MILITIA'S END

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[2023-12-12]

*ABSTRACT. Two federal statutes – the Dick Act and Insurrection Act – together could entice a wicked President to claim statutory authority to put the armed men of extremist groups, gangs, and mobs on official duty to do political violence. Ambiguities and gaps in state laws could entice wicked Governors to attempt the same. As partisanship spirals and political violence spikes in our times, any arguable basis for such power carries terrible risk. Such powers are intolerable when viewed through the lens of the Jan. 6, 2021 attack on the U.S. Capitol, when an electorally defeated President inspired self-organized militias to use force to prevent his departure from office. If the defeated President had merely ordered those militias federalized, their members since convicted of seditious conspiracy and other charges would have had a claim to legal legitimacy and a defense at trial. The Framers were aware of both the benefits and potential dangers of the militia – the armed male citizenry. They gave Congress plenary power over the militia in Article I of the Constitution, which Congress should use to remove any possibility that a wicked President or Governor could transform extremist groups into a legal American analogue to the SA (*Sturmabteilung*) – the Nazi militia that battled in the streets of the Weimar Republic and then surrounded the Reichstag until legislators voted authoritarian powers to the chief executive. After analyzing the origins of Article I's Militia Clauses and the constitutional (and in the South often unconstitutional) history of the militia in America, this article explains how the provisions of two outdated statutes intersect to create the present danger: a claim of legal basis for extremist militia violence at executive whim. The Insurrection Act that dates to the nation's early years allows federalization at presidential command of "militia," which includes the "unorganized militia" that the century-old Dick Act defines as all military-age males not in the National Guard. To foreclose any path to legal cover for violent extremists, this article recommends replacement of the Insurrection Act's capacious term "militia" with "National Guard," the modern military's professionalized "organized militia" and state-level U.S. military reserve component. Second, this article urges modernization of the Dick Act to include women (including those in extremist groups) in the "unorganized*

militia," and to allow its federalization only for the President to command demobilization, dispersal, and disarmament of any portion thereof that the President determines is infringing the rights of any person or is involved in rebellion, insurrection, or other resistance to government authority. This article further urges Congress to write this demobilization power to reach state defense forces: "unorganized militia" that Congress allows states to create outside the National Guard but today exempts from federal mobilization, thereby creating a potential tool of political violence for wicked Governors. Finally, this article recommends that states amend their own laws. States must prevent their Governors from mobilizing extremists, gangs, and mobs as "unorganized militia" on state duty. Ultimately, through these statutory changes, the violence of Jan. 6 must come to represent a malicious end to potential availability of "unorganized militia" to do political violence for wicked chief executives.

Concept Note

This article is in progress and well outlined. What remains is turning the detailed outline into prose and circulating for comment – a part of the writing process that would be considerably enhanced via presentation to colleagues at AALS. What follows here is a brief outline and conclusion.

Introduction

- Teaser: two militia moments
    - After civic violence, a self-organized violent militia loyal to the chief executive surrounded a meeting of the legislature until it voted the leader extraordinary powers; law enforcement and the professional military did not challenge the militia because it had been put on official duty
    - A militia loyal to the chief executive violently attacked the legislature in an effort to intimidate it into granting the chief executive the unconstitutional power of an extended term in office, but its appeals to the chief executive for official status went unanswered and the militia was repulsed by law enforcement and national guard, and later many of its leaders, members, and fellow militants prosecuted and sentenced for seditious conspiracy.
- The first was Germany 1933 (SA surrounded the Riechstag after the Reichstag building burned) and the second J6 (Stewart Rhodes explicitly called for federalization of the Oath Keepers and the mob as militia under the Insurrection Act; Gen. Milley worried about a "Reichstag fire moment" in run-up to J6).
- Danger persists that a wicked chief executive at federal or state level could attempt to give self-organized militias cover of government authority to do political violence.
- [see abstract for rest of framing and preview]

I. Congressional Control: The Constitution and Militia History

A. Constitutional Text

a. Congress in Art. I, sec. 8, cl. 15 has the power to "provide for calling forth the Militia," meaning powers both to take away from states and if it chooses not to provide militia to the President. The militia always exists constitutionally as a potentiality but the "provide for" language suggests clearly that Congress at its discretion can give a particular President permission or not, and with such restrictions as Congress determines.

b. The cl. 15 "calling forth" provision is one of five related changes to the relationship between the states and central government in the Constitution, that strengthened congressional control. The others are Congress's power to control militia operations and discipline (Art. I, sec. 8, cl. 16), command

while on federal duty by the new President (Art. II), ban on states maintaining military forces without congressional approval (Art. I, sec. 10), and federal guarantee to the states of a republican form of government (Art. IV).

c. Second Amendment ratified what was well understood: "well regulated Militia" is "necessary for the security of a free state," and to ensure that the militia could be mobilized quickly (and arguably federal regulars could be quickly raised) the right of the people to keep and bear arms was protected. (The Supreme Court in *Heller* also recognized the individual right).

