



Briefing Paper on the National Guard In the American Context of the 21st Century

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Few Americans born after our Mobilization in 1940 understand what the National Guard is, what the Founders intended it to be, or that it was one of the elements of Colonial America that was retained and embedded in our Constitution for specific and enduring purposes.

The National Guard is a uniquely American Institution that dates to 1636:

- The Constitutional Militia of the American Peopleⁱ was proposed by General George Washington as the centerpiece of the “peace establishment of the United States”ⁱⁱ formalizing 150 years of colonial service.
- “Organized and disciplined, armed and equipped, by the Congress of the United States, while trained and officered by the States”ⁱⁱⁱ.
- A separate land and air force of the Nation, whose roles including joining the Army and the Air Force *in the first line of defense*, whenever it is determined that the active forces are insufficient to deal with a challenge^{iv}.

The National Guard has three (3) Institutional Roles in America:

- **The Statutory Role** -- as proposed by President Washington and established by the Congress in 1792 in executing its Constitutional responsibilities under the “Armies” clause of the Constitution in Art I, Sect. 8 to “raise and support Armies”.
- **The Constitutional Role** is defined in the “Militia” clauses of the US Constitution in Article I, Section 8,:
 - “To execute the laws of the Union” – a purely civil function.
 - “Suppress insurrections” – a civil or military function depending on circumstance.
 - “Repel Invasions” – a military function integrated into the statutory role.
- **The Common Law Role** -- to serve as the Founders guarantor of Liberty^v and in the separation of powers equation, a role guaranteed in the Second Amendment.^{vi} (The learned answer to the contemporary uninformed question, “why governors need tanks, cannons and fighter planes,” and the explanation for the Guard being identified in law as a separate land and air force organized like the Active services.)

As intended by the Founders, today’s National Guard represents the “common” in our “common defense” through 450,000 Americans serving in 4350 units in 3100 communities.

- Governors serve as their “commanders-in-chief” until they are called into *actual* Federal service, at which time command reverts to the President^{vii}.
- The Guard provides a modern, capable, and experienced Land and Air Force, second in the world only to the US Army and Air Force, for about \$15B per year, including essential procurement – a Founder’s goal realized.
 - Over half this force have completed tours of service active in the Active forces – especially officers.

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- Training and schooling standards are the same as for Active personnel.
- Readiness for Combat is evaluated against common standards prescribed by the Secretaries of the Army and Air Force for their services.
- The National Guard brings 364 years of experience to Homeland Defense.
 - Continually provide immediate emergency response and disaster relief in all 54 States and Territories, today including Weapons of Mass Destruction Civil Support Teams.
 - Maintains a wide range of coordinated emergency response planning activities that facilitate rapid action in both military and civil capacities, and represent an established bridge across the local, county, state and Federal spectrum.
 - Provide sustained, multifaceted, state and local support operations in the civil arena ranging from the rescue of youth-at-risk to counter-drug operations.

The National Guard's combat record is well documented and readily available to any student willing to conduct the research. What is less well documented is the record of their civil Constitutional Role of maintaining domestic tranquility by executing the laws of the union. This history began before the ratification of our Constitution with Shay's Rebellion in 1786 and from the Whiskey Rebellion of 1794, through the desegregation period of 1957–1963 in Arkansas, Alabama and Mississippi to today on our borders, in our communities and at our airports.

The Civil Rights statutes give unusual latitude to use the Armed Forces to enforce orders of the Federal Courts. In each of these cases Presidents Eisenhower and Kennedy, kept with American tradition by employing the National Guard to execute these orders and held the Standing Army in the background – and never used it except to posture. Also, in each of these cases, the National Guard Commander at the scene was placed under the control of the senior civilian representative of the Attorney General, and not any Federal Military Command.

As noted by former Chief Justice Earl Warren, “the apprehensions of the founders regarding a standing Army found expression in the diffusion of the war powers granted the Government by the Constitution and that, further, provision was made for organizing and calling for the state militia to execute the laws of the Nation in times of emergency.”^{viii}

It is this rationale that has the National Guard employed as our militia to extensively augment civilian law enforcement under the Counter-Drug program,^{ix} or in support of the past two Olympiads held in the United States. This same approach is equally appropriate to reinforce domestic law enforcement efforts to interdict, prevent and respond to terrorist threats.

ⁱ 10 USC 311(b)(1)

ⁱⁱ Washington, George. Sentiments of the Peace Establishment. May 2, 1783

ⁱⁱⁱ US Constitution. Art I, Sect. 8, Cl. 16

^{iv} 32 USC, Ch. 1

^v Hamilton, Alexander. Federalist 29. New York, NY. Jan. 9, 1788 and United States v. Miller, 307 U.S. 174 (1939) Passim.

^{vi} Warren, Earl. The Bill of Rights and the Military. Presented as the third James Madison Lecture, New York University Law Center, New York, NY. Feb. 1, 1962.

^{vii} US Constitution. Art II, Sect. 2

^{viii} Op. Cit. Warren.

^{ix} 32 USC 112