Mustering the militia is not martial law

Overview

On March 17, Governor
Newsom put the California National Guard on alert to assist the state's efforts to combat the COVID-19 pandemic. This has raised questions
about the Guard's composition, the scope of its authority, and its role — along with concerns about whether the Guard's activation shows that martial law has taken hold. To be clear: martial law has not been declared, and activating the Guard has little relation to suspending civil authority. Guard call-ups happen frequently in California, and martial law has never been declared in this state. The Guard is being called up to provide disaster relief, not to police the streets.

Analysis

**Where California
is now**

A state of emergency
has been declared, and Governor Newsom issued a statewide stay-at-home order. That order is compulsory: refusing or
willfully neglecting to obey any lawful emergency order is a misdemeanor.[1] The Guard is on alert, and a few units have
been called up to provide logistical support for the state's emergency response efforts. Martial law has not been declared; California's civil government remains in charge. The state courts are still administering justice, though courts throughout the state have limited their capacity to priority and emergency matters (on March 23, the Judicial Council suspended
some proceedings for 60 days).

The California National

Guard is the domestic militia

The United States
National Guard is part of the country's reserve military force; it comprises the members of the Army National Guard and Air National Guard in each of the fifty states, the District of Columbia, and U.S. territories. The guard "is an unusual military force because it serves both as the militias for the 50 states . . . and as the reserve force for the United States Army and Air Force."[2] As a result, the National Guard maintains a unique "dual status" with both state and federal roles and missions.[3]

The National Guard
is a product of the federal constitutional design. The U.S. Constitution prohibits states from keeping troops without the consent of Congress.[4] The Constitution reserves to Congress the power "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."[5] Congress, in turn, has authorized states to keep both federally recognized militias (the National Guard) and non-federally recognized militias (known as "state defense forces").[6] This state's defense force is the California State Guard, authorized by Military & Veterans Code section 550.

The California
National Guard is part of the active militia of this state.[7] The "Governor is the commander in chief of a militia that shall be provided by statute. The Governor may call it forth to execute the law."[8] The California National Guard operates under the governor's command and control unless it is federalized, when it operates under the President's command and control.[9]

The Guard's role is domestic peacekeeping and disaster relief

The governor can activate National Guard personnel to state active duty in response to natural or manmade emergencies. The governor has exclusive authority over National Guard members in State Active Duty status.[10] In addition, the President has authority to activate national guard units under federal authority. While the Posse Comitatus Act generally bars the President from using federalized National Guard members within the United States for law enforcement and other purposes, there is no similar bar against a governor's use of the National Guard within a state for law enforcement purposes or to assist in emergency relief.[11]

For example, California governors have used the National Guard in various non-military capacities within California — most recently, to combat and prevent wildfires.[12] California governors have used state Guard units after the 1906 San Francisco earthquake, during the 1934 San Francisco dock strike, and in Los Angeles during the 1992 riots. The federal government can likewise activate the national guard to coordinate a federal response to an emergency. This was the case, for example, in Louisiana and Mississippi after Hurricane Katrina.

None of those instances equate to martial law.

Martial law is historically rare and has never been declared in California

The term "martial law" carries no precise meaning.[13] One useful definition is: "the temporary government, by military authority, of a place or district in which, by reason of the existence civil disorder, or a state of war and the pendency of military operations, the civil government is, for the time being, unable to exercise its functions."[14] The key indication of "martial law" or "martial rule," then, is for civil authority to have been supplanted by military rule.

The governor has declared a state of emergency under the Emergency Services Act; this authority is distinct from a governor's power to declare martial law.[15] The ESA establishes statewide standards in the event of natural, manmade, or war-related emergencies that affect California citizens. The ESA grants the governor several powers, including the power to suspend laws, commandeer private property or personnel, and spend from available funds (overriding the legislature's otherwise-exclusive appropriation power).[16] The ESA's primary purpose is to allow a governor to coordinate the "most effective use" of resources during a crisis.[17] Past governors have used the ESA to respond to public emergencies. For example, Governor Pete Wilson invoked the ESA to suspend environmental regulations to spray aerial insecticide to combat a Medfly infestation.

The governor's power to call up the militia flows from Article V, section 7, which provides that the governor "is commander in chief of a militia that shall be provided by statute." And from Mil. & Vet. Code § 143, which grants the governor authority to "order into the service of the state any number and description of the active militia, or unorganized militia, as he or she deems necessary, to serve for a term and under the command of any officer as he or she directs" when the governor "is satisfied that rebellion, insurrection, tumult, or riot exists in any part of the state . . . .".

