legislatures may or may not enact).[\[19\]](#)
- *Bond v. United States*, 564 U.S. 211, 222–23 (2011) (federalism principles are judicially enforceable structural protections, not merely political safeguards).[\[20\]](#)

Defend the Guard does not attempt to criminalize federal orders, prevent federal officers from acting under valid federal authority, or obstruct the execution of lawful federal directives. Rather, it governs the use of state-controlled Guard status and state resources unless Congress has fulfilled its constitutional role in authorizing hostilities. A state is not obligated to voluntarily provide state resources, administrative cooperation, or institutional support beyond what federal law validly compels. Properly drafted, the legislation operates squarely within that reserved sphere.

This principle is reinforced by the constitutional structure itself: state sovereignty functions as a structural check when federal duties are not fulfilled. If a state retains sovereign authority to deploy its militia to defend against invasion when the federal government fails to act, *a fortiori* it retains authority to condition deployment of its militia forces on the satisfaction of the constitutional predicate for war.

Federalism in this context is not a mere abstraction. It is a constitutionally designed structural safeguard, ensuring that “the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”[\[21\]](#)

V. *Perpich v. Department of Defense* Does Not Preclude the Legislation

Perpich v. Department of Defense, 496 U.S. 334 (1990), is frequently cited in opposition to Defend the Guard legislation but is often misunderstood and does not foreclose the measure.

The factual and legal context. The case arose from Congress’s adoption of the Montgomery Amendment, which eliminated the requirement of gubernatorial consent for overseas *training* missions of National Guard units. The Governor of Minnesota challenged the statute, arguing that the state’s authority over its militia precluded Congress from ordering Guard members to training duty without the governor’s approval.

The holding was narrow. The Supreme Court held that Congress could authorize training deployments without gubernatorial consent because Guard members hold dual enlistments. Under their federal enlistment, Congress had authority to order them to duty as it would any other reserve component member. *Perpich*, 496 U.S. at 347–53.

***Perpich* does not address war powers.** The critical distinction is that *Perpich* addressed training authority, not the deployment of Guard forces into sustained combat operations. The

Court did not consider a situation in which Congress had failed to authorize hostilities. Nor did the Court hold that states lack all discretion over Guard deployment policy while units remain in state status.

Perpich confirms federal supremacy when Congress clearly exercises valid statutory authority. Defend the Guard operates in a different constitutional space: the space that exists *before* Congress has exercised its war-authorizing authority. The legislation conditions state consent and state-level Guard deployment policy on Congress fulfilling its constitutional responsibility—a condition that *Perpich* neither addressed nor foreclosed.

VI. The Title 32 / Title 10 Distinction Defines the Legislation’s Operative Scope

The practical operation of Defend the Guard is grounded in the distinction between Title 32 status (state-controlled) and Title 10 status (federalized). When Guard members serve in Title 32 status, they operate under the authority of the governor and are funded, directed, and administered by the state. When Guard members are federalized under Title 10, they become part of the active federal armed forces under the President’s command.

Defend the Guard governs state decisions about the use of Guard forces in Title 32 status and the expenditure of state resources to facilitate deployments. It does not purport to override a valid Title 10 federalization order issued pursuant to clear statutory authority and congressional authorization for hostilities. The legislation operates in the space where the state’s own authority is paramount: the decision to commit state-controlled militia forces to combat in the absence of congressional authorization.

This is the space that each enacting state’s constitution typically contemplates. Most state constitutions designate the Governor as Commander-in-Chief of the state’s military forces except when those forces are called into the service of the United States.^[22] The legislation gives practical effect to that constitutional authority by establishing the conditions under which the state will permit its militia to be committed to hostilities.

VII. The Political Question Doctrine Does Not Bar the Legislation

An opponent might argue that war powers disputes are non-justiciable political questions beyond the reach of state legislation. This argument fails for several reasons.

Under *Baker v. Carr*, 369 U.S. 186 (1962), the political question doctrine applies only where there is “a textually demonstrable constitutional commitment of the issue to a coordinate political department” or “a lack of judicially discoverable and manageable standards for resolving it.”^[23] Neither condition is satisfied here. The Constitution commits the war power to Congress—a

textual commitment that provides judicially manageable standards: either Congress has authorized hostilities or it has not. Whether a declaration of war or specific statutory authorization exists is a binary, justiciable question.

Moreover, *Defend the Guard* does not ask courts to evaluate military strategy, second-guess operational decisions, or adjudicate the merits of foreign policy. It asks only whether the constitutional and statutory predicate for sustained hostilities has been satisfied. The Supreme Court has repeatedly adjudicated structural constitutional questions of this kind.[\[24\]](#)

VIII. The Measure Promotes Democratic Accountability, Civil-Military Integrity, and Structural Constitutional Values

The National Guard consists of citizen-soldiers who maintain civilian employment, family ties, and community roles alongside their military obligations. Deploying them into sustained overseas hostilities is among the gravest actions a government can take. The constitutional structure was designed to ensure that such decisions receive the fullest possible democratic deliberation.

