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NOTES

SHOULD I STAY OR SHOULD I GO: THE NATIONAL GUARD DANCES TO THE TUNE CALLED BY TWO MASTERS*

Passages in the main body of the Constitution make clear that control of the National Guard is shared between the federal government and the states. Relying on these passages, most courts and commentators have concluded that the federal government's control predominates over that of the various states. The author presents a new approach to this seemingly settled area of the law by arguing that the second amendment altered the allocation of control found in the main body of the Constitution. Therefore, a careful balancing of state and federal interests must be undertaken whenever the federal government exercises its control over the National Guard.

*The issue of shared control of National Guardsmen has again become an important issue. In 1986, Congress amended existing law to prevent State Governors from blocking federal training of their National Guardsmen in overseas locations. Several Governors challenged the new legislation on constitutional grounds in 1987. This Note concludes with an analysis of one such case, *Perpich v. Department of Defense*. *Perpich* was decided in favor of the federal government by a federal district court in 1987. That decision was successfully contested by Governor *Perpich* in the Court of Appeals for the Eighth Circuit.*

* The author is an active duty U.S. Naval Officer assigned by the Navy to Case Western Reserve Law School. His educational expenses are subsidized in full by the Navy's Law Education Program. Post-graduate educational programs such as this one are provided routinely to career Naval officers. Nevertheless, the views expressed herein are solely those of the individual author. They may not be considered as the official views of the Judge Advocate General, the Department of the Navy, or any other agency or department of the United States. Finally, copyright protection for this particular work is unavailable because it is a "work of the United States Government." 17 U.S.C. § 105 (1986).

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Unfortunately, the decision of the court of appeals was issued too late for inclusion within this Note.

The opinion of the court of appeals is noteworthy in at least two respects. First, it creates a conflict in the circuits because the first circuit has held that the new statute is constitutional. Second, the decision adopted several of the themes advanced in this Note when the court utilized principles embodied within the second amendment as a ground of decision.

“The struggle between local control and centralized authority in government is as old as history.”¹

THIS NOTE analyzes the balance of constitutional authority between the state and federal governments in military affairs. Its focus highlights the interplay between two specific constitutional powers: the states' militia power² and the army power granted to the federal government.³

Our constitutional predecessor, the Articles of Confederation, absolutely withheld the army power from the central government.⁴ Thus the federal government was stripped of the ability to maintain an army. Only the states were permitted to keep armies. The rationale supporting this rule was that an army, if placed in the hands of the federal government, would pose too great a risk to both the peoples' liberties in an American democracy and to the states' prerogatives under the American system of federalism.⁵ To preserve these important values a national defense strategy was fashioned which permitted each governor to maintain a state military force, known as the state militia.⁶ With the passage of time, these same state militia came to be known as the National Guard,

1. *Price v. United States*, 100 F. Supp. 310, 315 (Ct. Cl. 1951).

2. See *infra* notes 59-70 and accompanying text.

3. See *infra* notes 71-74 and accompanying text.

4. No provision of the Articles of Confederation authorized the central government to raise or equip an army. Rather, the Articles provided that “every State shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutered . . .” ARTICLES OF CONFEDERATION art. VI, § 4 (1777). The central government was, however, permitted to “make requisitions from each State” of these militia troops. *Id.* art. IX, § 5. Further, the central government was granted the authority to appoint “all officers of the land forces, in the service of the United States, excepting regimental officers.” *Id.* art. IX, § 4.

5. See *infra* notes 26-28 and accompanying text.

6. *Selective Draft Law Cases*, 245 U.S. 366, 380 (1918); Shaw, *The Interrelationship of the United States Army and the National Guard*, 31 MIL. L. REV. 39, 41-42 (1965) (providing excerpts from the Articles of Confederation relevant to the states' militia power).

the name by which they are known today.⁷

The Articles of Confederation permitted the central government to request troops from the states in order to form a temporary national army if circumstances threatened the collective good of the country.⁸ By withholding army powers from the central government and bestowing militia powers upon the states, the Articles of Confederation struck the balance of governmental power in this area squarely in favor of the states.

This scheme was re-examined and modified in the Constitutional Convention of 1787. The Constitution's approach was dramatically different from that of the Articles. It took a middle ground by refusing to elevate the states' military power above that of the federal government. Militia powers remained vested in the states *but* army powers were also given to the central government. The blending of these two powers has created numerous controversies in the years since. *Perpich v. United States Department of Defense*,⁹ now pending before the United State Court of Appeals for the Eighth Circuit, is but the most recent example.

The *Perpich* litigation directly challenges a legislative provision tacked onto the National Defense Authorization Act for Fiscal Year 1987.¹⁰ The challenged provision, known as the Montgomery Amendment,¹¹ radically broadens the federal gov-

7. Members of the various states' military forces were originally called "militia." In 1824-25, General Lafayette brought the term "National Guard" to the United States. "During the French Revolution . . . [he] had been commander of a French trained volunteer force which had assumed the designation 'National Guard.'" Shaw, *supra* note 6, at 54. "The term captured the public interest and from 1825 onward 'National Guard' was applied to all state troops in America." *Id.* at 55.

8. The Articles of Confederation also created the body which served as the forerunner of our modern day Senate. It was called the "Committee of the States" and was empowered to "agree upon the number of land forces, and to make requisitions from each State for its quota." ARTICLES OF CONFEDERATION art. IX, § 5 (1777).

9. *Perpich v. United States Dep't of Defense*, 666 F. Supp. 1319 (D. Minn. 1987), appeal filed, No. 87-5345-MN (8th Cir. Aug. 12, 1987).

10. National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 522, 100 Stat. 3816, 3871 (1986).

11. The bill bears the name of its sponsor. A Mississippi Democrat, "Representative G.V. 'Sonny' Montgomery . . . is a member of the House Armed Services Committee and a retired major general in the Mississippi National Guard." Montgomery, *Stop This Assault on Our Defense*, USA Today, Feb. 11, 1987, at A10, col. 1. Additionally, Representative Montgomery is "the principal spokesman in Congress for the Guard's Washington lobby, the National Guard Association." Kennedy, *Conflict Brews Over Training of National Guard Units*, Christian Sci. Monitor, Aug. 6, 1987, at 5, col. 2. Supplementing the clout wielded by sympathetic congressmen such as Representative Montgomery, is the partisan advocacy of the National Guard's powerful lobbying body, the National Guard Association. See generally, O. BRADLEY, A GENERAL'S LIFE 483 (1983)(commenting on the