B. Constitutional Understandings and Projects
   a. Overall, balancing and realizing both liberty and security in a large republic
   b. Original understanding of the militia, informed by colonial, wartime, and Articles of Confederation experiences
   c. Militia-related provisions in Constitution efficiently addressed seven specific categories of dangers identified by the Framers: (1) inability of the central government under the Articles of Confederation to muster adequate defense without state permission ("repel Invasions"), (2) risk of rebellion or civil disorder within states ("suppress Insurrections"), (3) risk of rebellion against the federal government ("execute the Laws of the Union"; includes rebellion by militia or by one or more states using militia or other military forces), (4) risk of wars among the states, (5) risk of repressive use of force internally by state governments ("republican form of government"), and (6) risk of repression by the new office of President, and (7) potential lack of availability of armed citizens for participation in militia or regular forces if states or federal government generally banned arms.
   d. Disagreements and commonalities in the original understandings

C. The Constitutional History of Congressional Control (and use of federalized organized militia and regulars against self-organized militias)
   a. Founding Era: Calling Forth Acts provide statutory authority for suppression of self-organized militias mainly by federalized militia during the Whiskey Rebellion
   b. 1800s: Civil War, and during Reconstruction use of statutory authority for suppression of Klan and other self-organized militias
   c. 1900s: Dick Act, the National Guard, and the Total Force
      i. use of National Guard in face of Klan militia and state/local militia defiance of federal civil rights

ii. Insurrection Act's use limited to use of National Guard and regulars, but statute not modernized like other statutes to substitute National Guard for "militia"

d. 2000s:

i. 2017 (Charlottesville) and 2020 – mobs and militias of left and right fighting in streets

ii. 2021 J6: Oath Keepers and other militias assembled in DC at presidential informal call, awaiting invocation of Insurrection Act to do political violence for the President against Congress; National Guard unavailable to the President for nefarious ends due to professionalism and the effective institutional maneuverings of Secretary of Defense and senior military, but also left Capitol unprotected against self-organized "unorganized militia"

D. Congressional Supremacy -- In sum: no presidential authority to call forth militia of any kind without congressional authorization, and no authority for states to defy federal statute or its use by President

II. Malicious History – history of violence (and especially white supremacist violence) by what Dick Act and our current norms understand as non-professional or "unorganized militia"

A. Self-Organized Unorganized Militia – partisan militias of Founding Era; militias in South (mainly but not only) enforce white supremacy pre-Civil War; Post-Civil War KKK and others in 1800s and 1900s (including 1921 Tulsa Race Massacre); 20th century militias of right and left; 21st century militia movement (including those of left) and the theories of Oath Keepers founder and disbarred lawyer Stewart Rhodes (now going to trial for seditious conspiracy)

B. State Militia (with relatively little professionalization) -- state militia enforce slavery in South in pre-National Guard era (mention but not emphasis on state defense forces authorized by Congress in 20th Century)

III. **Unorganized Militia's Enduring Risks**

A. The Unorganized Militia in the States

a. Many but not all states ban armed groups not subject to state authority

b. Some states allow for mobilization of unorganized militia, presenting a current risk of a wicked state government giving legal blessing to political violence

i. Self-organized militias / mob example: Ohio.

ii. State Defense Force example: Texas.

c. Elections - risk especially worrisome on the context of concern about free and fair elections, and untested federal law protecting places of elections and related rights against such state-level militia

B. The Unorganized Militia at the Federal Level

a. Federal law does not soundly ban self-organized militias (Dick Act, Voorhis Act)

b. J6 demonstrated that Dick Act and Insurrection Act together leave a loophole for presidential mobilization of self-organized unorganized militia to do political violence.

IV. Recommendations

A. Judicial Skepticism – courts should look with skepticism at governor or presidential claims of necessity in calling forth unorganized militia. No precedent or need in the post-Dick Act era of the professionalized National Guard and standing federal forces.

B. Insurrection Act Modernization – remove term "militia" in favor of "National Guard."

C. Flat Bans – States that have not clearly done so and Congress should enact flat bans on armed groups that self-organize for political, military, or militia purposes.

D. Demobilization Authority – States and Congress should allow for calling forth of unorganized militia for one purpose: if they are threatening or participating in violence, to order their demobilization (and if additionally necessary until such time as the danger has passed the surrender of weapons and/or ammunition) under pain of prosecution under state criminal codes or federal UCMJ.

V. Conclusion

In these times of civil unrest and strains on the standing regular military, there is every reason to believe that the militia will remain, in the words of the Second Amendment, "necessary to the security" of both the states and the United States. But both state legislatures and Congress must make clear via statute that the only militia available for mobilization must be in that Amendment's terms the "well regulated Militia." Today, that means the professionalized and federally inter-operable National Guard (with a limited secondary role for well regulated state defense forces). The self-organization of what the Dick Act still terms "unorganized militia" and their self-deployment to the U.S. Capitol on 1/6 in service of a stolen election lie, and the terrifying reality that they could have carried out their assault on federal duty if only President Trump would have followed their request for invocation of the Insurrection Act, underscores that it is time for the law to be modernized and loopholes to be closed. So too does the reality that in some states a wicked Governor could also call to state duty unorganized militia in service of

partisan or personal agendas, including in ways that interfere with polling places and other aspects of free and fair elections. It is time to eliminate any possibility of deployment of any militia except the National Guard, which thanks to its professional institutionalization and non-partisan ethos is more likely to find ways to resist or frustrate personal or political agendas of chief executives. Ultimately, the lies and violence of Jan. 6, 2021, must represent the malicious end of the unorganized militia as a potential legal tool of political violence available to wicked presidents or governors.