



# Federal Control of the National Guard Not in Federal Service

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This CRS Insight discusses federal authority over state militia practices that diverge from Department of Defense policy and may adversely affect readiness of the National Guard of a state or the National Guard of the United States to perform federal missions under title 32 or title 10 of the U.S. Code, respectively.

## Background

The federal government has broad authority over the National Guard. Congress may exercise its constitutional power to arm, organize, and discipline the militia as it considers necessary (U.S. Const., art. I, §8, *cl. 16*). The President of the United States must issue orders and regulations necessary to govern, organize, and discipline the National Guard ([32 U.S.C. §110](#)). The President’s governance of the National Guard includes policy that applies to all states and National Guard members (*Assoc. of Civ. Tech. v. U.S.A.*, [USCA D.C. Cir. Case No. 09-5153](#) (Apr. 30, 2010), §II, p. 8).

This federal authority is not exclusive: the National Guard is unique because it simultaneously possesses federal and state attributes making it responsible to both national and local sovereignty (*Lipscomb v. FLRA*, [USCA 5th Cir. Case No. 02-60060](#) (Jun. 24, 2003), §II, p. 2). It is a single organization established as two entities—one state (National Guard), the other federal (National Guard of the United States) (*In re Sealed Case*, [USCA D.C. Cir. Case No. 07-5251](#) (Jan. 6, 2009), §I, p. 2). Yet, the National Guard’s functions and capabilities are almost exclusively funded and stipulated by the federal government (*Perpich v. DOD*, [USSC Case No. 89-542](#) (Jun. 11, 1990), §II, p. 18 (351)). Whether state or federal authority controls the National Guard depends on both relevant law and the particular facts; using federal funds for their proper purpose can often be a primary consideration when making this determination ([31 U.S.C. §1301\(a\)\(d\)](#), see *NG Fiscal Law Guidebook*).

Congress appropriates funds to train the National Guard and maintain its readiness for federal missions ([32 U.S.C. §§106, 107, 708](#)). The objective of the National Guard training policy “is to train units that can mobilize, deploy, fight, and win anywhere in the world ... with a minimum of ... training time” ([NGR 350-1](#), para 1-5). The Army and the Air Force have “broad discretion ... to regulate” National Guard training ([B-176491](#), Comp. Gen. Jul. 17, 1972).

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## Forfeiture of Federal Support

Members of the National Guard of a state have a dual role as members of the National Guard of the United States, which provides a reserve component of the Army and the Air Force (10 U.S.C. §§10105, 10111, 12107(b)). When not on active duty, members of the National Guard of the United States are to be trained, equipped, and administered as members of the National Guard of a state (10 U.S.C. §§10107, 10113). If a state does not comply with a requirement under title 32, U.S. Code, or its implementing regulations within a period specified by the President, the National Guard of that state can be barred from receiving funds or any other federally authorized aid, benefit, or privilege (32 U.S.C. §108).

## Withdrawal of Federal Recognition

National Guard members must be federally recognized through regulations issued by a service secretary (see ARs 135-100, 601-210). To be eligible for federal recognition a member shall possess the qualifications prescribed in these regulations (32 U.S.C. §§301, 307(a)(2)). National Guard officers also are subject to suitability standards established under the authority of the President (3 U.S.C. §302; 32 U.S.C. 307(a)(3); NGR 600-100). Taking a dual oath of service that recognizes the authority of both the President and a state's governor is required for membership in the National Guard (32 U.S.C. §312).

If a National Guard member no longer qualifies for federal recognition, or is not assigned to a federally recognized unit, the member's recognition is to be withdrawn (32 U.S.C. §323(a)). A National Guard officer's "capacity and general fitness ... for continued Federal recognition may be investigated at any time" (32 U.S.C. §323(b)). If a board of officers investigating a National Guard officer's suitability for federal recognition makes unfavorable findings that are approved by authority of the President, the officer's recognition is to be withdrawn (3 U.S.C. §301; 10 U.S.C. §10503(8); NGR 635-101, §1V).

## Trial by Court-Martial

A state's National Guard typically has a code of military justice (CMJ) enacted as state law that will include punitive articles and their punishments (see P.L. 107-314, §512(e), *Models for State Code of Military Justice*). CMJ offenses resemble Uniform Code of Military Justice (UCMJ) offenses, such as *contempt toward officials* and *failure to obey order or regulation* (see UCMJ and model CMJ arts. 88, 92). National Guard courts-martial are constituted like those in the Army and the Air Force and both federal and state officials may convene them (32 U.S.C. §§326, 327(b), see model CMJ arts. 22, 23, 24). The President and certain Army or Air Force commanding officers are designated as convening authorities under federal law (Title 32); the governor and similar commanding officers in the National Guard are designated under state law (state CMJ).

Although Congress enacted the present form of concurrent federal and state discipline authority over the militia in 1916, it is unclear if a federal convening authority has ever court-martialed a member of the National Guard not in federal service (P.L. 64-85, §§102-108 (Am. by P.L. 107-314, §512(b)), see *Digest of Opinions* of the JAG of the Army (1912-1940), §1273). If such court-martial were convened, it likely would be conducted pursuant to rules and procedures in the United States Manual for Courts-Martial (MCM) (R.C.M. 504). However, any charges referred by a federal convening authority to a National Guard court-martial could only be for state CMJ offenses and the punishment associated with these offenses also would be governed by state law (32 U.S.C. §327(a), see H.Rept. 107-772, p. 643).

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