ernment's power to conduct National Guard training exercises. Previously, the federal government was required to obtain the Governor's consent before ordering a National Guard unit onto active duty for annual training.¹² In prior decades no Governor had ever withheld his consent, but the 1980's saw a rapid increase in National Guard training deployments to overseas, and sometimes politically sensitive, locations.¹³ In 1985 and 1986, several Governors either withheld or threatened to withhold their consent for controversial training exercises in Honduras.¹⁴ Congress responded with the Montgomery Amendment which expressly removes the Governors' ability to withhold consent for training exercises "because of any objection to . . . location."¹⁵ Having lost their battle in the halls of Congress,¹⁶ the Governors¹⁷ brought

politically powerful National Guard lobby); S. HUNTINGTON, *THE SOLDIER AND THE STATE* 171-72 (1957)(outlining the events which led to the creation of the National Guard Association in 1878). Due in part to the savvy political skills of its promoters, addition of the Montgomery Amendment onto the much larger appropriations statute was a development that went "largely unnoticed" in Congress. Glickman, *Governors vs. U.S. — Who Should Control National Guard?*, *Christian Sci. Monitor*, Nov. 4, 1986, at 3, col. 1. However, at least one Congressman noted that passage of the amendment was premature since not a single hearing was held on the matter. 132 CONG. REC. H6,265 (daily ed. Aug. 14, 1986)(statement of Representative Edwards, critical of adoption of the amendment because no hearing was held in the House of Representatives to examine the "serious constitutional questions" raised by it).

12. 10 U.S.C. § 672(b) (1986)(prior to its amendment by Pub. L. No. 99-661, § 522, 100 Stat. 3816, 3871 (1986)).

13. The number of National Guard and other reserve units deployed overseas for training increased more than fifteenfold between 1980 and 1985 (117 units in 1980 to 1,932 units in 1985). *Department of Defense Appropriations for 1987: Hearings Before the Subcomm. on the Dep't of Defense of the House Comm. on Appropriations*, 99th Cong., 2nd Sess. 578 (1986)(statement of James H. Webb, Assistant Secretary of Defense for Reserve Affairs). "The National Guard trains in more than 40 countries around the world every year." *Id.* at 604. "About 5800 guardsmen from 23 states participated in Honduran maneuvers" in 1986 and at least 1500 were slated to travel there in 1987. Glickman, *President's New Control Over the National Guard is Challenged*, *Christian Sci. Monitor*, Feb. 9, 1987, at 8, col. 1.

14. The governors of Arizona, Ohio, and Maine each "turned down federal requests to send National Guard units from their states to maneuvers" in Honduras. Kennedy, *supra* note 11, at 5, col. 2.

15. "The consent of a Governor . . . may not be withheld . . . because of any objection to the location, purpose, type, or schedule of . . . active duty." National Defense Authorization Act For Fiscal Year 1987, Pub. L. No. 99-661, § 522, 100 Stat. 3816, 3871 (1986). *See also* 132 CONG. REC. H6,264 (daily ed. Aug. 14, 1986)(Representative Montgomery, sponsor of the amendment, stated that the effect of the new law would be to deny State Governors the authority to block overseas training of National Guard troops only if "he or she thinks the guardsmen are needed at home for local emergencies.").

16. 132 CONG. REC. H6,264-68 (daily ed. Aug. 14, 1986); 132 CONG. REC. E2,872-73 (daily ed. Aug. 13, 1986).

17. Amici curiae who joined forces in support of Governor Perpich include the Gov-

suit in federal district court claiming that the Montgomery Amendment usurped their constitutionally granted militia powers. The federal government, on the other hand, argued that the Montgomery Amendment was nothing more than a legitimate exercise of its constitutionally granted army powers, made necessary because various Governors attempted to inject themselves into the arena of foreign affairs.¹⁸

The question thus presented is the same one that has gone unanswered since the Constitution replaced the Articles of Confederation. Given that the Constitution grants army powers to the federal government while simultaneously granting militia powers to the states, what limitations, if any, does the one grant of power impose upon the other? The answer formulated by this Note is premised on the notion that the second amendment to the Constitution requires governmental use of the federal army power to accommodate the militia rights guaranteed to the states. This argument draws support from an historical survey of the Constitution itself, followed by an analysis of congressional and judicial activity in the proceeding years.

ernors of Arkansas, Colorado, Delaware, Hawaii, Iowa, Kansas, Louisiana, Maine, Massachusetts, Ohio, Rhode Island, and Vermont. Memorandum of Law of Amici Curiae, *Perpich v. United States Dep't of Defense*, 666 F. Supp. 1319 (D. Minn. 1987)(No. 3-87 CIV 54), *appeal filed*, No. 87-5345-MN (8th Cir. Aug. 12, 1987).

18. Many of the governors indicated that they would withhold their consent for overseas National Guard training because they were opposed to the American military presence in countries bordering Nicaragua. For example, in a press release dated August 4, 1987, Governor Richard Celeste of Ohio stated his reasons for refusing to allow Ohio National Guardsmen to train in Honduras. He said:

As a result of my recent trip to Central America, I still feel that sending National Guard troops to that area is unnecessary, dangerous, and provocative because of the military buildup in Honduras . . . I have refused to send them [National Guard troops] because I believe it is a bad idea to send the Ohio National Guard to train in a country bordering on Nicaragua.

Statement of Governor Richard Celeste, Press Release (Aug. 4, 1987). The consensus among Governors, who are opposed to the training (including Minnesota's Governor Perpich), is that the National Guard is being used to build facilities designed ultimately for use by the Contra Rebels in their campaign to overthrow Nicaragua's Sandinista government. Under the guise of federal training missions in Honduras "American forces have built air strips and radar facilities around the country." Glickman, *supra* note 11, at 4, col. 1.

I. THE CONSTITUTIONAL TEXT

A. Background

The central government which was created under the Articles of Confederation was extremely weak. In the area of military affairs and national defense it was nothing more than a "paper tiger" because the power to raise and support armies had been vested exclusively in the states.¹⁹ This issue was reopened at the Constitutional Convention because of the general feeling that the absence of a national army was partially responsible for the huge cost of the Revolutionary War.²⁰ Needless difficulties engendered by states who were slow to fill the quotas imposed by the central government provided additional evidence that the distribution of military powers between the central government and the states established under the Articles was an issue ripe for review.²¹ It is not surprising, therefore, that "[n]o question was more thoroughly discussed by the Constitutional Convention than the military power to be entrusted to the national government."²²

B. The Anti-Federalist Position

The Anti-Federalists, led by Patrick Henry (who refused to attend the constitutional convention),²³ were strongly opposed to the notion of replacing the Articles of Confederation with a new constitution.²⁴ Instead, they favored merely amending the Arti-

19. Burger, *Lawyers and the Framing of the Constitution*, CASE & COM., Sept.-Oct. 1987, at 3, 4. See generally *supra* notes 4 & 8.

