Written by **Steven J. DuBord** on March 5, 2009

The Militia: In History and Today

The Founding Fathers had mixed feelings about military forces. At least 19 (probably more) of the 55 delegates to the Constitutional Convention had served in the armed forces, several with the rank of general. They knew they owed a debt of gratitude to the continental army and the colonial militias for securing their independence from England.

But they also knew that a standing army could be, in the words of Gov. Elbridge Gerry of Massachusetts, "the bane of liberty." One of the grievances the colonists raised against King George III of England in the Declaration of Independence was that "he has kept among us, in times of peace, Standing Armies without the consent of our Legislature," and further, that he had enacted legislation "for quartering large bodies of armed troops among us."

Recognizing the right of the people to organize locally for their mutual defense, the Founders therefore devised a system of government in which military power is divided between federal forces and a popular militia, between federal and state governments, with power over the military divided between the legislative and executive branches of government.

Not only does the right of the people to organize locally for their mutual defense still exist today, the exercise of that right is every bit as important today as it was during colonial times.

Constitution Provides for the Militia

When the Constitutional Convention met in 1787, they gave considerable attention to matters of national defense. They knew the new nation needed a military defense, but they also knew a standing army could be oppressive. Accordingly, they crafted a Constitution that balanced the power of the national government against that of the state and local governments and their militias. Article I, § 8 provided that

> The Congress shall have power …

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

To provide and maintain a Navy;

Notice the different language. Congress is empowered to "raise and support" Armies and to "provide and maintain" a Navy, and the two-year appropriation limit for Armies does not apply to the Navy. "Provide and maintain" implies a more permanent force than does "raise and support." The Framers

apparently believed a permanent naval force was necessary, but they believed armies should be raised and supported as needed, and in peacetime the nation would rely upon the local and state militias.

Article I, § 8 of the Constitution also addresses the militia:

> The Congress shall have power…

To make rules for the Government and Regulation of the land and naval Forces;

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

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.

Congress has supervisory authority over the armed forces generally, but the authority to train the militia and appoint militia officers is reserved to the states, provided they conduct that training "according to the discipline prescribed by Congress." Congress also has power to provide for calling the militia into federal service, meaning that Congress can federalize the militia of one or more states or pass legislation authorizing the president to call the militia into federal service.

One more provision of the Constitution deserves our attention — 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."

The reference to the militia states a reason for the right to bear arms, not a condition thereto. Note that the word "people" is not used interchangeably with the word "state," and that the term "*keep* and bear arms" implies individual ownership of weapons. Collectivists have argued that the Second Amendment protects only the right of the state to maintain a military force. However, in the 2008 *District of Columbia v. Heller* decision, the Supreme Court ruled 5-4 that the amendment protects the individual citizen's right to bear arms (although the court also errantly said this right is subject to state regulation).

In 1792, Congress passed the Uniform Militia Act to give limited direction to the state militias. Section 1 of the act defined militia according to the common historic understanding:

> That each and every free able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of 18 years, and under the age of 45 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 citizens shall reside, and that within 12 months of the passing of this act.… That every citizen so enrolled and notified shall, within 6 months thereafter, provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack [etc.] … and shall appear so armed, accoutred and provided, when called out to exercise, or [into] service … and that from and after five years from the passing of this Act, all muskets for arming the militia as herein required shall [be] of bores sufficient for balls of the eighteenth part of a pound. And every citizen so enrolled, and providing himself with the arms, ammunition and accoutrements required as aforesaid, shall hold the same exempted from all suits, distresses, executions or sales, for debt or for the payment of taxes.

The definition of the militia as all able-bodied male citizens was in keeping with the understanding of

the time.

Defender of Liberty

One purpose of the militia is to defend the liberty of the people against foreign invaders. Throughout history it has worked effectively, and it still works today. In "The Rationale of the Automatic Rifle," Massad Ayoob recounts part of a conversation that took place when Cmdr. Robert Menard attended a 1960 meeting between U.S. Navy personnel and their Japanese counterparts. One American naval officer asked why the Japanese did not invade America's west coast during WWII. A Japanese admiral answered: "We knew that probably every second home in your country contained firearms. We knew that your country actually had state championships for private citizens shooting military rifles. We were not fools to set foot in such quicksand."

