STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

May 6, 2021

Opinion No. 21-05

Militias

QUESTION 1

Is the Tennessee State Guard a militia, as contemplated by the Constitution of Tennessee, or is it part of the Army of this State, similar to the National Guard?

OPINION 1

The Tennessee State Guard, like the Tennessee National Guard, is a militia under the Constitution of Tennessee.

QUESTION 2

Is a militia currently authorized under the laws of this State to deploy and defend persons or property during a civil disorder or riot, a declared civil emergency, or a curfew?

OPINION 2

While Tennessee Code Ann. § 58-1-301 provides that the governor may call the militia into service at any time that "public safety" requires it, that law does not appear to comport with article III, section 5 of the Tennessee Constitution.

QUESTION 3

Using the definition of "militia" as a group of private citizens who are armed and trained for military service apart from the regular armed forces, does the Constitution of Tennessee prohibit Tennessee residents from organizing into local or regional militias?

OPINION 3

Yes. The Constitution of Tennessee prohibits a group of private citizens who are armed and trained for military service apart from the regular armed forces from organizing into local or regional militias.

QUESTION 4

Do any state statutes, including Tennessee Code Ann. § 39-17-314, prohibit or otherwise restrict Tennessee residents from organizing into local or regional militias or the activities such militias may undertake?

OPINION 4

Yes. Tennessee Code Ann. § 39-17-314 prohibits Tennessee residents from participating in paramilitary activities that are undertaken in furtherance of a "civil disorder." Additionally, any number of provisions of Tennessee's Criminal Code could apply depending on the circumstances in which paramilitary activities are undertaken.

QUESTION 5

Do the answers to Questions 3 and 4 differ if the only firearms training that is conducted by a militia is focused on self-defense or intended to teach the safe handling and use of firearms?

OPINION 5

No. As explained in Opinion 3, the Constitution of Tennessee prohibits private individuals from organizing into local or regional militias. While the Second Amendment to the U.S. Constitution confers an individual right to possess a firearm and to use that firearm for traditionally lawful purposes, such as self-defense within the home, the Second Amendment does not include the right to form and train as private, independent militias.

The state statutes referred to in Opinion 4 that prohibit paramilitary activities could apply depending on the circumstances in which the paramilitary activities are undertaken.

QUESTION 6

May a local government organize, coordinate, or partner with a militia for civil defense, including defending persons and property, during a civil disorder or riot, a civil emergency, or curfew?

OPINION 6

No. As explained in Opinion 3, the Constitution of Tennessee prohibits private individuals from organizing into local or regional militias; thus, a local government may not coordinate or partner with such a militia. Moreover, local governments may not organize their own militias because they lack the authority to do so.

QUESTION 7

If a local government were to organize or enter into an official arrangement with a local or regional militia, would the militia be considered a governmental military force as defined in

Tennessee Code Ann. § 39-17-314(a)(2)(B) and exempt from the training restrictions described in that statute?

OPINION 7

In light of Opinion 6, this question is moot.

QUESTION 8

If a local government were to organize or enter into an official arrangement with a local or regional militia, would the local government be liable for any acts of the militia within the scope of the arrangement? Would members of the militia be considered to be agents of the local government?

OPINION 8

In light of Opinion 6, this question is moot.

QUESTION 9

If a militia engages in the armed defense of persons or property, is the militia subject to laws regarding the use of deadly force and the possession and carrying of firearms under Chapter 11, Part 6 and Chapter 17, Part 13 of the Tennessee Code? Does the answer differ if militia is organized by or in coordination or partnership with a local government?

OPINION 9

In light of Opinions 3, 4, 5, and 6, these questions are moot.

ANALYSIS

Ever since Tennessee attained statehood in 1796, its Constitution has provided that the governor "shall be commander-in-chief of the Army and Navy of this State, and of the Militia, except when they shall be called into the service of the United States."[1] Tenn. Const. art. III, § 5. In conformance with this provision, the General Assembly has provided that "[t]he military forces of the state . . . [are] divided into three parts, as follows: the army, the navy, and the militia," Tenn. Code Ann. § 58-1-104(a), and it has provided for the extensive regulation of these forces, *see id.* §§ 58-1-101 to 58-1-706. Further, in conformity with Tennessee's Constitution, the General Assembly has bestowed comprehensive powers upon the governor so that he may fulfill his role as commander-in-chief of the State's military forces. *See id*. § 58-1-105.

