The News-Gazette
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Our Turn | America's founders rejected federal police force 250 years ago

By PAUL BARDACK and PATRICK NICHOLS
October 10, 2025

On Aug. 25, President Donald Trump signed an executive order which, among other things, directed the Secretary of Defense to "ensure the availability of a standing National Guard quick-reaction force that shall be resourced, trained and available for rapid deployment" in order to "assist federal, state and local law enforcement in quelling civil disturbances and ensuring the public safety."

Almost immediately, prominent elected officials of several states to which the president suggested he might send such troops objected to the legality of such an order. Among them was Democratic Illinois Gov. J.B. Pritzker, who called it "exactly the type of overreach that our country's Founders warned against." He was joined in resistance by Chicago Mayor Brandon Johnson.

Pritzker and Johnson are right. This move by Trump is patently illegal, and it's not even a close call.

Many observers envision that the issue will soon wind up on the Supreme Court docket.

Here's hoping it does. The "originalists" on the court, a majority that includes all of Trump's appointees, believe that provisions in the U.S. Constitution should be read within the context and original meaning of the Founders who wrote the words. If a challenge to the president's plan were to come before them, therefore, they would have no honest choice under originalist doctrine but to declare Trump's move unconstitutional. This is why.

In 1787, when the Founders gathered to ratify the Constitution, urban crime was not unknown to them. For example, murder, robbery, vice, riots, "licentiousness," horse theft, a

growing numbers of “vagrants and idle persons” and so on characterized Philadelphia at the time our Founders met there. As one contemporary observer noted, “the jails were full.”

Nor was Philadelphia unique at the time as a crime-ridden place. As early as the 1750s, New York City was already regarded as the most degenerate of the colonial towns, with frequent brawls spilling out of the saloons, gaming places and houses of prostitution, according to James F. Richardson in “The New York Police: Colonial Times to 1901.”

And colonial-era homicide indictments in New York ranged from two to 11 per 100,000 residents. (In 2024, the “reported homicide” rate, much higher than the “homicide indictment” rate often used during the colonial era, was 5.8 per 100,000 residents, a murder rate well within range of colonial-era New York.)

Still, knowing this, the Constitution’s framers rejected a federal police function in their conception of our republic. States and localities were to police their own populations, not nationalized troops, except in the rarest of circumstances.

As Alexander Hamilton wrote in Federalist 17 (1789): “There is one transcendent advantage belonging to the province of the State governments which alone suffices to place the matter in a clear and satisfactory light — I mean the ordinary administration of criminal and civil justice.”

To be sure, the Second Amendment, written in 1790, states that “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” However, maintaining and deploying such militias — what we today call state national guards — was typically to be done under the authority of a state’s governor, not under the authority of a president.

Thus, the Illinois Constitution, to cite one example, notes that “The Governor is commander-in-chief of the organized militia, except when they are in the service of the United States.”

Certainly, the U.S. Constitution does assert that Congress has the power of “calling forth the Militia ...” Title 10 of the U.S. Code allows the president to call the National Guard of any state into federal service when the nation is invaded or in danger of invasion or during a rebellion. And the Insurrection Act of 1807 grants the president the power to deploy troops domestically to suppress an insurrection, domestic violence or conspiracy that obstructs the enforcement of laws, even without a governor’s consent.

But the power of a president or Congress to federalize the Guard is not open-ended and subject to politically motivated whim. Very deliberately, it is limited by long-standing federal law. Both Title 10 and the Insurrection Act make clear that there is a high threshold for federalizing the Guard, and that a president's or Congress' requiring the Guard to engage in routine local law enforcement is illegal and unacceptable. And, to further drive home the point, the Posse Comitatus Act of 1878 prohibits in most instances the use of federal military personnel to enforce domestic policies.

That's why, just the other day, a federal judge in California ruled against Trump's federalization of the Guard in Los Angeles.

Crime rates are already falling dramatically in many of the cities to which the president has said he is considering sending federalized troops, including Chicago, Baltimore, New York, Oakland and San Francisco.

None of those cities is confronting insurrection or invasion. None is confronting the sort of massive and otherwise uncontrollable upheaval required under federal law for such deployment.

These cities, the targets of Trump's wrath, are instead engaging in the "ordinary administration of criminal and civil justice," exactly as envisioned by Hamilton and subsequently by multiple generations of federal lawmakers.

There is thus no legal justification whatsoever for Trump's federalization of the National Guard.

Some 250 years ago, as most originalist judges and scholars know, our nation's Founders would have told Trump the same thing.

Paul Bardack, left, and Patrick Nichols are co-founders of the State and Local Human Rights Center, a Washington, D.C.-based nonprofit designed to emphasize greater state constitutional protection of rights now under increasing federal assault.