But the militia serves another purpose: the defense of the people's liberty against domestic tyrants. To many Americans today, this thought seems radical and almost subversive. But consider James Madison's words in *The Federalist*, No. 46:

> Let a regular army, fully equal to the resources of the country, be formed; and let it be entirely at the devotion of the federal government; still it would not be going too far to say, that the state governments with the people on their side would be able to repel the danger. The highest number to which, according to the best computation, a standing army can be carried in any country, does not exceed one hundredth part of the whole number of souls; or one twenty-fifth of the number able to bear arms. This proportion would not yield in the United States an army of more than twenty-five or thirty thousand men. To these 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. It may well be doubted whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops.

And Alexander Hamilton, a continental colonel but hardly a wild-eyed revolutionary, expressed a similar thought in *The Federalist*, No. 29:

> Little more can reasonably be aimed at with respect to the people at large than to have them properly armed and equipped;… This will not only lessen the call for military establishments; but if circumstances should at any time oblige the government to form an army of any magnitude, that army can never be formidable to the liberties of the people, while there is a large body of citizens, little, if at all, inferior to them in discipline and in the use of arms, who stand ready to defend their rights and those of their fellow citizens.

Across the ocean and across the millennia, Aristotle would have agreed:

> A king's bodyguard is composed of citizens carrying arms; a tyrant's of foreign mercenaries.… Members of the constitution must carry [arms] even among themselves, both for internal government and in the event of civil disobedience and to repel external aggression.… For those who possess and can wield arms are in a position to decide whether the constitution is to continue or not.

From the adoption of the Uniform Militia Act of 1792 through the passage of the Dick Act in 1903, militias continued to be a bulwark of the nation's defense. Usually they were organized locally and consisted of men who were mostly friends and neighbors of each other, and commonly they elected their own officers, although they were subject to state regulation. Just before the War Between the

States, the United States Army consisted of 1,108 officers and 15,259 enlisted men, but there were thousands of militias, each consisting of about 30 to 60 men. Quickly after the war began, the Union Army swelled to 2,500,000 men, and the Confederate Army consisted of 1,000,000 men. Both sides relied upon the militia units that fought for their respective states.

After the war, the status of discipline of many militias gradually declined. In the North many of the militias simply ceased to exist, and in the South they were suppressed by the Reconstruction regime. In the 1870s, many states passed new laws requiring male citizens to serve in the militias, but these laws were poorly enforced and largely ignored.

Federalizing the Guard

In 1903, Congress passed the Dick Act, which began the process of federalizing the National Guard. Rep. Charles Dick's bill divided the American adult male population, other than those serving on active duty, into two categories: (1) the National Guard (the organized militia), and (2) the Reserve Militia (the unorganized militia, all other able-bodied adult male citizens). The 1916 National Defense Act revised the Dick Act and provided that "the militia of the United States shall consist of all able-bodied male citizens of the United States ... who shall be more than 18 years of age and ... not more than 45 years of age, and said militia shall be divided into 3 classes, the National Guard, the Naval Militia, and the unorganized militia."

And as federal funding for the Guard increased, so federal control over the Guard also increased, and the Guard gradually ceased to be a defender of the people's liberty against domestic tyranny.

A further reorganization took place in 1933, under which certain specially designated National Guard units received special attention and funding from the federal government. Men who enlisted in these Guard units were considered to have simultaneously enlisted in both their state's Guard Unit and the National Guard of the United States. Members of these units could be ordered to active duty with the United States armed forces, and upon completion of that service, their status would revert to that of members of their state's Guard. Guard units were better funded than before, but much of their independence and their identity as representatives of their respective states was lost. It is an old story, repeated many times before and many times since: federal aid leads to federal control.

At first, members of these units could be ordered to federal service only in the event of a national emergency. (Article I, § 8 says Congress can call the militia into federal service "to execute the Laws of the Union, suppress Insurrections and repel Invasions.") In 1952, Congress removed that requirement but provided that, in the absence of a national emergency, a state Guard unit could be federalized only with the governor's consent. That consent requirement was partially repealed by the Montgomery Amendment of 1986, which provided that a governor may not withhold his consent to federalization of his state's Guard unit for service outside the United States because of any objection to the location, purpose, type, or schedule of such duty.

In 1987, Minnesota Governor Rudy Perpich objected to the deployment of the Minnesota National Guard to Central America, alleging that the Montgomery Amendment unconstitutionally interfered with his authority over the Guard pursuant to Article I of the Constitution. In *Perpich v. Department of Defense*, 496 U.S. 334 (1990), the Supreme Court held that, under the dual-enlistment system established in 1933, guardsmen lose their status as militia members when they are ordered to federal service, and therefore the militia clauses of Article I, § 8 afford them and their units with no constitutional protection. The practical effect of this decision is that National Guardsmen are, first and

foremost, federal troops; their connection with the state militias is increasingly tenuous.