Importantly, giving the governor these comprehensive powers and establishing the State's military forces achieves compliance with another constitutional provision that requires the State have full authority over its military forces. Article I, section 24, which has also appeared in every

[1] Tenn. Const. art. II, § 5 (1796); Tenn. Const. art. III, § 5 (1834); Tenn. Const. art. III, § 5 (1870).

Tennessee Constitution since 1796, commands "that in all cases the military shall be kept in strict subordination to the civil authority."[2] Tenn. Const. art. I, § 24.

In short, the Tennessee Constitution vests the State with exclusive control over its military forces. Accordingly, the State's authority over its military forces is subject only to state and federal constitutional restraints. *Houston v. Moore*, 18 U.S. 1, 8-9 (1820) (recognizing the right of control of the militia by the respective States and their right to legislate regarding the militia as concurrent with that of Congress, within constitutional limitations, with the right of the State yielding to the superior right of Congress acting within said limitations); *see Fentress Cnty. Beer Bd. v. Cravens*, 356 S.W.2d 260, 263 (Tenn. 1962) (General Assembly may not enact law which federal or Tennessee Constitution prohibits).

As explained below, the State's plenary authority over its militia precludes local governmental entities and private persons from organizing militias. Constitutional restraints do not inhibit the State's authority. But the governor's authority to call the State's militia into service is constrained by constitutional limitations.

Article I, Section 8 of the U.S. Constitution and State Militias

1. Article I, Section 8 of the U.S. Constitution gives Congress the power to provide for "the common defense and the general welfare of the United States." U.S. Const. art. I, § 8, cl. 1. Further, Congress has the power to raise and support armies, provide and maintain a navy, and organize and call forth "the militia." *See id.* cls. 12, 13, 15, 16.

According to founding-era sources, "'the Militia comprised all males physically capable of acting in concert for the common defense.'" *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)). *Accord Andrews v. State*, 50 Tenn. 165, 178, 183 (1870) (recognizing that citizens make up the yeomanry of the land and the body of the militia, which is the natural defense of a free country against sudden foreign invasion, domestic insurrection, and domestic usurpations of power by rulers). More specifically,

> the common understanding [of a militia] is . . . 'a body of armed citizens trained to military duty, who may be called out in certain cases, but may not be kept on service like standing armies, in time of peace.' That is the case as to the active militia of this State. The men comprising it come from the body of the militia, and when not engaged at stated periods in drilling and other exercises, they return to their usual avocations, as is usual with militia, and are subject to call when the public exigencies demand it.

Perpich v. Department of Defense, 496 U.S. 334, 348 (1990) (quoting *Dunne v. People*, 94 Ill. 120 (1879)).

In other words, "[i]n a militia, the character of the labourer, artificer, or tradesman, predominates over that of the soldier: in a standing army, that of the soldier predominates over

[2] Tenn. Const. art. XI, § 24 (1796); Tenn. Const. art. I, § 24 (1834); Tenn. Const. art. I, § 24 (1870).

every other character; and in this distinction seems to consist the essential difference between those two different species of military force." *United States v. Miller*, 307 U.S. 174, 179 (1939) (citation and internal quotation marks omitted).

The preservation of the militia in Article I, Section 8 was part of an important compromise of two conflicting themes that developed at the Constitutional Convention:

> 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.

Perpich, 496 U.S. at 340 (footnotes omitted).

The Framers reconciled these competing concerns by establishing a standing army while protecting the existence of militias in Article I, Section 8.[3] *See id*.

The Framers also provided for a balance of power over the militia between the federal government and the States. Through two clauses, commonly described as the Militia Clauses,[4] Article I, Section 8 grants power to Congress over the Militia, while reserving certain power to the States. The first clause authorizes Congress "[t]o provide for calling forth militia to execute the laws of the Union, suppress insurrections and repel invasions." U.S. Const. art. I, § 8, cl. 15. The second clause 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, reserving to the states respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress.

Id. cl. 16.