20. Rogers, *Military Powers of Nation and State Under the Constitution*, 50 AM. L. REV. 321, 325 (1916). George Washington wrote that "[s]hort enlistments and a mistaken dependence upon militia, have been the origin of all our misfortunes and the great accumulation of our debt." E. LEE, *POLITICS OF OUR MILITARY NATIONAL DEFENSE*, S. DOC. NO. 274, 76th Cong., 3d Sess. 10 (1940). Washington said further that the militia will "come in you cannot tell how, go you cannot tell when, and act you cannot tell where, consume your provisions, exhaust your stores, and leave you at last at a critical moment." *Id.* See also *infra* notes 88-95 and accompanying text.

21. *Selective Draft Law Cases*, 245 U.S. 366, 380 (1918).

22. Rogers, *supra* note 20, at 325. See also J. SCOTT, *THE MILITIA*, S. DOC. NO. 695, 64th Cong., 2d Sess. 29-38 (1917) (probably the finest collection of materials shedding light upon the militia powers and the intent of the framers; included are extracts from the journals and debates of the federal convention, the state ratification debates, the Congress, the Federalist and other papers relating to the militia).

23. Burger, *supra* note 19, at 6. "[H]e refused to be a delegate from Virginia, because, as he put it, he 'smelled a rat.' The 'rat' he smelled was the idea of creating a strong central government under a constitution that would replace the loose Articles of Confederation." *Id.*

24. Speeches by Patrick Henry before the Virginia Ratifying Convention (June 5 &

cles. Further, the Anti-Federalists fought vigorously to deny the national government the power to raise armies.²⁵ From a modern perspective, quarrel over this issue seems quaintly outmoded because, for several decades, Americans have accepted the necessity of a standing army to protect the national interest. However, excesses suffered by the framers at the hands of the King's army²⁶ and the historical lessons learned from the behavior of Julius Caesar's army in ancient Rome²⁷ convinced many that a standing army was "the bane of liberty."²⁸

Instead of a standing army providing for the nation's defense, the Anti-Federalists advocated the use of a well regulated militia maintained by each state. These militia would be under the control of the State Governor but subject to requisition by the national government in time of need.²⁹ The Anti-Federalists thus fa-

7, 1788), reprinted in *THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES* 199-216 (R. Ketcham ed. 1986).

25. See Ansell, *Legal and Historical Aspects of the Militia*, 26 *YALE L.J.* 471 (1917); Rogers, *supra* note 20; Shaw, *supra* note 6, at 54-55; Wiener, *The Militia Clause of the Constitution*, 54 *HARV. L. REV.* 181 (1940).

26. An explicit account of the numerous abuses visited upon the citizens of England and the colonists in America is contained in Engdahl, *The Legal Background and Aftermath of the Kent State Tragedy*, 22 *CLEV. ST. L. REV.* 3 (1973).

27. That the American populace was sensitive to the historical lessons recorded by prior Republican societies (i.e. the Greek and Roman empires) is reflected in the essays of the time. See "Brutus", *Essay No. X to the Citizens of the State of New York*, *N.Y. Journal*, Jan. 24, 1788, reprinted in *THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES* 287-88 (R. Ketcham ed. 1986) (it is believed that "Brutus" was in fact Robert Yates, a New York judge and a delegate to the Federal Convention).

[T]he liberties of the commonwealth was [sic] destroyed and the constitution overturned, by an army, lead [sic] by Julius Caesar, who was appointed to the command, by the constitutional authority of that commonwealth. He changed it from a free republic, whose fame had sounded . . . into that of the most absolute despotism. A standing army effected this change, and a standing army supported it through a succession of ages, which are marked in the annals of history, with the most horrid cruelties, bloodshed, and carnage . . .

Id.

28. 1 *ANNALS OF CONG.* 749-51 (J. Gales ed. 1834). See also *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to their Constituents* (Dec. 18, 1787), reprinted in *THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES* 254-56 (R. Ketcham ed. 1986). The minority feared that:

A standing army in the hands of a government placed so independent of the people, may be made a fatal instrument to overturn the public liberties; it may be employed to enforce the collection of the most oppressive taxes, and to carry into execution the most arbitrary measures. An ambitious man who may have the army at his devotion, may step up into the throne, and seize upon absolute power.

Id. at 254.

29. See sources cited *supra* note 25. The prevailing sentiment was that:

vored perpetuating the arrangement provided by the Articles of Confederation.³⁰

C. The Federalist Position

The very opposite point of view was advanced by the Federalists, including Alexander Hamilton,³¹ John Jay, James Madison,³² and John Marshall. They urged the framers to grant an army power to the central government.³³ The unsatisfactory battle record of the militia bolstered their claim that reliance on the militia had nearly "lost us our independence . . . [T]he steady operations of war against a regular and disciplined army can only be

The standing army with its upper-class officers and lower-class enlisted men was basically an aristocratic institution. It was associated with the British Crown and with European despotism. It was quite unnecessary in the eyes of many Americans. The distance of the United States from Europe meant that it required no permanent military force with the possible exception of small frontier garrisons to deal with the Indians. Consequently, it was generally agreed that primary reliance must be put on a citizen militia composed of part-time officers and enlisted men.

S. HUNTINGTON, *supra* note 11, at 166-67.

30. See *supra* notes 4 & 8 and accompanying text.

31. Hamilton argued in THE FEDERALIST that if the central government was denied an army power then future generations would be unable to adequately protect themselves.

The authorities essential to the common defense are these: to raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support. These powers ought to exist without limitation, because it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be coextensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils which are appointed to preside over the common defense.

THE FEDERALIST NO. 23, at 153 (A. Hamilton)(C. Rossiter ed. 1961)(emphasis in original).

32. Madison argued that constitutional restraints upon the army power threatened the safety of the United States. It was foolishness to constitutionally "chain the discretion" of the central government because there existed no countervailing "chain" upon the ambition of all other nations. THE FEDERALIST NO. 41, at 257 (J. Madison)(C. Rossiter ed. 1961).

33. Both Hamilton and Marshall (who served as officers in General Washington's army during the Revolution) observed first hand how an inadequate military power vested in the national government resulted in "terrible privations" and "needless deaths." Burger, *supra* note 19, at 3-4. See also W. RIKER, SOLDIERS OF THE STATES 1 (1957)(the record of the militia during the Revolutionary War was "mixed"); *infra* note 92 and accompanying text.

successfully conducted by a force of the same kind."³⁴ They argued that the nation's very survival required that the power to raise armies be given to the national government and that failure to grant this important power was to invite "certain and inevitable ruin"³⁵ at the hands of foreign invaders.

