



COMMONWEALTH of VIRGINIA

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The Honorable Bill Janis
Member, House of Delegates
Post Office Box 3703
Glen Allen, Virginia 23058-3703

Dear Delegate Janis:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You inquire whether the Virginia General Assembly has the authority to mandate that the Virginia National Guard continue the “Don’t Ask, Don’t Tell” policy (“DADT”) in the aftermath of recent Congressional action and, if so, you inquire about the limits and parameters of that authority.

Response

I am unable to answer your questions because the federal regulations repealing DADT have not been issued. Regardless of what form those regulations take, the Constitution expressly reserves to the States the power to appoint officers to the state militias, and that includes the modern National Guard. The power to determine which state Guard officers are eligible for service in the overlapping National Guard of the United States, however, rests with Congress. Moreover, Congress, through its spending power, can condition the use of federal funds on the States’ acceptance of DADT. Should the General Assembly wish to avoid the conditions attached to these funds, it can raise, equip and fund an independent Virginia militia entirely from state revenues.

Background

Under the DADT statute, a person who, among other things, engaged in a “homosexual act or acts” or who “stated that he or she is a homosexual or bisexual” was to be “separated from the armed forces.”¹ The United States Congress has now repealed DADT.² The repeal, however, is not effective immediately. Instead, the repeal will go into effect after the Department of Defense has prepared the

¹ 10 U.S.C. § 654.

² Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (to be codified at 10 U.S.C. § 654).

required regulations and policies.³ These regulations and policies have not been finalized as of the time this writing. Until then, DADT remains the law.

Applicable Law and Discussion

To better understand the authority of the General Assembly in this area, it is helpful to review the historical backdrop leading up to the present system. State militias trace their roots to the very dawn of the colonial era. The “notion of the people –in-arms springing to the defense of their homeland” was central to the founders.⁴ George Mason memorialized this understanding in the Virginia Declaration of Rights by writing that the militia is properly “composed of the body of the people.”⁵ The practical utility of the militia, however, was on a local basis and for short duration. George Washington, faced with fighting a protracted continental war, described militia troops as a “broken staff.”⁶ The debates over the Constitution pitted the anti-federalists, who saw a standing army as the blunt and expensive instrument of tyranny, against the federalists, who recognized that the defense of the nation could not be adequately sustained solely by the militia.

In addition to limiting army appropriations to two years, the powers of Congress set forth in Art.1, § 8, of the Constitution reflect a compromise over these two conflicting themes.

On the one hand, there was a widespread fear that a national standing Army posed an intolerable threat to individual liberty and to the sovereignty of the separate States, while on the other hand, there was a recognition of the danger of relying on inadequately trained soldiers as the primary means of providing for the common defense. Thus, Congress was authorized both to raise and support a national army and also to organize “the Militia.”^[7]

Consistent with the power given to Congress to “provide for the common Defence” of the United States and to declare war,⁸ the United States Constitution confers broad power to the United States government with respect to military matters in general and with respect to control over state militias more specifically.⁹ The Constitution authorizes Congress 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.”¹⁰ Congress also can “provide for the calling forth the Militia to execute the laws of the Union, suppress Insurrections, and repel invasions.”¹¹ Therefore, the power of the General Assembly to regulate the militia is limited by these express textual provisions. The Constitution reserves to the States the

³ *Id.*

⁴ ALLAN R. MILLETT, PAPERS ON THE CONSTITUTION 95 (John W. Elsberg, ed. 1990).

⁵ VA. CONST. art. 1, § 13.

⁶ Frederick B. Wiener, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181, 182-83 (1940) (citing Letter, Washington to the President of Congress, Sept. 24, 1776, p. 106 in *The Writings of George Washington* (1932)).

⁷ *Perpich v. Dep't of Def.*, 496 U.S. 334, 340 (1990).

⁸ *Id.*

⁹ U.S. CONST. art. I, § 8.

¹⁰ *Id.*

¹¹ *Id.*

“Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.”¹²

For the first century of the Nation’s existence, Congress did not exercise its authority to regulate the state militias.¹³ At the turn of the twentieth century, Congress enacted a series of reforms that produced the modern National Guard system.¹⁴ Congress created “two overlapping but distinct organizations’ . . . the National Guard of the various States and the National Guard of the United States.”¹⁵ Under this system, “persons who [] enlist[] in a state National Guard unit simultaneously enlist[] in the National Guard of the United States.”¹⁶ State guardsmen are both members of the organized militia and a reserve component of the armed forces of the United States. “[A] member of the Guard who is ordered to active duty in the federal service is thereby relieved of his or her status in the state Guard for the entire period of federal service.”¹⁷ In other words, Guardsmen “keep three hats . . . a civilian hat, a state militia hat, and an army hat – only one of which is worn at any particular time.”¹⁸