Congress first exercised its power under the Militia Clauses when it passed the National Militia Act in 1792. 14 U.S. Att'y Gen. Op. 490, 493, 1874 WL 4105, at *3 (Nov. 11, 1874); *see Heller*, 554 U.S. at 596. The Act commanded that every able-bodied male citizen between the ages of 18 and 45 enroll in the militia and equip himself with appropriate weaponry. Militia Act of 1792, ch. 33, 1 Stat. 271. Consistent with the Militia Clauses, the Act did not create a militia, it merely "organized" the existing militia, and left it to the States to train the militia according to the discipline prescribed by Congress. *See Heller*, 554 U.S. at 596; *Houston*, 18 U.S. at 13-15.

[3] The existence of militias is also protected in the Second Amendment to the United States Constitution. *See Miller*, 307 U.S. at 178. This constitutional provision is discussed later in this Opinion.

[4] *See Perpich*, 496 U.S. at 337 n. 3.

While the National Militia Act of 1792 stood until 1901, the Act had been a failure.[5] *See Perpich*, 496 U.S. at 341. In its place, Congress enacted the Dick Act which divided the class of able-bodied male citizens between 18 and 45 years of age into an "organized militia" to be known as the National Guard of the several States, and the remainder of which was described as the "reserve militia," and which later statutes have termed the "unorganized militia." *Id*. at 342. This Act marked the beginning of a series of Acts over the next thirty years that "federalize[d]" the National Guard and produced our modern-day National Guard system. *See id*. at 342-45.

The federalization of the National Guard resulted in "two overlapping but distinct organizations . . . – the National Guard of the various States and the National Guard of the United States." *Id*. at 345 (internal quotation marks omitted). All persons who enlist in a state National Guard unit simultaneously enlist in the National Guard of the United States. *Id*. Under this system, state guardsmen are both members of the "organized militia" and a reserve component of the armed forces of the United States. *See id*. at 337 n.1, 345-46, 347 n. 19; 10 U.S.C. § 246.[6] When a member of the Guard is ordered to active duty in the federal service, he or she is thereby relieved of his or her status in the state Guard for the entire period of federal service. *Perpich*, 496 U.S. at 346. Upon being relieved from active federal service, the individual reverts to National Guard status. *Id*. at 348.

Important here, courts examining the newly created National Guard System consistently and early on agreed that the National Guard remained "militia" when not in federal service. *See United States ex rel. Gillett v. Dern*, 74 F.2d 485, 487 (D.C. Cir. 1934); *Oregon-Washington R.R. & Navigation Co. v. U.S.*, 60 Ct. Cl. 458, 465 (Ct. Cl. 1925); *Alabama Great S. RR. Co. v. United States*, 49 Ct. Cl. 522, 531 (Ct. Cl. 1914); *Bianco v. Austin*, 197 N.Y.S. 328, 330 (N.Y. App. Div. 1st Dept. 1922); *State v. Johnson*, 202 N.W. 191, 194 (Wis. 1925). Particularly instructive is the rationale set forth in *Alabama Great S. RR. Co. v. United States*, wherein the court found that the National Guard was militia when not in federal service, as opposed to "troops":

> Whether militia be defined as "the body of soldiers in a State, enrolled for discipline but not engaged in actual service except in emergencies as distinguished from regular troops or a standing army," Black's Law Dict., or as "a body of men enrolled and drilled according to military law as an armed force, but not as regular soldiers," Cent. Dict., or more comprehensively "that portion of the people who are capable of

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[5] *See* Frederick Bernays Wiener, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181, 187 (Dec. 1940) (explaining that the basic fallacy of the Act was that it imposed a duty on everyone, with the result this duty was discharged by no one).

[6] 10 U.S.C. § 246 provides:

> (a) The militia of the United States consists of all able-bodied males at least 17 years of age and, except as provided in section 313 of title 32, under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are members of the National Guard.
> (b) The classes of the militia are
> (1) the organized militia, which consists of the National Guard and the Naval Militia; and
> (2) the unorganized militia, which consists of the members of the militia who are not members of the National Guard or the Naval Militia.

> bearing arms, the arms-bearing population," per Stone, J., in McCant's case, 39 Ala., 112, or as "citizen soldiers," as some described the militiamen, we think the description of the organized and reserved militia given in [the Dick Act] of 1903 sufficiently meets the requirements of this case.
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> The word 'troops' conveys to the mind the idea of an armed body of soldiers whose sole occupation is war or service, answering to the Regular Army. The organization of the active militia of the State bears no likeness to such a body of men.