The Anti-Federalist warnings of inevitable doom, which would follow granting the central government an army power,³⁶ were neutralized by a Federalist-proposed system of checks and balances,³⁷ which would prevent the army from usurping the power of the elected government and oppressing the people. An additional accommodation inherent in the Federalist's approach to national defense was a temperance of their demand that the central government be given an army power with a concomitant willingness to accept a militia power shared between the state and federal governments.³⁸

D. The Resulting Compromise

Rather than adopt one position to the exclusion of the other, the framers of the Constitution incorporated both the Anti-Federalist and the Federalist plans. The resulting constitutional text steered a middle road, allowing *both* a militia³⁹ which could be requisitioned for federal use in time of need⁴⁰ and a national army.⁴¹ The army and militia were unmistakably separate and in-

34. THE FEDERALIST No. 25, at 166 (A. Hamilton)(C. Rossiter ed. 1961). See also JOINT COMM. ON THE REORGANIZATION OF THE ARMY, REPORT ON REORGANIZATION OF THE ARMY, S. DOC. No. 555, 45th Cong., 3d Sess. 90 (1878) [hereinafter REORGANIZATION OF THE ARMY] ("[D]ependence upon the militia . . . [was to] rely upon a broken staff."). The militia were a "destructive, expensive and disorderly mob." *Id.* at 94. They were "totally unacquainted with every kind of military skill . . . timid and ready to fly from their own shadows." *Id.* at 90.

35. REORGANIZATION OF THE ARMY, *supra* note 34, at 91; see generally sources cited *supra* note 25.

36. See *supra* notes 26-28 and accompanying text.

37. See *infra* notes 71-74 and accompanying text.

38. THE FEDERALIST No. 27, at 176-77 (A. Hamilton)(C. Rossiter ed. 1961). Hamilton was careful to stress, however, that the militia should be under the control of the central government because it was the central government which bore the responsibility for maintaining the national security. *Id.* at 174-75.

39. U.S. CONST. art. I, § 10, cl. 3 allows the states to keep troops (militia) provided consent of the Congress is first obtained.

40. U.S. CONST. art. I, § 8, cl. 15 provides that Congress shall have the power to call "forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions" These are commonly referred to as the militia "call" provisions.

41. U.S. CONST. art. I, § 8, cl. 12 provides "[t]he Congress shall have Power . . . To raise and support Armies"

dependent of each other⁴² and the use of neither was mandated. The power of choice between them, or the concurrent use of them both, was left to the wisdom of Congress in the exercise of its power to "provide for the common Defence."⁴³

E. Implications of the Second Amendment

Ratification of the Constitution by the states was a Federalist triumph because, *inter alia*, of the inclusion of the army power for the federal government.⁴⁴ However, consent was grudgingly obtained from the more reluctant states⁴⁵ only because they were promised that "one of the first items of business of the new government would be the framing of amendments."⁴⁶ The primary objectives of these states were to trim federal power by guaranteeing certain trial rights for criminal defendants, freedom of the press, and a limitation upon the military powers reposed in the federal government.⁴⁷ These developments show that the battle for

42. The bright line separating the militia from the army is explicitly acknowledged in the constitutional text where, on at least two occasions, the militia is contemplated as distinct from the army. U.S. CONST. art. II, § 2 vests the President with commander-in-chief powers over the army *and* the militia. U.S. CONST. amend. V excuses both the army *and* the militia from compliance with certain grand jury requirements. *Accord* Selective Draft Law Cases, 245 U.S. 366, 382 (1918); *see also* Authority of President to Send Militia Into a Foreign Country, 29 Op. Att'y Gen. 322, 322 (1912) ("From very early times . . . the militia has always been considered and treated as a military body quite distinct and different from the Regular or standing army.").

43. U.S. CONST. art. I, § 8, cl. 1 states that "[t]he Congress shall have Power To . . . provide for the common Defence . . . of the United States"

44. The Anti-Federalists vehemently opposed inclusion of the army power. *See supra* note 25 and accompanying text. One commentator has suggested that the Anti-Federalists lost the debate over the Constitution for three reasons: They were less clever advocates, they were less skillful politicians, and they had the weaker argument. H. STORING, *WHAT THE ANTI-FEDERALISTS WERE FOR* 71 (1981).

45. Many states felt that they had "been deprived of the power of self-defense . . . [due to the] centralization of the taxing and military authorities." H. STORING, *supra* note 44, at 35. *See also* S. HUNTINGTON, *supra* note 11, at 167 ("The ratifying conventions were even more strongly opposed to regular military forces [than the federal constitutional convention] Criticism of [the army power] . . . was widespread in the state conventions.").

46. H. STORING, *supra* note 44, at 65; *see also* S. HALBROOK, *THAT EVERY MAN BE ARMED* 74 (1984) ("The objections of the anti-Federalist[s] . . . particularly George Mason and Richard Henry Lee, prompted the state-ratifying conventions to recommend certain declarations of rights which became the immediate source of the federal Bill of Rights.").

47. H. STORING, *supra* note 44, at 64-65. The amendments operated not only to clip federal power in favor of the states, but also supplied incentives for the federal government to decline the use of its granted powers. For instance, the third amendment, adopted simultaneously with the second, created one such incentive bearing on federal use of the army

power waged between the central government and the states continued even after the ratification process was at an end. Adoption of the Bill of Rights signified the "major legacy of the Anti-Federalists"⁴⁸ because it significantly reduced the central government's power in these areas.

The Constitution, in its original form, afforded Congress the luxury of choice in the area of national defense. Congress could raise an army or it could permit the states to maintain their own militia which could be pressed into federal service upon the occurrence of any of the three constitutional "call" provisions.⁴⁹ Congress' ability to refuse permission to the states is found in article I, section 10 which provides: "No State shall, without the Consent of Congress . . . keep Troops . . . in time of Peace . . ." ⁵⁰ Vesting this discretion in the central government meant the end of state primacy in the area of military affairs. It also meant that the army power was not limited by the militia power.

Adoption of the second amendment altered this arrangement. Its language 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."⁵¹ Article I, section 10 clashes with the command of the second amendment because it would be inconsistent to permit Congress to deny the states the prerogative of keeping troops while acknowledging that "[a] well regulated Militia . . . [is] necessary to the security of a free State."⁵² The interpretation which correctly harmonizes these two provisions is that the second amendment *amends* article I, section 10⁵³ by elim-

power. This subtle result was accomplished by placing an incidental advantage favoring the militia vis-a-vis the army. The third amendment's prohibition against quartering soldiers in any house without the consent of the owner applied equally to soldiers and militiamen. *See Engblom v. Carey*, 677 F.2d 957, 961 (2d Cir. 1982) ("National Guardsmen are 'Soldiers' within the meaning of the Third Amendment . . ."). This prohibition against quartering, however, removed an economical method of providing shelter for soldiers in the performance of their duties away from their post. Thus, when faced with the need for a federal force to accomplish a military task in a particular region of the nation, the Congress could "call" into federal service whichever state militia resided in the area. These militiamen, unlike federal troops, could perform military tasks in the vicinity of their homes without placing on the federal government the financial burden of lodging.