Over the years from 1903 to 1990, Guard units have increasingly come under the authority of the United States government. They still bear the name of their respective states, i.e. the Idaho National Guard, and they still perform functions for their respective states. But it is now clear that they are federal forces first, state forces only second, and only at the sufferance of the federal government. The Guard continues to perform admirable service in the defense of our nation, and they serve heroically to defend their states and local communities against natural disasters like Tropical Storm Katrina. Any American who serves or has served in the Guard should be proud indeed. But the guardsman's role as defender of the people of his state against domestic tyranny, as envisioned by Madison and Hamilton, has virtually disappeared.

Enter the State Guard/Defense Force

The role the Founders once envisioned for the militia as guardian of states' rights and the people's liberties, now falls upon State Guard units, or as some states call them, State Defense Force units. But many Americans have never heard of state defense forces and incorrectly assume the state guard is the same as the National Guard.

During the 1950s, several governors objected to their guard units being federalized and called out of the country. Who, they asked, is going to man the armories or do riot or flood control, if the guard is engaged elsewhere? Congress responded in 1956 by adopting 32 U.S.C. § 109, titled "Maintenance of Other Troops," which provides that

> (c) In addition to its National Guard, if any, a State or Territory, Puerto Rico, the Virgin Islands, or the District of Columbia may, as provided by its laws, organize and maintain defense forces. A defense force established under this section may be used within the jurisdiction concerned, as its chief executive (or commanding general in the case of the District of Columbia) considers necessary, but it may not be called, ordered, or drafted into the armed forces.

The act also provides that enlistment in a state's defense force shall not exempt a person from the draft, and that a person may not belong to a defense force if he is already a member of a reserve component of the armed forces.

At least 26 states, the District of Columbia, and Puerto Rico have established defense forces or State Guard units, and they are spread throughout the country: Alabama, Alaska, California, Colorado, Georgia, Indiana, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, South Carolina, Tennessee, Texas, Virginia, and Washington. Most states call this force either the State Guard (as distinguished from the National Guard) or the State Defense Force, but others use different titles, like the California State Military Reserve, the Indiana Guard Reserve, the Massachusetts Volunteer Militia, the New Jersey Naval Militia, or the Ohio Military Reserve. I will refer to them generally as State Guard units. Some of these are very active, others less so.

These State Guard units are not the same as the privately organized militias that received so much media attention during the 1980s and '90s. State guard units are organized under state auspices and have distinctive chains of command that start with the governor (not the president because they cannot be federalized), and then the adjutant general of the state, followed by the commander of the state guard, then the brigade commanders, battalion commanders, and company commanders. In Alabama, as in many other states, the adjutant general is appointed by the governor, and he commands the Army

National Guard, the Air National Guard, and the Alabama State Defense Force. The Alabama adjutant general and the commander of the State Defense Force are major generals, and the brigade commanders are either brigadier generals or colonels.

Because they cannot be called to federal service, state guardsmen receive no federal pay. They generally do not receive pay from the state for regular drills and commander's calls, but they can receive pay when called to active duty by the governor, and for certain other activities they can receive per diem and mileage.

The headquarters brigades of most State Guard organizations contain many retired military personnel, or at least many who have had some prior active or reserve military service. Prior military service is not a requirement at the brigade, battalion, or company levels, but many who serve at these levels do have prior military service and/or service in law enforcement, firefighting, homeland security, or emergency management. Many state guardsman want a military connection but did not choose the total commitment of an active military career and do not have the time to serve in a reserve or National Guard unit. Age limits are often relaxed, and while State Guard units stress physical fitness, they can often work around disabilities and limitations that the active duty military and the National Guard cannot accept. Those who lead and compose State Guard units have a tremendous wealth of experience in military service, law enforcement, homeland security, emergency management, and many other fields that contribute to the defense of their communities and states.

Missions Accomplished

The missions of the State Guard units are set forth in state statutes or regulations. These may vary from state to state, but generally their role is to fulfill the duties of the National Guard when the National Guard is called out of state or otherwise overtaxed and in need of assistance. For example:

• During Tropical Storm Katrina (2005), guardsmen of the Alabama 3rd Brigade (South Alabama) were called up to the Gulf states to man food distribution centers and otherwise assist in flood control and crowd control; the 2nd Brigade (Central Alabama) and the 1st Brigade (North Alabama) also provided assistance.

• After the 9/11 attack, the Alaska 49th Military Police Brigade performed classified security missions for Alaskan pipelines, railroads, harbors, and ports.