Alabama Great S. RR., 49 Ct. Cl. at 531, 536.

More recently, the United States Supreme Court has confirmed that the National Guard remains militia when not in federal service. *See Perpich*, 496 U.S. at 348; *see also Maryland ex rel. Levin v. United States*, 381 U.S. 41, 46 (1965), *vacated on other grounds*, 382 U.S. 159 (1965) ("[t]he National Guard is the modern Militia reserved to the States by Art. I, § 8 cl[s]. 15, 16 of the Constitution"). Accordingly, members of the Tennessee National Guard[7] are part of the army only when called to active federal duty. Other than those brief periods of federal service, its members "continue to satisfy the description of a militia." *Perpich*, 496 U.S. at 348; *Bredesen v. Rumsfeld*, No. 3:05-0640, 2005 WL 2175175, at *7 (M.D. Tenn. Sept. 7, 2005) ("While the National Guard can be called into federal service, it is a state militia when not called to active federal duty.").

Similarly, the Tennessee State Guard[8] meets the description of a militia. The Tennessee State Guard is a "defense force,"[9] which is authorized under federal law. *See* 32 U.S.C. § 109(c). Congress permitted the States to establish defense forces when the National Guard was federalized so that a State could have a "separate militia of its own."[10] *Perpich*, 496 U.S. at 352. These forces are like the National Guard and perform similar services, *see generally* Tenn. Code Ann. §§ 58-1-401 to -412, but unlike Tennessee National Guard members, defense forces are statutorily exempt from being called into the armed forces, *see* 32 U.S.C. § 109(c).[11]

In short, for the same reasons that the National Guard satisfies the description of a militia, the Tennessee State Guard meets that description. The Tennessee State Guard is drawn from that portion of the people who are capable of bearing arms, and its members are enrolled and drilled

[7] *See* Tenn. Code Ann. § 58-1-104(b); *see generally* Tenn. Code Ann. §§ 58-1-104 to 58-1-235.

[8] *See* Tenn. Code Ann. § 58-1-104(b); *see generally* Tenn. Code Ann. §§ 58-1-401 to -412.

[9] *See* Tenn. Code Ann. § 58-1-401.

[10] Defense forces are "unorganized militia" under 10 U.S.C. § 246(b). *See* note 6, *supra*.

[11] The *Perpich* Court observed that while it is true that defense forces may not be called into the armed forces, they could be subject to domestic national militia duty under 10 U.S.C. §§ 331-33 [now codified at 10 U.S.C. §§ 251-253], which distinguishes the "militia" from the "armed forces" and appears to subject all portions of the "militia" – organized or not – to call if needed for the purposes specified in the Militia Clauses. *Perpich*, 496 U.S. at 352 n. 25.

according to military law as an armed force, but not as regular soldiers. *See Alabama Great S. RR.*, 49 Ct. Cl. at 531. "'[W]hen not engaged at stated periods in drilling and other exercises, they return to their usual avocations, as is usual with militia, and are subject to call when the public exigencies demand it.'" *See Perpich*, 496 U.S. at 348 (quoting *Dunne*, 94 Ill. at 120).

Accordingly, Tennessee constitutional provisions addressing militias apply to the Tennessee State Guard, as well as the Tennessee National Guard, because both entities meet the description of militia as that term was used in founding-era sources.[12]

Calling the State Militia into Service

2. Tennessee Code Ann. § 58-1-301 authorizes the governor to call the militia into service when "public safety" requires it: "The governor, with the advice and consent of the general assembly, and pursuant to the laws of the United States, shall call the militia, or any portion thereof, into active service at any time that public safety requires it; . . . ." Tenn. Code Ann. § 58-1-301.

Tennessee's Constitution, however, only permits the governor to call the State's militia into service under very limited circumstances. Unlike the broader federal constitutional provision that states that "Congress shall have Power . . . to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions," U.S. Const. art. I, § 8, cl. 15, Tennessee's Constitution provides that "the Militia shall not be called into service *except in case of rebellion or invasion*, and then only when the General Assembly shall declare, by law, that the public safety requires it," Tenn. Const. art. III, § 5 (emphasis added).[13]