48. "It is often said that the major legacy of the Anti-Federalists is the Bill of Rights." H. STORING, *supra* note 44, at 64.

49. *See supra* note 40 and accompanying text.

50. U.S. CONST. art. I, § 10, cl. 3.

51. U.S. CONST. amend. II.

52. *Id.*

53. It is a natural use of the amendment process to alter specific passages in the

inating the requirement of Congressional consent.⁵⁴ Thus, passage of the second amendment mandated the state's right to keep troops as a matter of constitutional law. Indeed, the Supreme Court has held that the "obvious purpose" of the second amendment was to assure the continuation of the militia.⁵⁵ Constitutional protection of the states' militia rights was guaranteed even at the cost of removing the central government's prerogative to prohibit ownership of firearms.⁵⁶ The central government was thus compelled to shoulder certain risks to insure that the existence of the various state militia would not be infringed.

This result is hardly surprising. Aside from the implications of the language presented by these constitutional passages, removal of article I, section 10's consent provision is consistent with the overall theme behind the adoption of the Bill of Rights. Few would dispute that the Bill of Rights was adopted to limit the grant of power given the central government in the main text of the constitution.⁵⁷ Additionally, since the framers justified the

original Constitutional text. *See* *United States v. Louisiana*, 123 U.S. 32, 35 (1887)(the purpose of the 11th amendment was to amend article III, § 2); *Civil Rights Cases*, 109 U.S. 3 (1883)(the purpose of the 13th amendment was to amend article IV, § 2); *Elk v. Wilkens*, 112 U.S. 94 (1884)(the purpose of the 14th amendment, § 2 was to amend article I, § 2); *Eisner v. Macomber*, 252 U.S. 189 (1920)(the purpose of the 16th amendment was to amend article I, § 9). Similar arguments can be made regarding the twelfth, seventeenth and twentieth amendments.

54. *Rogers*, *supra* note 20, at 326 (the second amendment denied Congress the ability to prohibit the states from maintaining militia forces). *Accord id.* at 336 (We know that historically the second amendment was adopted to amend that portion of section 10 of Article I of the Constitution which said that "no State shall, without the Consent of Congress keep Troops . . . in time of Peace . . ."); *W. RIKER*, *supra* note 33, at 9-10 ("[T]he Second Amendment to the Constitution was intended to guarantee the permanence of the division of control over the militia.") (emphasis in original). *Cf.* *Selective Draft Law Cases*, 245 U.S. 366, 381 (1918)(The court held that the framers, in supplying the army power to the central government and prohibiting the states from maintaining militia forces without Congressional consent, had removed all military powers from the states. Implications of the second amendment were not discussed by the court.).

55. *United States v. Miller*, 307 U.S. 174, 178 (1938).

56. In *Miller*, the Supreme Court held that the central government would be without authority to deny a citizen his sawed off shotgun if it could be shown that possession of the weapon had "some reasonable relationship to the preservation or efficiency of a well regulated militia . . ." 307 U.S. at 178.

57. "[P]assage of [the Bill of Rights was] in response to the spirit of dissatisfaction expressed by . . . the States at the time of their ratification of the Constitution, and the general demand of the country for further limitation upon the powers of the Federal Government." H. AMES, *THE PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES DURING THE FIRST CENTURY OF ITS HISTORY* 19 (1970); *see also* T. BRANT, *THE BILL OF RIGHTS: ITS ORIGIN AND MEANING* 47 (1965)("The great object in view was to limit and qualify the powers of government."). Those who would argue that the Bill of

central government's army power by arguing that the states could use their militia to repel any danger presented by a federal standing army, it follows that protection of the states' militia rights was unexceptional (even among the Federalists).⁵⁸

F. The Militia Powers

The "Militia of the several States"⁵⁹ could be called into federal service only upon the occurrence of one or more of three constitutionally enumerated contingencies (the constitutional "call" provisions): first, when needed to "execute the Laws of the Union";⁶⁰ second, when needed to "suppress Insurrections";⁶¹ or, third, when needed to repel an invasion.⁶² These provisions were drawn so that Congress could elect to entrust the national defense solely to the militia of the several states (a result that would bring satisfaction to the Anti-Federalists). However, the three exclusive conditions limiting federal access to the militia suggest that these state armies were not intended to serve as a general purpose fighting force. For instance, if the national government desired an offensive projection of military power abroad, resort to the army power would be mandatory.⁶³ Constraining federal access to state militia troops in this fashion also speaks to the underlying concerns of the subsequently adopted second amendment. By disallowing unfettered federal discretion, the states retained primary use of their militia troops with minimal federal interference.

Rights was intended to limit the power of the central government in its dealings with individual citizens but not in its dealings with states are contradicted by the blackletter of the tenth amendment.

58. In *THE FEDERALIST* NO. 46, Madison urges the states to accept the army power. He argues that the downfall of state governments at the hands of a federal army would be impossible because the state militia would "be able to repel the danger." *THE FEDERALIST* NO. 46, at 299 (J. Madison)(C. Rossiter ed. 1961). See also S. HALBROOK, *supra* note 46, at 68 (quoting Tench Coxe - a friend of Madison and a prominent Federalist)("The militia . . . will form a powerful check upon the regular troops . . ."). See also *id.* at 83 ("Whenever a people . . . entrust the defence of their country to a . . . standing army . . . the power of that country will remain under the direction of the most wealthy citizens . . . [y]our liberties will be safe as long as you support a well regulated militia.").

59. U.S. CONST. art.II, § 2, cl. 1.

60. U.S. CONST. art. I, § 8, cl. 15.

61. *Id.*

62. *Id.*

63. This issue received close scrutiny in *Authority of President to Send Militia Into a Foreign Country*, 29 Op. Att'y Gen. 322, 322 (1912). The opinion concluded that the militia was "liable to be called into the service of the Government only upon the particular occasions named in the Constitution." *Id.* at 323.

Congress could ensure the desired state of militia readiness because it held the power to organize, arm, and discipline the state militia.⁶⁴ Additionally, Congress held the power to devise the training regimen to be undertaken by the militia troops.⁶⁵ These provisions were responsive to the federalist desire for a "regular and disciplined"⁶⁶ fighting force which could ably defend the country when called upon.

However, certain provisions operated to deny Congress significant control over the militia. The power to appoint the militia's officers⁶⁷ and to conduct the training of the militia⁶⁸ was reserved for the states.