• In 2007, the Maryland State Defense Force performed assessments of National Guard facilities, joined the National Guard for Exercise Vigilant Guard, a homeland security emergency and terrorism response exercise, and performed health screenings for over 900 National Guardsmen deploying overseas.

• During Katrina the Texas State Guard activated more than 1,000 state guardsmen to paid active duty, receiving evacuees at Kelly Air Force Base, the Houston Astrodome, and other emergency centers.

• Also during Katrina, the Virginia State Defense Force provided security for armories and assisted in the deployment of National Guard troops.

The South Carolina State Guard has established an effective communications system whereby every state guardsman has an "sg.sc.gov" e-mail address, thus facilitating prompt emergency readiness responses. (Paul Revere would be envious!)

The State Guard is a uniformed service, and most guardsmen wear a variation of the U.S. Army BDU (battle dress uniform) for regular drill and duty, and the army Class A, Class B, or dress uniform for special occasions, always with distinctive State Guard insignia. (Alabama State Defense Force

regulations provide that members with prior Air Force service may wear the Air Force Class A or B or mess dress with ASDF insignia.) Most state guard units follow a ranking system similar to that of the U.S. Army. Personnel with prior military service commonly enter the State Guard at the rank they held when they left active duty, with the possibility of promotion thereafter.

The mission of the State Guard is to augment the National Guard, and therefore guardsmen spend much time training and preparing for the missions they might someday be called upon to perform. This training can take many forms: instruction in military procedures, courtesies, drill and ceremony, leadership training, emergency response, CPR, counter-terrorism, funeral protocol, and many others. Several schools for training state guardsmen have been established, including the School of the Soldier and Military Emergency Management Specialist (MEMS) Academy, and specialized schools for chaplains, medics, communications specialists, and others.

True Successors to the Militia

Besides constituting a cost-effective means of fulfilling America's defense needs and providing many Americans with the opportunity for military service, State Guard units are now the true successors to the militias that the Framers intended as state and local checks upon federal power. In 1997, when the Alabama Freethought Association and the ACLU of Alabama sued to force Etowah County Circuit Judge (later Alabama Chief Justice) Roy Moore to remove a Ten Commandments display from his courtroom, Governor Fob James promised to call up the Alabama National Guard, if necessary, to defend the Ten Commandments display. Had he done so, President Clinton could have countered by federalizing the National Guard. But if Governor James had called up the State Defense Force, President Clinton could not have federalized them. Although State Guard units are not overtly political, their existence is consistent with a constitutional states' rights philosophy, and in this author's experience, state guardsmen generally tend to be politically and socially conservative.

Readers who are interested in the State Guard may go to the website of the State Guard Association of the United States (sgaus.org) and click on the link to their respective State Guard unit, or contact the adjutant general of their respective state for further information.

An addendum from the author (March 27, 2009):

My thanks to all who have written; the many comments (see below) demonstrate that there is substantial interest in state guard units or state defense forces.

Mr. Gates, my list of state guard units was taken from the State Guard Association of the United States website (sgaus.org). I have brought your comments to SGAUS's attention, and they assure me that they are checking the states you have mentioned. If in fact these links are not legitimate, you have done SGAUS a great service by bringing this to our attention.

Mr. Cronkhite, I appreciate your kind words. I respectfully disagree with your assertion that modern state defense forces are not within the meaning of the term "militia" as used in the Constitution. The phrase "well regulated militia" in the Second Amendment clearly indicates that the Framers expected the militia to have some training and organization, as do Madison's and Hamilton's comments in *The Federalist*, No. 46 and 29. As to whether state defense forces or state guard units constitute "troops" as the term is used in Art. I § 10 of the Constitution, the answer might depend on the functions these units perform in their respective states. In either event, Article I § 10 says that states may not keep troops in time of peace "without the Consent of Congress." Federal statutes authorizing the organization of national guard units and state defense forces clearly constitute the consent of Congress.

Mr. Stertz, recent changes to the Insurrection Act are a valid concern and a good subject for a future article.

Badger, I'll let you and Mr. Gates work out your differences — hopefully without having to activate the Colorado Front Rangers. I believe people have a God-given right to self-defense, individually and/or collectively. When this right is exercised collectively, that is normally done through a militia with ties to state and local government, because defense is one of the few legitimate functions of government. But that does not mean defense is exclusively the function of government. When government abdicates or fails in its responsibility to defend the populace, the people may organize outside government. But state guard units and state defense forces recognized by SGAUS are linked to state and local government.

Again, my thanks to all who have written. I hope constitutionalists will see state guard units as opportunities for service.

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Photo: Colorado State Defense Force