In short, only circumstances amounting to a rebellion or invasion permit the governor to call out the militia, and even then, the legislature must declare, by law, that the public safety requires it. Accordingly, past statutes that have granted authority to the governor to call the militia into service beyond these narrow circumstances have been found unconstitutional. For instance, the Tennessee Supreme Court perfunctorily found an Act that empowered the governor to call out the militia when he deems it necessary, to suppress riots, insurrections, mobs, or breaches of the peace to be unconstitutional under article III, section 5. S*ee Green v. State*, 83 Tenn. 708, 710-11 (1885). Similarly, a federal court held unconstitutional a later Act that permitted the governor to assign the Tennessee National Guard to any duty in the execution of the laws of this State or to employ the Guard in any locality not sufficiently protected by the civil authorities against invasion, rebellion, insurrection, riot, storm, flood, fire, or other emergency or disaster. *See Joyner v. Browning*, 30 F.Supp. 512, 515, 517 (W.D. Tenn. 1939).

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[12] The conclusion that the Tennessee National Guard and Tennessee State Guard are militia comports with another observation of the *Perpich* Court: Several federal constitutional provisions commit matters of foreign policy and military affairs to the exclusive control of the Unites States. *See Perpich*, 496 U.S. at 353. For instance, Article I, Section 10, cl. 3 of the U.S. Constitution forbids the States to keep troops in time of peace without the consent of Congress. *See id*. at 353 n. 26; *Miller*, 307 U.S. at 178-79 (the militia that States were expected to maintain and train stands in contrast to the troops that they were forbidden to keep without the consent of Congress).

[13] This provision did not appear in article III, section 5 of Tennessee's Constitution until Tennessee adopted the Constitution of 1870. The provision's inclusion in the 1870 Constitution appears to be in response to Governor Brownlow's abuse of power in calling the militia into service. *See* Lewis L. Laska, *A Legal and Constitutional History of Tennessee*, 1772-1972, Mem. St. U. L. Rev. 563, 638 (1976).

Current law authorizing the governor to call the militia into service when "public safety" requires it appears to suffer the same infirmities as the Acts described above.[14]

Organization and Formation of Private Militias

3. The Constitution of Tennessee prohibits a group of private citizens who are armed and trained for military service apart from the regular armed forces from organizing into local or regional militias. Tennessee's Constitution commands "that in all cases the military shall be kept in strict subordination to the civil authority," Tenn. Const. art. II, § 24, and to this end provides that the governor is to be commander-in-chief of the army, navy and militia of this State, *id*. art. II, § 5.

The militia under the State's control through the State's regulatory scheme include not only the "organized militia," such as the Tennessee National Guard and the Tennessee State Guard, but also all able-bodied male citizens who are residents of this State and are between 18 and 45 years old. *See* Tenn. Code Ann. § 58-1-104.[15] Further, the Tennessee Constitution makes it clear that

[14] Similarly suspect is Tenn. Code Ann. § 58-1-106, which provides:

> (a) The governor shall have the power, in case of invasion, disaster, insurrection, riot, attack, or combination to oppose the enforcement of the law by force and violence, or imminent danger thereof, or other grave emergency, to order into the active service of the state, for such period, to such extent and in such manner as the governor may deem necessary, all or any part of the national guard or the Tennessee state guard, but, in accordance with the constitution, may not call the militia into service except in case of rebellion or invasion, and then only when the general assembly shall declare by law that the public safety requires it.
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> (c) As an alternative and cumulative procedure, upon the request of the governing body of a city or county, and its representation, by resolution duly and regularly adopted, that there is a breakdown of law and order, a grievous breach of the peace, a riot, resistance to process of this state, or disaster, or imminent danger thereof, the governor may order into the active service of the state, for such period, to such extent and in such manner as the governor may deem necessary, all, or any part of, the national guard, or the Tennessee state guard.

While the statute incorporates the constitutional command of article III, section 5, some of the statute's substantive provisions with respect to calling the Tennessee National Guard and the Tennessee State Guard into service do not comport with that command, *e.g*., allowing the governor to call forth these entities as he "may deem necessary," permitting these entities to be called into service for "disaster."