Power over the state militia was diffused not only between the Congress and the states, but the President as well. He was to act as "Commander in Chief of . . . the Militia of the several States, when called into the actual Service of the United States."⁶⁹ Thus, commander-in-chief duties over the militia were shared between the President and the various State Governors.⁷⁰

G. The Army Powers

Initially, it should be noted that unlike the militia, the framers placed no limits upon the purposes to which the army could be employed. The army was, thus, a general purpose fighting force available for service wherever the central government should choose to send it. An additional point of difference between the army power and the militia power was that no control over the army was reserved to the states. Control over the army resided only with the central government.

So that the army would not be able to wrest "from the people that liberty they had so dearly earned,"⁷¹ three significant limita-

64. U.S. CONST. art. I, § 8, cl. 16 gives Congress the power to "provide for organizing, arming, and disciplining the Militia"

65. U.S. CONST. art. I, § 8, cl. 16 specifically reserves to the states "the Authority of training the Militia . . . according to the discipline prescribed by Congress."

66. See *supra* notes 34-35 and accompanying text.

67. U.S. CONST. art. I, § 8, cl. 16 reserves to the states "the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."

68. *Id.*

69. U.S. CONST. art. II, § 2, cl. 1.

70. This aspect makes the National Guard unique because no other military force in the world maintains dual loyalties or serves dual commanders. W. RIKER, *supra* note 33, at 1-2.

71. "Brutus", *supra* note 27, at 288.

tions were saddled upon the national government's exercise of its army power. First, an army could exist only if Congress chose to "raise and support" one.⁷² Thus, the army could be disbanded at the pleasure of Congress. Second, Congress could fund the army for not more than two years at a time.⁷³ Periodic review of funding was intended to keep an obedient army close by its civilian master's heel. The third limitation was the diffusion of authority over the army among the executive and legislative branches. Congress could raise armies, but only the executive could exercise command.⁷⁴

II. CONGRESSIONAL ACTIVITY

A. The Militia Act of 1792

The Militia Act of 1792⁷⁵ was the first exercise by the Congress of its constitutionally conferred militia powers. Since this Act did not blend the army and militia powers, it provides little aid in determining what limitations these powers impose upon each other when applied jointly (as in *Perpich*⁷⁶). Nevertheless, the act merits close attention because it set in motion the forces which led to the initial statutory intermingling of the militia and army powers some 124 years later.⁷⁷

The Act illustrates a Congressional choice to place primary emphasis on the militia powers with recourse to the army powers only when needed.⁷⁸ This policy contemplated the maintenance of

72. U.S. CONST., art. I, § 8, cl. 12 provides that "The Congress shall have Power . . . To raise and support Armies . . ."

73. U.S. CONST. art. I, § 8, cl. 12 provides that "no Appropriation of Money [for support of the army] . . . shall be for a longer Term than two Years."

74. U.S. CONST. art. II, § 2, cl. 1 provides that the "President shall be Commander in Chief of the Army . . . of the United States . . ."

75. Militia Act of May 8, 1792, ch. 32, 1 Stat. 271, *repealed by* an Act of Feb. 28, 1795, ch. 36, 1 Stat. 424.

76. *Perpich v. United States Dep't of Defense*, 666 F. Supp. 1319 (D. Minn. 1987), *appeal filed*, No. 87-5345-MN (8th Cir. Aug. 12, 1987).

77. The National Defense Act of 1916 was the first time that the Congress chose to blend the militia and army powers. *See infra* notes 118-30 and accompanying text. *But see* S. HUNTINGTON, *supra* note 11, at 171 (claiming that the intermingling of army and militia powers first occurred with the adoption of the Dick Act in 1903). In 1957 it was noted that the army and militia powers had become so intermingled that the militia was almost completely "nationalized." W. RIKER, *supra* note 33, at 99.

78. The act allowed access to state troops by the federal government in language that mirrored the Constitutional "call" provisions. If the federal government needed troops for other purposes, or troops in larger numbers than the state militia could supply, then recourse to a draft under the army power would follow. Extensive analysis of the workings

only a bare bones army during peacetime.⁷⁹ Thus, each national military conflict began with militia troops "called" into federal service, supplemented by those few regular army troops then in existence. Of course, the army's number would swell during war-time because the Congress would compel military service by implementing a draft under its army powers. However, at war's end, the army was always reduced to its impotent peacetime complement. This approach was followed in the War of 1812,⁸⁰ the Civil War,⁸¹ and even as late as the Spanish-American War in 1898.⁸² It was not discarded until well into the twentieth century.⁸³

Congress chose not to raise a permanent army for several reasons. First, there was little disruption of the status quo since no army had been raised in the history of this country except when required by the onset of war. Second, the expense involved in raising and equipping an army posed a major deterrent.⁸⁴ Third, there

of the Militia Act of 1792 has been performed elsewhere and need not be repeated here. See, e.g., Wiener, *supra* note 25, at 186-88.

79. The U.S. Army numbered only about 1,300 officers and men at the time the act was adopted. Shaw, *supra* note 6, at 46. See also Wiener, *supra* note 25, at 186.

80. At the outset of the War of 1812, the army consisted of only "several thousand regulars" who "were chained to the frontier forts and the coast line." W. GANOE, THE HISTORY OF THE UNITED STATES ARMY 116-17 (1942). Faced with difficulties in raising the army on a moment's notice, the Congress "threw up its hands altogether and passed its responsibility to the States by asking the Governors to have 80,000 officers and men ready to march . . ." *Id.* at 118. The army reached a peak strength of approximately 60,000 men. Yet, at war's end, "a law was passed limiting the army to 10,000 men . . ." *Id.* at 146.

81. The nation entered the Civil War in 1860 with an army of less than 13,000 men. *Id.* at 244. "Having no regular army in sight, . . . [President Lincoln] had to fall back on the old law of 1795 [the Militia Act of 1792] and to turn in desperation to the militia of the states." *Id.* at 249. The President called out 75,000 militia. Simultaneously, he sought to increase the army to approximately 79,000 men (22,714 new regulars and 42,834 under a three year enlistment). *Id.* at 251. Six months later the President sought 500,000 three year volunteers. *Id.* at 259. Yet, at war's end the army was cut back to only 25,000 men. *Id.* at 261.

82. At the beginning of 1898, the Army numbered less than 25,000 (compared to the U.S. population of 73,000,000). *Id.* at 370. With war imminent, the President called for 125,000 volunteers from the militia. *Id.* at 372. "The next day legislation more than doubled the size of the regular army But Congress was wary. It was careful to provide that as soon as hostilities were over the army should return to its former impotent size." *Id.* at 372-73.

83. See The National Defense Act of 1920, ch. 227, subch. I, § 2, 41 Stat. 759 (omitted in codification)(adopted at the conclusion of World War I, this statute permitted, for the first time in our nation's history, maintenance of a substantial peacetime standing army (280,000 enlisted men)).