Defend the Guard promotes three fundamental constitutional principles that operate as non-partisan structural safeguards, applying equally regardless of which political party controls the federal executive:

Separation of Powers. The legislation ensures that the branch constitutionally entrusted with declaring war actually exercises that authority before citizen-soldiers are committed to combat. Structural constitutional requirements must be observed even when they are inconvenient.[\[25\]](#)

Federalism. The legislation preserves the state’s retained authority over its militia forces, a role the Constitution expressly contemplates in the Militia Clauses and the Tenth Amendment.[\[26\]](#) Madison described this state authority as essential to the constitutional design.[\[27\]](#)

Democratic Accountability. Requiring explicit congressional authorization before Guard units are sent into combat ensures that the people’s elected representatives go on record, strengthening civilian control of the military and reducing constitutional ambiguity. “A state of war is not a blank check for the President.”[\[28\]](#)

Preemption Considerations

Any state legislation must be drafted to avoid direct conflict with valid federal activation orders issued pursuant to clear statutory authority. Under the Supremacy Clause, U.S. Const. art. VI,

cl. 2, federal law prevails over contrary state law when Congress acts within its enumerated powers.

If Congress declares war or passes a specific Authorization for Use of Military Force (AUMF), and the President federalizes Guard units pursuant to that authorization under valid statutory authority such as 10 U.S.C. § 12301(a), federal law would preempt contrary state restrictions.

However, where Congress has *not* exercised its war-authorizing authority, a state retains constitutional space to structure its own Guard policy and to decline voluntary facilitation of hostilities lacking legislative authorization. See *Murphy v. NCAA*, 584 U.S. at 477–78 (reaffirming that the anti-commandeering principle protects states’ ability to make policy choices even in areas of federal interest).

Defend the Guard should be understood as operating in the absence of congressional war authorization, governing state status and state resources rather than attempting to override lawful federal orders. This construction minimizes preemption concerns and aligns with the presumption against preemption in areas of traditional state authority. See *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

Conclusion

Defend the Guard legislation rests on three mutually reinforcing constitutional principles:

1. **Separation of Powers:** The Constitution assigns initiation of sustained hostilities to Congress. U.S. Const. art. I, § 8, cl. 11; 50 U.S.C. § 1541(c). The supplemental activation authorities in §§ 12302 and 12304 do not displace this requirement; read *in pari materia* with § 12301(a), they confirm a statutory scheme rooted in congressional authorization.
2. **Statutory Alignment:** The legislation mirrors the congressional predicate Congress itself established in 10 U.S.C. § 12301(a). Constitutional avoidance, the major questions doctrine, and *expressio unius* all support reading the statutory framework as one that preserves—rather than supplants—Congress’s war-authorizing role.
3. **Federalism:** States retain authority over their militia forces while not in federal service and cannot be commandeered to implement federal policy beyond valid federal activation. U.S. Const. amend. X; U.S. Const. art. I, § 8, cls. 15–16; *Printz*, 521 U.S. at 925–35; *Murphy*, 584 U.S. at 470–78; *Bond*, 564 U.S. at 222–23.

Properly drafted, the legislation does not nullify federal law, obstruct lawful federal activation, or intrude upon Congress’s enumerated powers. Instead, it reinforces constitutional accountability by requiring that the political branch entrusted with declaring war actually exercise that authority before the state’s citizen-soldiers are committed to combat.

The Constitution’s structural design confirms the foundational principle: state authority functions as a constitutional safeguard, and states are not left without recourse when the federal

government fails to fulfill its constitutional duties. Defend the Guard applies that principle to the most consequential area of governance: the decision to send citizens to war.

Table of Authorities

Constitutional Provisions

U.S. Const. art. I, § 8, cls. 11–16 (War Powers, Army, Navy, Militia Clauses)

U.S. Const. art. I, § 10, cl. 3 (State Self-Defense Clause)

U.S. Const. art. II, § 2 (Commander in Chief Clause)

U.S. Const. art. IV, § 4 (Guarantee Clause)

U.S. Const. art. VI, cl. 2 (Supremacy Clause)

U.S. Const. amend. X (Reserved Powers)

Applicable State Constitution (Governor as Commander-in-Chief and Militia Provisions)

Supreme Court Cases

Baker v. Carr, 369 U.S. 186 (1962)

Bond v. United States, 564 U.S. 211 (2011)

Erlenbaugh v. United States, 409 U.S. 239 (1972)

Gregory v. Ashcroft, 501 U.S. 452 (1991)

Hamdi v. Rumsfeld, 542 U.S. 507 (2004)

INS v. Chadha, 462 U.S. 919 (1983)

Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996)

Murphy v. NCAA, 584 U.S. 453 (2018)

New York v. United States, 505 U.S. 144 (1992)

NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979)

Perpich v. Department of Defense, 496 U.S. 334 (1990)

Printz v. United States, 521 U.S. 898 (1997)

The Prize Cases, 67 U.S. (2 Black) 635 (1863)

Wachovia Bank, N.A. v. Schmidt, 546 U.S. 303 (2006)

West Virginia v. EPA, 597 U.S. 697 (2022)

