New American

Written by Major General Donald A. McGregor, USAF (Ret.) on May 7, 2021
Published in the May 24, 2021 issue of the New American magazine. Vol. 37, No. 10

What The Founders Feared

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Fox News published an article on March 11 entitled "Defense Secretary Austin overruled National Guard chief on keeping troops at Capitol: memo." To the average reader, this may appear to be a sensationalized story throwing fuel on the embers of an already-charred issue in our Capitol. But the story captures the growing and troubling divide between the secretary of defense and the chief of the National Guard Bureau over the appropriate use of the National Guard, and reveals a much larger and more concerning dilemma — something our Founding Fathers feared most.

Defining the Problem

The Fox article references a defense memo — in military terms a "coordination sheet" — normally used to "concur or non-concur" on issues within the Department of Defense. In this particular instance, a memo from Defense Secretary Lloyd Austin requested an "Extension of NG [National Guard] support to U.S. Capitol Police" with an additional 2,280 guardsmen to support the U.S. Capitol Police security detail beyond March 12.

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

The latest Capitol Police request to extend the National Guard support was not only hastily coordinated (it was done in two days), but also failed to give a convincing case for approval. Laying out its rationale to the Defense Department, the Capitol Police referenced the Department of Homeland Security's National Terrorism Advisory System, particularly a January 27 threat bulletin, as the chief reason for the augmented security support.

The bulletin summary describes a "heightened threat environment" — using words such as "believes" or "suggests" — in which "ideologically-motivated violent extremists [domestic violent extremists (DVE)] … could continue to mobilize to incite or commit violence." The bulletin goes on to link, without evidence, the El Paso, Texas, DVE attacks in 2019 to the January 6 Capitol riots, saying, "Some DVEs may be emboldened by the January 6, 2021 breach of the U.S. Capitol Building" — a dubious threat association that has no place in the Capitol Police request. But the problems don't stop there.

Federal statutes and defense directives come into play when the military is used in direct support of law enforcement, which is the case here. Posse Comitatus and section 275 of Title 10 USC are federal laws limiting the power of the federal government in using service members to "execute the laws" including

"search, seizure, arrest, or other similar activity."

What's more, the Defense Support of Civil Authorities directive provides ruling guidance for any military support of law enforcement. The defense regulation has six approval criteria to "examine" and "assess" the need for support. If we use the regulation's six criteria (legality, lethality, risk, cost, appropriateness, and readiness), a legitimate argument can be made that any one of them would disqualify the Capitol Police application — a troubling Defense Department miscue. Yet, as disturbing as this is, it is not the main concern.

What the Founders Feared Most

The National Guard chief's non-concur (dissent) to the Capitol Police demand gave two reasons: (1) the Guard is already maxed out with supporting COVID relief, natural disasters, civil-disturbance operations, and ongoing overseas deployments; and (2) to involuntarily activate the Guard for any Defense Department mission, the defense secretary must have the governors' consent. Yet, as the memo mentioned, "numerous Adjutants-General and Governors have expressed their unwillingness to order the involuntary mobilization of Guard personnel to man the mission." This leads us to the grander dilemma.

The aforementioned Fox News article links to a related story claiming that the Defense Department is reportedly considering issuing involuntary activation orders to keep the National Guard troops stationed at the U.S. Capitol. The problem with this is that the defense secretary possesses no legal authority to involuntarily activate the Guard in a Title 32 status. Any attempt would be unlawful and create a constitutional crisis.

In accordance with Title 32 law, the secretary can *request* that state governors send Guard members to perform "other duty" in "support of [Defense Department] operations or missions." But the secretary cannot *order* Guard members to perform "other duty" in "support of [Defense Department] operations or missions." Only a state governor can order a non-federalized National Guard member to perform duty. To avoid the need for governors' consent and Posse Comitatus restrictions would require an Insurrection Act declaration — a rare presidential decree allowing federal troops to quell rebellion and enforce laws, but only in dire situations. Based on current threat assessments, this action would be -unwarranted.

If attempted, the defense secretary's indiscriminate act would constitute an illegal end-run around Posse Comitatus and congressional legislative powers.The secretary would have to ignore Congress' constitutional authority under Article I of the U.S. Constitution to "make all laws," including Posse Comitatus, section 275 of Title 10, and the exception to these laws, the Insurrection Act. Furthermore, the defense secretary's action would encroach on Congress' constitutional power of the purse by spending money on unlawful purposes, a "purpose of obligation" or fiscal offense under the Purpose Statute and Anti-Deficiency Act. So, what conditions or threats justify creating a constitutional quandary?

Are the circumstances in D.C. serious enough to push a defense secretary to breach the law or a president to invoke a rarely used insurrection law? Is there a legitimate threat assessment with evidence of groups mobilizing to incite or commit violence — not merely to "suggest" or "believe" in such sedition? Have there been any violent or anarchist actions since January 6 to justify the extreme

need for involuntarily activating our guardsmen? An obvious lack of evidence would tell us no; so, where does this bring us?

The questionable involuntary activation of the Guard under Title 32 without state governors' consent or invoking the Insurrection Act sets a worrying precedent that undermines U.S. law and, more importantly, is what our Founding Fathers feared most, i.e., the use of the military to control the people. It appears that the defense secretary has not only ignored this legal misstep, but has disregarded the National Guard chief's readiness concerns and pleas to end the Guard's support for the D.C. mission.

In a recent memo, the National Guard chief commented, "the continued indefinite nature of this requirement [the D.C. security mission] may also impede our ability to man future missions as both adjutants general and guardsmen alike may be skeptical about committing to similar [policing] endeavors." It would be more preferable, he said, if D.C. pursued other "law enforcement" options. This is another subtle and important warning to Defense Secretary Austin.

What the Founders Intended

The unconstitutionality of these acts threatens the long-term stability of the Republic. Using the military to police the citizenry was anathema to our Founders. It is, for example, the reason Article I of the Constitution grants Congress the power to "raise an army," but not to maintain it. The Founders knew that without these critical separations of authority, at some point the military might be turned on the people. A homogenized military force under the control of an unchecked federal government or a corrupt Congress would be the end of our constitutional protections.

The Founding Fathers designed the system to keep the standing military relatively small, distributing a substantial portion of the armed forces across the states (and later the territories and districts) in the form of state-controlled, organized militias. The diffusion of military power among the sovereign states helps prevent the federal government from using the military to control the domestic population.

When state governors are complicit in the coopting of their sovereign militias by the federal government, to be used as an illegal domestic police force (as is the case here), it distorts the balance of power between state and federal governments. Further, it abdicates the states' responsibility, granted by the Constitution, to protect the liberties and freedoms of their citizens.

The defense secretary is ignoring the law, circumventing regulations, and potentially spawning an unnecessary constitutional crisis — a decision that should strike fear into the hearts of freedom-loving Americans. What our Founding Fathers feared most was a president or military chief coalescing military forces against citizens — just one of history's tragic paths to tyranny and oppression.

Major General Donald McGregor, USAF (Ret.), is an accomplished national security leader, fighter pilot, and career Air Force Officer with a diverse background, and expertise in Homeland Defense and National Guard issues. He was a former lead advisor to the Chief of the National Guard Bureau, who is a member of the Joint Chiefs of Staff. In this lead advisor role, he was the National Guard's Director of Strategy, Policy, Plans, and International Affairs, developing overall strategy, Secretary of Defense (SECDEF) policy, and civil support planning for the National Guard's warfighting, homeland, and international partnership missions.

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