84. There were many who subscribed to the rule that a "standing army in peacetime could never be sufficient to meet war needs, unless so large that it would bankrupt the Republic." E. LEE, *supra* note 20, at 13.

was a general fear that a large army would seize power from the elected government. The dire prediction voiced by the Anti-Federalists during the constitutional convention⁸⁵ left its mark on the early Congress, many of whom were themselves participants in the Constitutional Convention of 1787.

Finally, there was little need to raise an army because it was thought that the militia would offer an able substitute. The limited purposes to which the militia might be put, as defined by the constitutional "call" provisions, were of little concern because the chief threats facing the nation were the Indians on the western frontier, the British to the north (across the Canadian border), and the Spanish and French on the eastern seaboard. Defense of the borders, a purely domestic task, fell easily within the limited purposes specified in the "call" provisions of the militia clause. Projection of military force into foreign lands was hardly contemplated by the national policy makers in 1792. Additionally, it was thought that the Act had cured those deficiencies which led the Federalists to declare that "dependence on the militia . . . [was to rely] upon a broken staff."⁸⁶ Pursuant to the power to organize, arm, and discipline the militia, the Act contained numerous provisions intended to guarantee a militia which was fully equipped and battle ready.

Unfortunately, those portions of the Act which were meant to ensure an ably trained militia met with failure.⁸⁷ With the passage of time, the axiom that an "adequate defense of country and laws [can] . . . be secured through the Militia"⁸⁸ became little more than a shibboleth. Two factors led to this conclusion. First, empirical evidence indicated that use of the militia led to failure and needless bloodshed during the first two years of each war in which the United States was involved.⁸⁹ The prime causes for this failure

85. See *supra* notes 23-30 and accompanying text.

86. REORGANIZATION OF THE ARMY, *supra* note 34, at 90.

87. The terms of the Militia Act were ill-conceived. "Under this law, every able-bodied man between 18 and 45 was . . . enrolled in the militia, and required to arm and equip himself at his own expense. Annual returns were prescribed, the result of which was that the militia was, in most communities, mustered once a year." Wiener, *supra* note 25, at 187. This infrequent training negatively impacted efficiency. Further complications arose because Congress delegated to the states its power to prescribe the training regimen to be followed. The resulting creation was a militia force untrained, unreliable, and utterly ill-equipped to perform whatever tasks were entrusted to it by the central government. See generally Shaw, *supra* note 6, at 46-47 (outlining the provisions of the Militia Act).

88. *United States v. Miller*, 307 U.S. 174, 179 (1938).

89. The setbacks that have resulted each time the federal government has trans-

were deficient training⁹⁰ and the appointment of "political generals"⁹¹ within the militia. This result is amply demonstrated by the nation's performance in several early conflicts. For example, the United States clearly lost the initial two and one half years of the Revolutionary War.⁹² In the War of 1812, over the course of a

formed the various state militia into a single fighting force to act in defense of the nation have never served to doom the overall war effort. Rather, the early failures at war's onset were each time reversed, approximately two years into the conflict, with victory the ultimate result. See *infra* notes 92-94 and accompanying text. This trend was still apparent as late as World War II. See COMMITTEE ON CIVILIAN COMPONENTS, RESERVE FORCES FOR NATIONAL SECURITY 2 (1948) [hereinafter The Gray Report] (report to the Secretary of Defense finding that "[i]t took two years of extraordinary effort under Federal control before [the National Guardsmen called into federal service in 1940] were prepared for offensive combat operations"). It is interesting to note that the findings of the Gray Report were never acted upon by Congress. Some speculate that the powerful National Guard lobby effectively "bottled up" the report. W. RIKER, *supra* note 33, at 99; accord O. BRADLEY, *supra* note 11, at 483.

90. Deficient training resulted in militia troops who were unprepared to handle the duties cast upon them when war broke out. "It is the old story of the use and abuse of amateurs in war." W. GANOE, *supra* note 80, at 383. The militia troops became "the victims of those superficial politicians who loudly contend that you can develop a clerk into a soldier overnight without murdering him or holding him up to shame in battle." *Id.* These training difficulties were compounded by the dual nature of the militia's "organization and mission." See generally NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968) (Commission's report to President Johnson evaluating, *inter alia*, the effectiveness of National Guard use in response to the racial riots which erupted across the country in 1963-67. The report complements this note in that the former criticizes National Guard proficiency in the execution of its state mission while the latter criticizes National Guard proficiency in the execution of its federal mission.). On the one hand, the state militia was devoted to the state mission of "protect[ing] life and property and preserv[ing] order and public safety within the state it serv[e]d. On the other hand, [the militia had] a Federal mission to provide . . . trained personnel . . . to augment the Active Army . . . in time of war . . ." *Id.* at 275.

91. "Belief in citizen-soldiers became inextricably intertwined with an undying faith in the martial prowess of untrained men led by political generals." Wiener, *supra* note 25, at 183. The State Governors possessed a constitutionally granted power to appoint the officers of the militia and they used it principally to reward deserving civilians who had garnered their favor. Thus, the militia forces operated at a terrible disadvantage when opposed in war by foreign armies commanded by officers with professional training and battlefield experience. Even as late as 1940, most of the senior National Guard commanders were "political appointees who were militarily incompetent." O. BRADLEY, *supra* note 11, at 108. This practice was also common among Presidential appointments of regular army officers. "The prevailing view was . . . that soldiering did not require professional training, a view which found striking expression in President Polk's plan to appoint Senator Benton as Lieutenant General so that he might rank and control the two Whig Major Generals, Scott and Taylor." Weiner, *supra* note 25, at 190.

92. The Revolutionary War was one in which "nearly 400,000 frantically raised soldiers . . . sought to drive little more than 40,000 of the enemy from our shores." W. GANOE, *supra* note 80, at 116. Generally speaking, the war effort was begun on June 21, 1775. On that day the Congress vested command of the Continental Army in George Washington. *Id.* at 2-3. His army was composed mainly of militia units supplied by the

two year war, the militia troops "called" into federal service were ineffective, and it was the Navy that eventually won the war for the United States.⁹³ Similarly, two and one half years of bloodshed elapsed in the Civil War before the militia gained proficiency.⁹⁴ The first two years of World War II also illustrate this

various colonies. Sprinkled among their number were a few federal soldiers (continental troops). "Everything bespoke irregularity . . ." *Id.* at 4. Military training and knowledge was virtually non-existent. The deplorable situation was highlighted by Washington's recommendation that Congress provide troops in "a proportion of two to one against the British in order to make up in numbers for the American deficiency in quality." *Id.* at 26. The army, however, was not entirely without success in the early years of the Revolution. In March, 1776, the British General Howe elected to abandon the city of Boston rather than to engage the American force. *Id.* at 22-23. Success, however, was fleeting. Pursuit of General Howe, and the resulting New York campaign in the fall of 1776 was an expensive failure. It was followed up with defeats at Fort Washington, Fort Lee, the Brandywine, and Germantown. *Id.* at 48. Excepting minor skirmishes, it was not until the fall of 1777 at Saratoga that the American army would engage the enemy and emerge with a decisive victory. *Id.* at 47-48. In February, 1778, the arrival from Germany of Frederick von Steuben signalled a much needed improvement in the efficiency of the army. *Id.* at 54-61. These two events, the victory at Saratoga and the arrival of von Steuben, foretold the turning point in the Revolutionary War. They came approximately two years after the nation had pinned its hopes for success in the war on the militia supplied by the various colonies.