[15] Tenn. Code Ann. § 58-1-104 provides:

> (a) The military forces of the state, in conformity with the Constitution of Tennessee, shall be divided into three (3) parts, as follows: the army, the navy and the militia.
> (b) The army shall be composed of an army national guard and an air national guard, which forces, together with an inactive national guard, when such is authorized by the laws of the United States and regulations issued pursuant thereto, shall comprise the Tennessee national guard; and the Tennessee state guard, whenever such a state force shall be duly organized, and its reserve.
> (c) The navy shall consist of such naval or sea forces as may be duly organized.

there are only certain circumstances in which the militia may be called forth by the governor. *See* Tenn. Const. art. III, § 5**.**

The Tennessee Constitution and implementing statutes are in keeping with the federal Constitution, which specifically reserves to the States "the authority of training the militia according to the discipline prescribed by Congress." U.S. Const. Art I, § 8, cl. 16. The United States Supreme Court has recognized that the practical effect of this constitutional provision is that "[t]rained professionals, subject to the day-to-day control of the responsible civilian authorities, necessarily must make comparative judgments on the merits of training, equipping, and controlling military forces with respect to their duties under the Constitution." *Gilligan v. Morgan*, 412 U.S. 1, 8 (1973). In other words, "[t]he complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches," *id*. at 10; they are not decisions to be made by groups of private citizens. *See Presser v. Illinois*, 116 U.S. 252, 267 (1886).

Significant here, the *Presser* Court's observation that the power to regulate the militia is conferred upon the federal and state governments occurred as it upheld a state statute prohibiting private military organizations. *Id*. The Court declared:

> The right voluntarily to associate together as a military company or organization, or to drill or parade with arms, without, and independent of, an act of congress or law of the state authorizing the same is not an attribute of national citizenship. Military organization and military drill and parade under arms are subjects especially under the control of the government of every country. They cannot be claimed as a right independent of law. Under our political system they are subject to the regulation and control of the state and federal governments . . . .

Id.

The Court further reasoned that the exercise of this power was necessary to maintain "public peace, safety and good order. To deny the power would be to deny the right of the state to disperse assemblages organized for sedition and treason, and the right to suppress armed mobs bent on riot and rapine." *Id*. at 268.

Finally, the *Presser* Court found that State anti-militia laws "do not infringe the right of the people to keep and bear arms" under the Second Amendment to the United States Constitution.[16] *Id*. at 264-65. Significantly, that determination was recently confirmed by the

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> (d) The militia shall consist of all able-bodied male citizens who are residents of this state and between eighteen (18) and forty-five (45) years of age and who are not members of the army or navy as hereinabove defined, and who may not otherwise be exempted by the laws of this state or the United States.

[16] The Second Amendment provides: "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." Similarly, article I, section 24 of the Tennessee Constitution provides "[t]hat the sure and certain defense of a free people is a well regulated militia . . . " and article I, section 26 provides "[t]hat the citizens of this State have right to keep and to bear arms for their common defense .

United States Supreme Court. *See Heller*, 554 U.S. at 621. In holding that the Second Amendment confers an individual right to possess a firearm and to use that firearm for traditionally lawful purposes, such as self-defense within the home, *id.* at 595, 635, the Court specifically conveyed that its "individual rights interpretation" of the Second Amendment did not conflict with its declaration in *Presser* that the Second Amendment does not prevent the prohibition of private paramilitary organizations, *id*. at 621.

Accordingly, private groups have no authority to organize as militias or to engage in functions reserved to the state militia. The Tennessee Constitution vests the exclusive control of the organized and unorganized militia with the State. The Second Amendment does not displace that authority because the Second Amendment does not afford private paramilitary organizations a constitutional right to train as a militia.

State Law Prohibiting Organization and Formation of Private Militias

4. Tennessee Code Ann. § 39-17-314 prohibits Tennessee residents from participating in paramilitary activities that are taken in furtherance of a "civil disorder."[17] Specifically, "[a] person commits an offense who assembles with one (1) or more persons for the purpose of training or instructing in the use of, or practicing with, any technique or means capable of causing property damage, bodily injury or death with the intent to employ such training, instruction or practice in the commission of a civil disorder." Tenn. Code Ann. § 39-17-314(b).

Moreover, paramilitary activities undertaken while wearing law enforcement or military-type attire could give rise to a violation of Tennessee Code Ann. § 39-16-301, which addresses criminal impersonation. Under this statute, "a person commits criminal impersonation who, with intent to injure or defraud another person pretends to be an officer or employee of the government." *Id*. § 39-16-301(a)(3). Additionally, "[a] person commits criminal impersonation who pretends to be a law enforcement officer for the purpose of: (1) Engaging in an activity that is ordinarily and customarily an activity established by law as a law enforcement activity; and (2) Causing another to believe that the person is a law enforcement officer." *Id*. § 39-16-301(b).

It is likewise an offense for a person to falsely represent to another, by conduct or dress, that such person is a member of the armed forces of the United States, *id*. § 58-1-119, or to improperly use or display military decorations, medals, or badges, *id*. § 58-1-118.

Additionally, any number of provisions of Tennessee's Criminal Code could apply depending on the circumstances in which paramilitary activities are undertaken. *See, e.g*., *id*. § 39-16-1307(a) (offense to carry a firearm with the intent to go armed) (as amended by 2021 Tenn. Pub. Acts, ch. 108 to "constitutional carry" as signed by Gov. on Apr. 8 and effective July 1, 2021);

. . ." The Tennessee Supreme Court has observed that "the same rights, and for similar reasons, were being provided for and protected in both the Federal and State Constitutions." *Andrews*, 50 Tenn. at 177; *see Aymette v. State*, 21 Tenn. 154, 157 (1840) (explaining that article I, section 26 of the Tennessee Constitution was adopted with the same goals as the Second Amendment).

[17] "'Civil disorder' means any public disturbance involving acts of violence by an assemblage of two (2) or more persons which acts cause an immediate danger of or result in damage or injury to the property or person of any other individual." Tenn. Code Ann. § 39-17-314(a)(1).

§§ 39-17-1311(a), (b)(1)(C) (making it an offense to possess or carry certain weapons with the intent to go armed in designated public areas).

Organization and Formation of Militias by Local Governmental Entities

6. Local governments may not coordinate or partner with a militia for civil defense. As explained in Opinion 3, the Constitution of Tennessee prohibits private individuals from organizing into local or regional militias; thus, a local government may not coordinate or partner with such a militia.

Moreover, local governments may not organize their own militias because they lack the authority to do so. While the General Assembly has conferred wide-ranging emergency management powers upon political subdivisions, *see id.* § 58-2-110, and it has authorized the chief administrative officer of metropolitan governments and certain municipalities to issue certain orders following the proclamation of a civil emergency, *see id.* § 38-9-104, neither of these statutes authorizes local governments to organize a militia for civil defense. It is well established that counties and municipalities have only those powers expressly granted by, or necessarily implied, from statutes. *City of Lebanon v. Baird*, 756 S.W.2d 236, 241 (Tenn. 1988); *Bayless v. Knox Cnty*., 199 Tenn. 268, 281, 286 S.W.2d 579, 585 (1956). Thus, in order for a local government to organize its own militia, there must be a positive grant of authority to do so. *See Southern Constructors, Inc. v. Loudon Cnty. Bd. of Educ*., 58 S.W.3d 706, 712 (Tenn. 2001). Neither Tennessee Code Ann. § 58-2-110 nor Tennessee Code Ann. § 38-9-104 contains the requisite positive grant of authority.

Furthermore, none of the broad powers bestowed upon local governments under these statutes, such as the power to appoint personnel and volunteer workers under Tennessee Code Ann. § 58-2-110 or the power to issue orders under Tennessee Code Ann. § 38-9-104 "as are necessary for the protection of life and property," may be construed to authorize local governments to organize militias because the Tennessee Constitution and implementing statutes vest *exclusive* control of the militia with the State. A construction which places one statute in conflict with another is to be avoided. *Cronin v. Howe*, 906 S.W.2d 910, 912 (Tenn. 1995). Accordingly, specific statutory provisions control over conflicting general provisions. *Arnwine v. Union Cnty. Bd. of Educ*., 120 S.W.3d 804, 809 (Tenn. 2003). "'[W]here the mind of the legislature has turned to the details of a subject and they have acted upon it, a statute treating the subject in a general manner should not be considered as intended to affect the more particular provision.'" *Id*. (quoting *Woodroof v. City of Nashville*, 183 Tenn. 483, 192 S.W.2d 1013, 1015 (1946)).

7., 8., and 9. Since (a) the Tennessee Constitution prohibits private individuals from organizing into local or regional militias, (b) a local government may not coordinate or partner with such a militia, and (c) local governments lack authority to organize their own militias, Questions 7, 8, and 9 are moot and do not warrant analysis.

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