

**SENATE JUDICIARY COMMITTEE**  
**Senator Thomas Umberg, Chair**  
**2023-2024 Regular Session**

SB 901 (Umberg)  
Version: April 15, 2024  
Hearing Date: April 23, 2024  
Fiscal: Yes  
Urgency: No  
AWM

**SUBJECT**

The military: eligibility

**DIGEST**

This bill provides that a person is not eligible to commission or enlist in, and must be discharged from, the California National Guard or State Guard if they actively participate to advocate for, or engage in, the use of unlawful force, unlawful violence, or other means to deprive an individual of their rights, as specified.

**EXECUTIVE SUMMARY**

Extremism in the military has long been understood to pose a threat to unit safety and cohesion. At the federal level, servicemembers report that fellow servicemembers express extremist views disturbingly often; a Department of Defense study found a “disturbing” level of extremist beliefs and behavior within the ranks.

The California National Guard is a part of the National Guard of the United States, a dual federal-state military reserve force. The California State Guard is a unit that provides assistance and training to the California National Guard and is a military force of California. Both of these units fall under state control, with the California National Guard falling under federal control as well. Current law provides numerous bases prohibiting an individual from joining the California National Guard or the California State Guard.

This bill adds to the restrictions on who may enlist or be commissioned in the California National Guard and California State Guard, and adds bases for administrative discharge, relating to a servicemember or potential servicemember’s active participation in extremist activities, specifically, advocating for, or engaging in, the use of unlawful force, unlawful violence, or other illegal means to deprive an individual of their rights under the United States Constitution or the laws of the United States, including the laws of a state, commonwealth, territory, or the District of Columbia, or a political

subdivision thereof, in accordance with Department of Defense regulations. The activities prohibited by the bill, and the requirement that the person be an active participant in those activities, is consistent with existing First Amendment restrictions on the conduct of members of the Armed Forces.

This bill is sponsored by the author. The Committee has not received timely opposition to this bill. The Senate Military and Veterans Affairs Committee passed this bill with a vote of 5-0.

### **PROPOSED CHANGES TO THE LAW**

Existing constitutional law:

- 1) Provides that Congress shall make no law abridging the freedom of speech, or the right of the people to peaceably assemble, and to petition the government for redress of grievances. (U.S. Const., 1st amend. & 14th amends.; see *Gitlow v. People of State of New York* (1925) 268 U.S. 652, 666 (First Amendment guarantees apply to the states through the due process clause of the Fourteenth Amendment).)
- 2) Provides that every person may freely speak, write, and publish their sentiments on all subjects, and that a law may not restrain or abridge liberty of speech. (Cal. Const., art. I, § 2.)
- 3) Provides that that the people have the right to petition for redress of grievances and assemble freely to consult for the common good. (Cal. Const., art. I, § 3.)

Existing federal law:

- 1) Establishes the Army National Guard of the United States and the Air National Guard of the United States. (10 U.S.C. §§ 10105, 10111.)
- 2) Provides that the Army National Guard is a component of the Army and Air National Guard is a component of the Air Force, when they are in the service of the United States. (10 U.S.C. §§ 10106, 10112.)
- 3) Provides that members of the Army National Guard and Air National Guard are not in active Federal service except when ordered thereto under law. (10 U.S.C. § 12401.)
- 4) Provides that members of the National Guard called into Federal service are, from the time when they are equipped to respond to the call, subject to the laws and regulations governing the Army or the Air Force, as the case may be, except those applicable only to members of the Regular Army or Regular Air Force. (10 U.S.C. § 12405.)

- 5) Provides that, whenever Congress determines that more units and organizations are needed for the national security than are in the regular components of the ground and air forces, the Army National Guard and the Air National Guard, or such parts of them as are needed, shall be ordered to active Federal duty and retained as long as so needed. (32 U.S.C. § 102.)
- 6) Provides that each State, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands may fix the location of the units and headquarters of its National Guard, and unless as otherwise specifically provided in federal law, the organization and the composition of the Army National Guard and Air National Guard shall be the same as those prescribed for the Army and Air Force, respectively, subject to general exceptions as the Secretary of the Army or Secretary of the Air Force may authorize. (32 U.S.C. § 104.)
- 7) Provides that, to be eligible for enlistment in the National Guard, a person must be at least 17 years of age and under 45, or under 64 years of age and a former member of the Regular Army, Regular Navy, Regular Air Force, or Regular Marine Corps. (32 U.S.C. § 313.)
- 8) Provides that the discipline, including training, of the Army National Guard shall conform to that of the Army, and the discipline, including training, of the Air National guard shall conform to that of the Air Force; and the training of the National Guard shall be conducted by the States and listed territories. (32 U.S.C. § 501.)

Existing state law:

- 1) Provides that all acts of Congress relating to the control, administration, and government of the Army of the United States and the United States Air Force and relating to the control, administration, and government of the United States Navy, and all rules and regulations adopted by the United States for the government of the National Guard and Naval Reserve or Naval Militia, so far as the same are not inconsistent with the rights reserved to this State and guaranteed under the Constitution of the State, constitute the rules and regulations for the government of the militia. (Mil. & Vet. Code, § 101.)
- 2) Adopts the Uniform Code of Military Justice (UCMJ) and the rules and regulations adopted thereunder, together with the Manual for Courts-Martial, United States, as part of the Military and Veterans Code and provides that they are applicable except as otherwise provided in the Military and Veterans Code or in the California Manual for Courts-Martial or other regulations adopted by the Governor Adjutant General, to the active militia, including the California National Guard. (Mil. & Vet. Code, § 102.)

- 3) Provides that the California National Guard consists of general officers, the several staff corps and departments, as prescribed in specified tables of organization; the officers and enlisted persons on the retired and the reserve lists; and the organizations forming the National Guard and the persons enlisted or commissioned therein. (Mil. & Vet. Code, § 210.)
- 4) Provides that persons to be commissioned in the National Guard shall be selected from those eligible for federal recognition in accordance with Army and Air National Guard Regulations promulgated by the Department of the Army or the Department of the Air Force, and from former commissioned officers of the Army or Air Force, as specified. (Mil. & Vet. Code, § 222.)
- 5) Provides that the qualifications for enlistment and re-enlistment in the National Guard and the term and form of oath shall at all times conform to the requirements of the laws of the United States and of this State and to regulations promulgated by the Department of the Army or the Department of the Air Force, as specified, or any reserve component thereof, as specified. (Mil. & Vet. Code, § 250.)
- 6) Establishes the causes for discharge of enlisted National Guard personnel as:
  - a) Expiration of term of service.
  - b) Attainment of the age of 64 years.
  - c) Acceptance of appointment as a commissioned officer in the state or federal service.
  - d) To enlist in the United States Army, Navy, Marine Corps, Air Force, Space Force, or Coast Guard.
  - e) To accept appointment in the United States Military Academy, Naval Academy, Air Force Academy, or Coast Guard Academy.
  - f) To accept appointment as a flying cadet.
  - g) To re-enlist.
  - h) Discontinuance of the organization in which the person is serving.
  - i) Change of residence.
  - j) Certificate of disability.
  - k) Inaptness or misconduct.
  - l) Fraudulent enlistment.
  - m) Action of civil or military court.
  - n) Draft into the service of the United States.
  - o) Business or educational interference.
  - p) Any other reason which the Governor deems adequate and satisfactory.
  - q) For the best interests of the military service.
  - r) For the good of the service.
  - s) For absence without leave. (Mil. & Vet. Code, § 260.)
- 7) Provides that the discharge of enlisted personnel under 6) must be effected by order of the Governor, under such regulations as may have been prescribed, or as

authorized by provisions prescribed for the National Guard by the United States government, provided that those provisions are not inconsistent with state law; except that the Adjutant General may discharge a person who is absent without leave for 90 days or more. (Mil. & Vet. Code, § 261.)

- 8) Establishes the State Guard as a force additional and distinct from the National Guard as the reserve force that provides assistance and training to the California National Guard, as specified. (Mil. & Vet. Code, § 550.)
- 9) Provides that no person shall be commissioned or enlisted in the State Guard who is not a citizen of the United States or who has not declared their intention to become such a citizen, or who has been expelled or dishonorably discharged from any military or naval organization of this State, or of another state, or of the United States. (Mil. & Vet. Code, § 559.)

This bill:

- 1) Provides that a person is not eligible to commission as an officer or warrant officer in the California National Guard if they actively participate to advocate for, or if they engage in, the use of unlawful force, unlawful violence, or other illegal means to deprive an individual of their rights under the United States Constitution or the laws of the United States, including the laws of a state, commonwealth territory, or the District of Columbia, in accordance with the United States Department of Defense regulations.
- 2) Provides that an officer who actively participates to advocate in, or engages in, the use of unlawful force, unlawful violence, or other illegal means to deprive an individual of their rights under the United States Constitution or the laws of the United States, including the laws of a state, commonwealth, territory, or the District of Columbia, or a political subdivision thereof, shall be charged under undesirable conditions, in accordance with the United States Department of Defense regulations.
- 3) Adds, as a basis for discharge of enlisted personnel, active participation in advocating for, or engaging in, the use of unlawful force, unlawful violence, or other illegal means to deprive an individual of their rights under the United States Constitution or the laws of the United States, including the laws of a state, commonwealth, territory, or the District of Columbia, or a political subdivision thereof, shall be charged under undesirable conditions in accordance with the United States Department of Defense regulations.
- 4) Provides that a person discharged pursuant to 3) shall be discharged under undesirable conditions.
- 5) Provides that a person is not eligible to enlist in the California National Guard if they actively participate to advocate for, or if they engage in, the use of unlawful

force, unlawful violence, or other illegal means to deprive an individual of their rights under the United States Constitution or the laws of the United States, including the laws of a state, commonwealth territory, or the District of Columbia, in accordance with the United States Department of Defense regulations.

- 6) Provides that a person is not eligible to commission or enlist in the State Guard if they actively participate to advocate for, or if they engage in, the use of unlawful force, unlawful violence, or other illegal means to deprive an individual of their rights under the United States Constitution or the laws of the United States, including the laws of a state, commonwealth territory, or the District of Columbia, in accordance with the United States Department of Defense regulations.
- 7) Provides that person who is commissioned or enlisted in the State Guard shall be discharged under undesirable conditions if they actively participate to advocate in, or engage in, the use of unlawful force, unlawful violence, or other illegal means to deprive an individual of their rights under the United States Constitution or the laws of the United States, including the laws of a state, commonwealth, territory, or the District of Columbia, or a political subdivision thereof, in accordance with the United States Department of Defense regulations.

### COMMENTS

#### 1. Author's comment

According to the author:

SB 901 would prevent enlistment or require an administrative discharge for members of the California National and State Guard if that person advocates for or engages in extremist activity.

Within the National Guard, there are several procedures in place to discipline and effectively discharge guard members who participate in extremist organizations and activities. The effectiveness of these procedures came under scrutiny after it was found that several service members participated in the attempted insurrection on January 6th. Service members' involvement in the insurrection had made the spread of extremism a significant issue for the U.S. Military and has prompted investigations as well as regulatory changes that further define extremism along with prescribing punishments. The California National Guard has adopted army regulations that provide examples of prohibitive extremist activities/affiliations, but commanders are given a range of punishment options, one of which is an administrative discharge.

Members of the California National Guard may be administratively discharged for many reasons. This can range from failing physical fitness requirements and

poor attitude, to disruptive and tortious conduct. If a member of the National Guard is found to have advocated or participated in extremist activity, a standardized approach should be applied.

SB 901 would prevent the enlistment of or require the administrative discharge of current members if they actively participate or engage in the use of unlawful force, unlawful violence, or other illegal means to deprive an individual of their rights under the United States Constitution or the laws of the United States.

## 2. Background on the California National Guard and the State Guard

As explained by the Senate Military and Veterans Affairs Committee's analysis of this bill:

The California National Guard is a part of the National Guard of the United States, a dual federal-state military reserve force. With a total strength of over 20,000 personnel, it is the largest National Guard in the United States. The California State Guard (CSG) (formerly the California State Military Reserve) is a unit that provides assistance and training to the California National Guard and is a military force of California. The CSG is a reserve force that supports the state missions and federal readiness of the Army and Air National Guard.

Members of the military and CNG members on federal orders fall under the Uniform Code of Military Justice (UCMJ). Members of the National Guard of the United States not under federal orders are exempt from the UCMJ, however, under Title 32 orders, National Guard soldiers are still subject to their respective state codes of military justice. Members of the California National Guard who have reverted from federal control to state control become members of the State Guard for the unexpired period of their enlistment or appointment, unless upon reversion the members are assigned to active units of the California National Guard which have not been called or ordered into federal service.

## 3. Members of the military do not enjoy the same First Amendment rights as civilians

According to the United States Supreme Court, "the military constitutes a specialized community governed by a separate discipline from that of a civilian, and the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty."<sup>1</sup> As such:

While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the

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<sup>1</sup> *Parker v. Levy* (1974) 417 U.S. 733, 744 (cleaned up).

consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside of it.<sup>2</sup>

The UCMJ, therefore, prohibits a range of behavior and conduct specific to the military, including “conduct unbecoming of an officer” and a general prohibition on “all disorders and neglects to the prejudice of good order and discipline in the armed forces, [and] all conduct of a nature to bring discredit upon the armed forces.”<sup>3</sup> The Supreme Court has upheld restrictions allowing a commander to restrict what materials may be communicated to members of Congress,<sup>4</sup> restrictions on wearing religious headgear while in uniform,<sup>5</sup> and restrictions on speech questioning the restrictions on speech.<sup>6</sup>

#### 4. The concerning prevalence of extremist behavior in the armed forces and the Department of Defense’s response

The Department of Defense (DOD) has prohibited servicemembers from engaging in extremist activities for decades, and provided policy guidance enumerating specific prohibited activities since 1969.<sup>7</sup> This prohibition arises from concerns about the strength of the armed forces: according to the DOD, “even a small number of cases [of extremist activity] can pose a significant problem, challenging safety and unit cohesion.”<sup>8</sup> Despite the longstanding ban, the Inspector General for the U.S. Department of Defense (DODIG) found in 2022 that, “[a]lthough DoD and Service policies clearly prohibit extremist behavior by military Service members, recent surveys and incidents have raised concerns about the presence of ideological extremists within the U.S. military.”<sup>9</sup> One poll found that about one-third of active duty respondents had witnessed signs of white supremacist or racist ideology in the ranks.<sup>10</sup> Active duty and reserve servicemembers have been involved in the plot to kidnap Michigan Governor Gretchen Whitmer<sup>11</sup> and in the January 6, 2021, attack on the U.S. Capitol.<sup>12</sup> The DODIG has also reported that, although the DOD collects data relating to extremist activity, it

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<sup>2</sup> *Id.* at p. 758.

<sup>3</sup> 10 U.S.C. §§ 933, 934 (UCMU articles 133, 134).

<sup>4</sup> See *Brown v. Glines* (1980) 444 U.S. 348, 361.

<sup>5</sup> See *Goldman v. Weinberger* (1986) 475 U.S. 503, 510.

<sup>6</sup> See *Secretary of the Navy v. Avrech* (1974) 418 U.S. 676, 678; *id.* at p. 679 (dis. opn. of Douglas, J.).

<sup>7</sup> U.S. Department of Defense, Report on Countering Extremist Activity Within the Department of Defense (Dec. 2021) (CEAWG Report), p. 3.

<sup>8</sup> *Id.* at p. 8.

<sup>9</sup> U.S. Department of Defense, Office of the Inspector General, Evaluation of Department of Defense Efforts to Address Ideological Extremism Within the Armed Forces, Report No. DODIG-2022-95 (May 12, 2022) (DODIG Report), p. 2.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> Watson & Legare, *Over 80 of those charged in the January 6 investigation have ties to the military*, CBS News (Dec. 15, 2021), <https://www.cbsnews.com/news/capitol-riot-january-6-military-ties/> (link current as of April 18, 2024).

has not been able to accurately identify all instances of extremist behavior within the armed forces and gaps remain in data collection and reporting.<sup>13</sup>

In April 2021, Secretary of Defense Lloyd J. Austin III directed the establishment of a working group to undertake specified actions and to formulate recommendations to address concerns about increased extremist activities within the Armed Forces.<sup>14</sup> One of the specified actions was to clarify the definition of the Department of Defense instruction that prohibits active participation in extremist activities (DoDI 1325.06).<sup>15</sup> The working group “concluded that DoDI 1325.06 needed to be revised to more clearly define the terms ‘extremist activities’ and ‘active participation.’ ”<sup>16</sup>

The revised instruction, which was devised in coordination with the Military Departments and other DOD components,<sup>17</sup> is remarkably thorough. The definition sets forth six groupings of activities that constitute “extremist activities,” which include:

- Advocating or engaging in unlawful force, unlawful violence, or other illegal means to deprive individuals of their rights under the United States Constitution or the laws of the United States, including those of any State, Commonwealth, Territory, or the District of Columbia, or any political subdivision thereof.
- Advocating or engaging in unlawful force or violence to achieve goals that are political, religious, discriminatory, or ideological in nature.
- Advocating, engaging in, or supporting the overthrow of the government of the United States, or any political subdivision thereof, including that of any State, Commonwealth, Territory, or the District of Columbia, by force or violence; or seeking to alter the form of these governments by unconstitutional or other unlawful means (e.g., sedition).
- Advocating widespread unlawful discrimination based on race, color, national origin, religion, sex (including pregnancy), gender identity, or sexual orientation.<sup>18</sup>

The revised instruction also lists 14 sets of behaviors that can constitute “active participation,” including:

- Advocating or engaging in the use or threat of unlawful force or violence in support of extremist activities.
- Knowingly communicating information that compromises the operational security of any military organization or mission, in support of extremist activities.

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<sup>13</sup> DODIG Report, *supra*, p. 15.

<sup>14</sup> CEAWG Report, *supra*, at p. 6.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Id.* at p. 9.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Id.* at p. 10.

- Creating, organizing, or taking a leadership role in a group or organization that engages in or advocates for extremist activities, with knowledge of those activities.
- Actively demonstrating or rallying in support of extremist activities (but not merely observing such demonstrations or rallies as a spectator).
- Knowingly displaying paraphernalia, words, or symbols in support of extremist activities or in support of groups or organizations that support extremist activities, such as flags, clothing, tattoos, and bumper stickers, whether on or off a military installation.
- Engaging in electronic and cyber activities regarding extremist activities, or groups that support extremist activities – including posting, liking, sharing, re-tweeting, or otherwise distributing content – when such action is taken with the intent to promote or otherwise endorse extremist activities. Military personnel are responsible for the content they publish on all personal and public Internet domains, including social media sites, blogs, websites, and applications.<sup>19</sup>

The revised DoDI 1325.06 was adopted in December 2021.<sup>20</sup>

4. This bill prohibits California National Guard and State Guard members from actively participating in specified extremist activities

This bill is intended to ensure that the California National Guard and the State Guard are free from the types of extremist activities that will risk the safety and cohesion of our State's forces. The bill both prohibits persons from enlisting or being commissioned in the California National Guard and State Guard if they actively participate in activities to advocate for, or engage in, the use of unlawful force, violence, or other illegal means to deprive individuals of their rights; the bill also makes active participation in those activities a basis for administrative discharge. The Senate Military and Veterans Affairs Committee considered this bill from the perspective of military policy; this Committee has jurisdiction over the bill with respect to the bill's potential limitation on servicemembers' First Amendment freedoms.

The bill's prohibitions are modeled after DoDI 1325.06 and are carefully tailored to ensure that the limitations do not infringe on servicemembers' First Amendment rights. As discussed above in Part 2, members of the military have fewer First Amendment freedoms than civilians. The bill's terms are in line with the limitations established by the courts and the DOD, so it does not appear that the bill overly burdens servicemembers' First Amendment rights.

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<sup>19</sup> *Id.* at pp. 10-11.

<sup>20</sup> U.S. Department of Defense, Instruction re Number 1325.06 (eff. December 20, 2021).

**SUPPORT**

None received

**OPPOSITION**

None received

**RELATED LEGISLATION**

Pending Legislation: None known.

Prior Legislation: None known.

**PRIOR VOTES:**

Senate Military and Veterans Affairs Committee (Ayes 5, Noes 0)

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