Both the ESA and Guard call-up powers are different from declaring martial law. Under the state constitution a governor may order the "militia" to "execute the law."[18] No California governor has formally declared martial law; only two instances even potentially qualify. California was under U.S. military rule for the brief period between the end of the Mexican-American War and California adopting its first constitution in 1849. And Governor Frank C. Merriam threatened to impose martial law in San Francisco when he placed troops on the city's docks during a 1934 labor strike — but martial law proved

unnecessary because the unrest subsided. Merely calling up the militia to aid the state's relief efforts in a crisis is fundamentally distinct from replacing civil courts with military justice.

Historical examples illustrate this contrast. Governors frequently call up the National Guard when a crisis threatens to prevent ordinary institutions from functioning. That is distinct from governors declaring martial law, which has occurred very rarely — just six times among all governors of the 50 states.[19] Federal authorities have occasionally declared martial law: Abraham Lincoln did so in 1863 during the Civil War, and Hawaii (then a U.S. territory) was under martial law for several years following the Pearl Harbor attack in 1941.

California has never suffered a calamity so severe that the civil government has been unable to exercise its functions. Nor have the state's courts ever been prevented by crisis from administering justice. The coronavirus pandemic is no exception. California's government remains at the helm, and the state courts are still operating (albeit with some limitations). And even if the courts temporarily suspend operations, that does not mean that they are incapable of operating and that military rule is the only viable replacement. The conditions that would require martial law — that civil authority is rendered incapable of keeping order — have never occurred and do not exist now.

Conclusion

The COVID-19 pandemic is unprecedented — and Governor Newsom has indeed taken extraordinary measures to protect the health and safety of Californians. But while these may be unprecedented times, California's constitutional structure is designed to accommodate emergencies while maintaining civil order. This design is working: the state government is working cooperatively with local governments to ensure an orderly and effective response to the pandemic. We are not on the precipice of martial law.

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[1] Gov. Code § 8665.

[2] *Stirling v. Brown* (2018) at 1151.

[3] Nat. Guard Reg. (NGR) 500-5 § 4-1. See also *Perpich v. Dept. of Defense* (1990) at 340–46 (providing a brief history of the National Guard).

[4] U.S. Const., art. I, § 10, cl. 3.

[5] U.S. Const., art. I, § 8, cl. 16.

[6] See 32 U.S.C. § 109.

[7] Mil. & Vet. Code § 120.

[8] Cal. Const., art. V, § 7; see also Mil. & Vet. Code § 140.

[9] See Mil. & Vet. Code § 550; 32 U.S.C. §§ 110, 502(a) 502(f), 903–04.

[10] See NGR 500-5 § 10-2(a) ("National Guard Soldiers and Airmen serving in a state active duty status are under the command and control of the Governor and the state or territorial government.").

[11] One primary exception to the prohibition on federal use of the military, including the National Guard, within the United States is in the case of insurrection or rebellion. "In accordance with the Insurrection Act (10 USC §§ 331-335) and 10 USC § 12406, the President may call into federal service members and units of the National Guard of any State in such numbers as he considers necessary

whenever the United States, or any of the territories, commonwealths, or possessions, is invaded or is in danger of invasion by a foreign nation; there is a rebellion or danger of a rebellion against the authority of the Government of the United States; or the President is unable with the regular forces to execute the laws of the United States to repel the invasion, suppress the rebellion, or execute those laws. Orders for these purposes shall be issued through the governors of the States or, in the case of the District of Columbia, through the Commanding General, Joint Force Headquarters, District of Columbia National Guard." NGR 500-5 § 4-1d(3).

[12] See Nat. Guard Bur., *California National Guard Helps Fight Wildfires* (Oct. 31, 2019).

[13] *Duncan v. Kahanamoku* (1946) at 315 ("The Constitution does not refer to 'martial law' at all and no Act of Congress has defined the term. It has been employed in various ways by different people and at different times.").

[14] George B. Davis, A Treatise of the Military Law of the United States (3d ed. 1913) Ch. 16, p. 300; see also *Hamdi v. Rumsfeld* (2004) at 552 ("martial law justified only by 'actual and present' necessity as in a genuine invasion that closes civilian courts").

[15] Gov. Code § 8574.

[16] Gov. Code §§ 8571–72, 8645.

[17] *Macias v. State of California* (1995) at 854.

[18] Cal. Const., art V, § 7.

[19] Governor Brigham Young declared martial law in the Utah Territory in 1857; Idaho Governor Norman Willey declared martial law in 1892 during a miner's strike; in 1912, West Virginia Governor William Glasscock declared martial law during a miner's strike; Washington

Governor

Ernest Lister declared martial law in Spokane in 1917; in 1954 Alabama Governor Gordon Persons declared martial law in Russell County; and in 1961 Governor John Patterson declared martial law in Alabama during a civil rights conflict.