Under the present system, the power of appointing or terminating a state National Guard officer is left to the States.¹⁹ Appointment in the state National Guard, however, is distinct from what is required to become commissioned in the National Guard of the United States. Congress regulates the commissioning of officers in the National Guard of the United States through the process of federal recognition.²⁰

“Federal recognition is the acknowledgment by the Federal Government that an officer [of the state militia] appointed, promoted or transferred to an authorized grade or position vacancy in the . . . National Guard [of the United States] meets the prescribed laws and regulation[s] governing the [appointment, promotion, or transfer].”²¹ Once a state officer receives a federal commission, the officer’s “capacity and general fitness” to retain federal recognition can be investigated at any time by a board composed of commissioned officers of the Regular Military, the United States National Guard, or both.²² Given the current dual enlistment system, it is not surprising that under current law the Governor of Virginia is given the power and the duty “to issue such orders and to prescribe such regulations relating to the organization of the armed forces of the Commonwealth as will cause the same at all times to conform to the federal requirements of the United States government relating thereto.”²³

One final aspect of the modern dual system bears mentioning. Congress provides extensive funding for the training and equipment of state guard units. As the United States Supreme Court has

¹² *Id.*

¹³ *Perpich*, 496 U.S. at 341.

¹⁴ *See id.* at 342-45 (tracing the history of Congressional regulation of state Militias). *See also* Patrick T. Mullins, Note, *The Militia Clauses, The National Guard, and Federalism: A Constitutional Tug of War*, 57 GEO. WASH. L. REV. 328, 332-44 (1988) (tracing the history of the integration of state militias into the national military).

¹⁵ *Perpich*, 496 U.S. at 345.

¹⁶ *Id.*

¹⁷ *Id.* at 346.

¹⁸ *Id.* at 348.

¹⁹ *MacFarlane v. Grasso*, 696 F.2d 217, 226 n.4 (2d Cir. 1982).

²⁰ 32 U.S.C. § 307(d).

²¹ *Frey v. California*, 982 F.2d 399, 401 n.3 (9th Cir.), *cert. denied*, 509 U.S. 906 (1993).

²² 32 U.S.C. § 323(b).

²³ VA. CODE ANN. § 44-9 (2002).

noted, “[t]he Federal Government provides virtually all of the funding, the material, and the leadership for state Guard units.”²⁴ Congress can and has conditioned those funds upon conformity with federal policy. “States that fail to comply with federal regulations risk forfeiture of federal funds allocated to organize, equip and arm state Guards.”²⁵

The dual enlistment system, and the federal recognition process, combined with Congress’s spending power, has meant in practice that Congress set the standards and policy for state Guard units. Although the present system has been criticized for straying far from what the Framers originally intended for the militia, it has been upheld against repeated challenges.²⁶

From this backdrop, several legal conclusions follow. First, the States can continue to hold the power to appoint officers to the state Guard. This power of appointing officers is secured by the express provisions of Article I, § 8, reserving to the States the power to “Appointment of the Officers.”²⁷ Second, Congress will continue to determine the criteria for who is eligible for federal recognition in the National Guard of the United States. Third, Congress, through its spending power, can condition the use of federal funds on the States’ acceptance of DADT. Should the General Assembly wish to evade the conditions attached to federal funding, the General Assembly can raise, equip and fund an independent Virginia militia entirely from state revenues.²⁸

Conclusion

At the present time, I am unable to answer your questions regarding the General Assembly’s authority to retain a DADT policy because the federal regulations repealing DADT have not been issued. Regardless of what form those regulations take, the Constitution expressly reserves to the States the power to appoint officers to the state militias, and that includes the modern National Guard. The power to determine which state Guard officers are eligible for service in the overlapping National Guard of the United States, however, rests with Congress. Moreover, Congress, through its spending power, can condition the use of federal funds on the States’ acceptance of DADT. Should the General Assembly wish to avoid the conditions attached to these funds, it can raise, equip and fund an independent Virginia militia entirely from state revenues.

With kindest regards, I am

Very truly yours,

A handwritten signature in blue ink that reads "Ken C II". The signature is stylized and written in a cursive-like font.

Kenneth T. Cuccinelli, II
Attorney General

²⁴ *Perpich*, 496 U.S. at 351.

²⁵ *Charles v. Rice*, 28 F.3d 1312, 1315-16 (1st Cir. 1994) (citing 32 U.S.C. §§ 101, 107, 108 and 501).

²⁶ *Perpich*, 496 U.S. at 347-48 (rejecting an attack on the “Montgomery Amendment,” which provided authority for federal training of the National Guard without a Governor’s consent); *Selective Draft Cases*, 245 U.S. 366, 368, 389-89 (1918) (upholding the power of the President to draft members of the state militia).

²⁷ U.S. CONST. art. I, § 8.

²⁸ *Perpich*, 496 U.S. at 352.