Wyeth v. Levine, 555 U.S. 555 (2009)

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)

Federal Statutes

10 U.S.C. § 12301(a) (Involuntary activation in time of war or national emergency)

10 U.S.C. § 12302 (Presidential authority to augment active forces)

10 U.S.C. § 12304 (Selected Reserve activation)

10 U.S.C. § 12304a (Reserve activation for disaster response)

50 U.S.C. § 1541(c) (War Powers Resolution – Purpose and Policy)

50 U.S.C. § 1547(a) (War Powers Resolution – Interpretation of Joint Resolution)

State Authorities

Applicable State Constitution (Commander-in-Chief provisions)

Applicable State Constitution (State Militia provisions)

Historical Sources

The Federalist No. 46 (James Madison)

The Federalist No. 69 (Alexander Hamilton)

Letter from James Madison to Thomas Jefferson (Apr. 2, 1798)

[1] James Madison 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 in the Legislature." Letter from James Madison to Thomas Jefferson (Apr. 2, 1798).

[2] See U.S. Const. art. I, § 8, cls. 11–16; The Federalist No. 51 (James Madison) (explaining that the structural distribution of powers among branches serves as the primary safeguard of republican government).

[3] Alexander Hamilton distinguished the President's commander-in-chief authority from a monarch's power to declare war: the President's authority "would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral," 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." The Federalist No. 69 (Alexander Hamilton).

[4] See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

[5] The War Powers Resolution further provides that authority to introduce forces into hostilities "shall not be inferred from any provision of law . . . including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities." 50 U.S.C. § 1547(a)(1).

[6] Madison described state militias as a structural counterbalance to any concentration of federal military power: "To [a standing federal army] would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence." The Federalist No. 46 (James Madison).

[7] 10 U.S.C. § 12302 authorizes the President to order up to 1,000,000 members of reserve components to active duty (not to exceed 24 months) when the President determines it necessary to augment the active forces for any operational mission. This authority was added by Total Force Policy amendments.

[8] 10 U.S.C. § 12304 authorizes the Secretary of Defense, with presidential approval, to order up to 200,000 Selected Reserve members to active duty (not to exceed 365 days) to augment active forces for any named operational mission.

[9] 10 U.S.C. § 12304a authorizes the Secretary of Defense to order reserve component members to active duty to provide assistance in response to a major disaster or emergency under specified conditions.

[10] Most state constitutions vest the Governor with authority as commander-in-chief of the state's military forces when those forces are not in federal service, and separately define the composition of the state militia. These provisions confirm each state's retained sovereign authority over Guard forces operating in state status, which is the precise space in which the Guard legislation operates.

[11] Most state constitutions contain a provision designating the Governor as Commander-in-Chief of the military forces of the State, except when such forces are called into the service of the United States. See the applicable enacting state's commander-in-chief clause.

[12] State constitutions typically define the composition of the state militia, encompassing able-bodied citizens of a defined age range. See the applicable enacting state's militia definition clause.

[13] See *The Federalist No. 69* (Alexander Hamilton); Letter from James Madison to Thomas Jefferson (Apr. 2, 1798) (collectively establishing that the constitutional design deliberately assigned the war-initiation power to Congress).

[14] See *The Federalist No. 69* (Alexander Hamilton).

[15] *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863) (recognizing presidential authority to respond to sudden attack, but distinguishing that emergency power from the authority to initiate war).

[16] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

[17] See *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979) ("an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available").

[18] *West Virginia v. EPA*, 597 U.S. 697, 723–24 (2022).

[19] *Murphy v. NCAA*, 584 U.S. 453, 475 (2018) ("The anticommandeering doctrine may sound arcane, but it is simply the expression of a fundamental structural decision incorporated into the Constitution.").

[20] See *Bond v. United States*, 564 U.S. 211, 222–23 (2011) (holding that individuals may challenge federal action on federalism grounds and that "fidelity to the design of the Constitution" requires respect for state sovereignty as a structural protection).

[21] *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (describing state sovereignty as a constitutionally ensured "check on abuses of government power" and noting that "[j]ust as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front").

[22] Most state constitutions designate the Governor as Commander-in-Chief of the state's military forces, except when those forces are called into the service of the United States. This

constitutional language confirms that each state retains command authority over its militia forces when those forces have not been federalized.

[23] *Baker v. Carr*, 369 U.S. 186, 211–17 (1962) (establishing the framework for identifying non-justiciable political questions).

[24] *INS v. Chadha*, 462 U.S. 919, 944–51 (1983) (holding that structural constitutional requirements must be observed even when they create "inconvenience" and rejecting the argument that political expediency can override the Constitution's procedural requirements).

[25] See U.S. Const. art. I, § 8, cl. 11; *INS v. Chadha*, 462 U.S. 919 (1983).

[26] See U.S. Const. amend. X; U.S. Const. art. I, § 8, cls. 15–16; *Printz v. United States*, 521 U.S. 898 (1997).

[27] See *The Federalist* No. 46 (James Madison).

[28] *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality) (emphasizing that "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens").