



HENRY McMASTER
GOVERNOR

February 17, 2022

The Honorable Lloyd J. Austin, III
Secretary of Defense
U.S. Department of Defense
1000 Defense Pentagon
Washington, DC 20301-1000

Dear Secretary Austin:

As Governor of the State of South Carolina and commander-in-chief of the State's militia, I write to urge you to reconsider and rescind the Department of Defense's ("Department") recent directives imposing COVID-19 vaccination requirements on members of the South Carolina National Guard and purporting to do so regardless of their state or federal duty status. The vaccine mandates issued by the Department's Service Secretaries are at odds with law and logic, both because they exceed the federal government's constitutional and statutory authority and because they fail to account for the current circumstances related to COVID-19. Unless the Department agrees to cease enforcement of these mandates or a court enjoins the same, I intend to make clear that any adverse action taken against a member of the South Carolina National Guard on account of their vaccination status is not of my making but is solely due to the Department's implementation of the Biden Administration's misguided and unlawful policies.

It is axiomatic that the South Carolina National Guard remains under my command and control unless and until one or more units are federalized under Title 10 of the United States Code. *See, e.g., Maryland v. United States*, 381 U.S. 41, 48 (1965) ("[M]ilitary members of the Guard are employees of the States, and so the court of appeals have uniformly held."), *vacated on other grounds*, 382 U.S. 159 (1965); *United States v. Hawaii*, 832 F.2d 1116, 119 (9th Cir. 1987) ("Except when federalized, the Guard is under the direct order of the State Governments." (quoting H.R. Rep. No. 384, 97th Cong., 1st Sess. at 3 (1981))). This fundamental principle is enshrined in the Constitution's Militia Clauses. *See* U.S. Const. art. I, § 8. Under this well-established authority, the chains of command are clear.

As you are aware, on August 24, 2021, you issued a Memorandum directing the Service Secretaries "to immediately begin full vaccination of all members of the Armed Forces under DoD authority on active duty or in the Ready Reserve, including the National Guard, who are not fully

vaccinated against COVID-19.” According to your Memorandum, you “determined that mandatory vaccination” was “necessary to protect the Force and defend the American people” and you arrived at this decision “[a]fter careful consultation with medical experts and military leadership, and with the support of the President.” Respectfully, you did not have the authority to issue—and the Service Secretaries do not have the authority to implement—this directive for members of the South Carolina National Guard under the circumstances.

The Constitution grants Congress the power “to provide for organizing, arming, and disciplining the militia, and for governing for such part of them as may be employed in the Service of the United States,” and expressly “reserv[es] to the States respectively, the appointment of officers, and the Authority of training the militia according to the discipline prescribed by Congress.” U.S. Const., art. I, § 8, cl. 16. Although Congress has delegated certain authority to the President, *see* 32 U.S.C. § 110, even assuming this broad delegation of authority would pass constitutional muster, the President has not prescribed regulations or issued orders specifically requiring that all members of the National Guard be vaccinated for COVID-19, regardless of their duty status. Indeed, your Memorandum acknowledges as much, noting only that you issued your directives “with the support of the President.”

The Supreme Court has made clear that members of the National Guard “must keep three hats in their closets—a civilian hat, a state militia hat, and an army hat—only one of which is worn at any particular time.” *Perpich v. Dep’t of Def.*, 496 U.S. 334, 348 (1990). But here, the directives issued by you and the Service Secretaries purport to govern members of the South Carolina National Guard who are exclusively wearing their “state militia hat” under Title 32. Therefore, these directives exceed the federal government’s power and plainly intrude upon my authority as commander-in-chief of the State’s militia. *See, e.g., King v. St. Vincent’s Hosp.*, 502 U.S. 215, 216 n.2 (1991) (“[A State’s] National Guard is a militia under state control except under certain constitutionally defined circumstances.”).

In recent correspondence, you have stated that your decision to mandate COVID-19 vaccination “stems directly from [your] responsibility and authority as the Secretary of Defense to promote the health, safety, and readiness of our military personnel, regardless of duty status, to include all members of the National Guard performing any duty or training under title 10 or title 32, U.S. Code.” To be clear, I do not question the federal government’s authority over members of the National Guard serving in a Title 10 status and operating under the command of the President, and I do not contest your general ability to establish and enforce readiness standards for National Guard activation to Title 10 duty status. However, the assertion that you may exercise the same or similar degree of control over National Guard units operating exclusively in a Title 32 status is at odds with the law.

Notwithstanding the legally established, and previously respected, chains of command, you have insisted that members of a State’s National Guard, “regardless of duty status, must follow the directions of the Secretaries of the Army and the Air Force, respectively, regarding specific COVID-19 vaccine compliance deadlines and requirements” and that “[f]ailure by a member to do so will lead to a prohibition on participation in drills, training, and other duty conducted under title 32 and will jeopardize the member’s status in the National Guard.” Yet, the Supreme Court

has recognized that “[w]hen the state militia hat is being worn,” drilling and other exercises conducted in a Title 32 status are conducted by the States “pursuant to ‘the Authority of training the Militia according to the discipline prescribed by Congress.’” *Id.* (quoting U.S. Const., art. I, § 8, cl. 16). Again, neither Congress nor the President has attempted to impose such a sweeping vaccine mandate on members of the National Guard without regard to their duty status.

I will continue to follow closely the pending litigation challenging the Department’s unprecedented assertion of authority, and I expect that, like other vaccine mandates issued by the Biden Administration, the Department’s directives will not withstand judicial scrutiny. In the meantime, I respectfully encourage you to revisit, reconsider, and rescind the Department’s previous directives both to account for current circumstances and to avoid further negative impacts on the “boots on the ground.”

As a practical matter, and separate and apart from the aforementioned and other legal concerns, the Department’s vaccination requirements are not tailored to the current realities of the pandemic. In South Carolina, the wave of new cases brought on by the Omicron variant is steadily receding, with our State marking several consecutive weeks of declining case counts. Moreover, while I certainly recognize and appreciate that COVID-19 vaccines have helped individuals reduce the risk of significant illness and death, it is undisputed that the Omicron variant has demonstrated its ability to evade vaccine-induced immunity. Thus, I struggle to understand how the Department’s ongoing effort to mandate vaccinations for members of the South Carolina National Guard is supported by the current circumstances or science.

I appreciate your stated desire to ensure that COVID-19 does not temporarily “take[] our Service members out of the fight,” but I fail to see how such a mandate accomplishes this goal. Instead, it appears that the Department’s plans to proceed with this mandate are having the opposite effect, permanently sidelining members of our National Guard—whether voluntarily or involuntarily—who do not wish to receive a COVID-19 vaccine. In addition to reducing the size of available forces and disrupting current mission readiness, compelling our men and women in uniform to choose between serving their State and Nation or setting aside their objections to COVID-19 vaccines is negatively impacting our ability to recruit and retain members of the South Carolina National Guard.

The State of South Carolina has a rich heritage of military service, and South Carolinians are proud of, and eternally grateful for, those among us who choose to serve in uniform. Consistent with this tradition, and in furtherance of my responsibilities as commander-in-chief of the State’s militia, I will not be conscripted into enforcing the Department’s arbitrary and capricious vaccine mandates and will play no part in punishing members of the South Carolina National Guard solely on account of their vaccination status. While I understand that the Department intends to enforce its vaccine mandates via administrative action, members of the South Carolina National Guard serving in a Title 32 status may understandably be confused by this alteration of the customary command structure. Therefore, to the extent that the federal government seeks to upend or redefine clearly established chains of command and continue imposing its vaccine mandates on members of the South Carolina National Guard, I am prepared to bring clarity to the situation.

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In an effort to remove any doubt or confusion regarding the source of any adverse action against our brave men and women in uniform, should the Department proceed with enforcing these directives, I plan to withhold court-martial convening authority for the Adjutant General and any subordinate commanders in connection with a soldier's failure to comply with the Department's vaccine mandates. By taking such action—which the Department has recognized as an example of proper command involvement in military justice matters—I intend to make clear that the Biden Administration will be solely responsible for any consequences brought to bear on a member of the South Carolina National Guard based on their vaccination status. I continue to hope either that the Department will reconsider and rescind its directives or that a court will enjoin the same. In the interim, however, I will not stand idly by or be compelled to implement the Biden Administration's misguided policies and directives—which defy both law and logic—or play any part in punishing members of the South Carolina National Guard.

Thank you in advance for your careful consideration of my request and your prompt attention to this important matter. I look forward to hearing from you.

Yours very truly,

A handwritten signature in blue ink, appearing to read "Henry McMaster", is centered on the page.

Henry McMaster

cc: Major General R. Van McCarty
The Adjutant General of South Carolina