93. The War of 1812 required the country, once again, to call upon the various state militia because the army consisted of only a few thousand regulars. *See supra* note 80. Of the many Governors, several simply denied the federal request for militia. The militia troops that were sent were largely undisciplined and "had to be urged along often at the point of the bayonet . . ." W. GANOE, *supra* note 80, at 119. War was declared on June 18, 1812. *Id.* at 120. By August, militia ineptitude led to the fall of Detroit and the passage of the nation's northwest into the hands of the British. *Id.* at 121. Shortly thereafter, at Queenstown, the New York militia saw 225 of its number slaughtered while "an overwhelming force of American militia . . . looked on calmly." *Id.* at 122-24. During the same period of time, "some smaller units of regulars were giving good accounts of themselves." *Id.* at 131-32. Finally, "[a]fter two years of war the training and discipline that had been discarded as lost arts after the Revolution were brought from their hiding places." *Id.* at 137-38. The lone positive militia contribution came at Fort Erie and the battle of Chippewa in July 1814. However, the "crowning disgrace of the war" — the militia's cowardly abandonment of the nation's capital and the subsequent burning of it by the British — was yet to come. *Id.* at 139. The war ended in late 1814 "solely on account of political conditions and a successful navy." *Id.* at 142. The army was dismantled without delay because the national policy dictated but a token federal army coupled with reliance on federal use of the various state militia. *See supra* note 80.

94. The army numbered fewer than 13,000 men at the beginning of the Civil War. The President was forced, once again, to turn in desperation to the militia of the states. *See supra* note 81. The few northern army regulars who could be brought from their Indian fighting stations in the west were "engulfed in the great vortex of irregular volunteers" and state militia. W. GANOE, *supra* note 80, at 253. This was the situation when South Carolina seceded from the Union on December 20, 1860. At one point in the war "a whole regiment and a battery of artillery among the militia shamefully went home . . . because their enlistment had expired . . ." *Id.* at 257. At Bull Run, in July 1861, masses of northern militia fled from the enemy while "[t]he single battallion of regulars . . . [.] conspicuous in its orderliness and energetic daring," protected the retreat. *Id.* at 259. A

point.⁹⁵ Second, the limited purposes for which the militia could be used under the constitutional "call" provisions became an increasingly drastic drawback as the United States achieved world power stature.⁹⁶

The combination of these two problems spurred a re-examination of Congress' chosen defense policy. No longer could the United States afford to suffer failure during the first two years of each war she entered. If she did, the war might end in defeat before the United States could bring effective military force to bear. The element of time had become an increasingly significant factor as improved technologies gradually overcame the insulating effect of the Atlantic and Pacific Oceans.⁹⁷

In addition, the constitutional bottlenecks preventing the use of the militia abroad were hampering the implementation of foreign policy. As the United States assumed the status of a world

nervous Congress expanded the army on the condition that it be reduced to 25,000 once peace was secured. *Id.* at 261. It was February, 1862 before the north realized its "first real victory." *Id.* at 275. Nonetheless, 1862 would belong to the Confederacy due to Union mismanagement. "The southern government wisely abandoned states' rights for their army shortly after they had begun to fight . . ." *Id.* Thus, "[w]hile the Union was organizing as a loose Confederacy, the Confederacy was organizing as a close Union." *Id.* Not until the southern defeat at Gettysburg and Grant's simultaneous capture of Vicksburg on July 4, 1863, would the war effort swing to the Union's favor. The Union ultimately prevailed, but only after losing the first two and one half years of the conflict.

95. The Gray Report, *supra* note 89, at 2. See also O. BRADLEY, *supra* note 11, at 108-10.

96. The plain language of the Constitution enumerates only three purposes to which the militia may be put. These are the "call" provisions contained in the militia clause. See *supra* text accompanying notes 60-62. "These three occasions, representing necessities of a strictly domestic character, plainly indicate that the services required of the militia can be rendered only upon the soil of the United States . . ." EFFICIENCY OF THE MILITIA, H.R. REP. No. 1094, 57th Cong., 1st Sess., at 22 (1902) [hereinafter EFFICIENCY OF THE MILITIA]. "And it is but just to infer that the enumerations of the specific occasions on which alone the militia can be called into the service of the General Government was [sic] intended as a distinct limitation upon their employment." *Id.* "They can not, consequently, be used to invade the territory of a neighboring country, or to enforce any public rights abroad." *Id.* How these constitutional provisions could hamstring national policy became clear when, during the War of 1812, the New York Militia refused to cross into Canada to battle the British. Wiener, *supra* note 25, at 189. This same problem arose later with ever greater frequency. It ruled out militia service in the Mexican War, Cuba, Puerto Rico, and the Philippines. *Id.* at 190 & 192.

97. The critical issue of time was initially recognized by the Senate in 1892.

With the introduction of steam, electricity, and arms of precision, the "pomp and circumstance of glorious war" went out, and with them departed the dignified slowness which characterized military operations of the period when combatants took their time about wars, and their duration was from seven to thirty years. Modern wars are short and sharp.

EFFICIENCY OF THE MILITIA, *supra* note 96, at 16.

power she would require access to a military force commensurate with her needs.

The Spanish-American War of 1898 became "our military eye-opener"⁹⁸ because it brought home to Congress the lessons of militia ineptitude. For the first time since 1792, there was developing a political resolve to thoroughly rethink the national defense policy.

B. The Dick Act of 1903

One possible remedy for the many problems which surfaced under the old Militia Act of 1792 was to discontinue reliance upon the militia. If the central government chose to raise a permanent army there would be little federal use for the militia. Instead, the militia would be left entirely to the states' control. The national concern over the unsatisfactory performance of the militia when "called" into federal service, as well as the constitutional problems which limited employment of the militia to purely domestic situations, would evaporate.

The alternative remedy was to tinker with the pre-existing system, thereby preserving the reliance traditionally placed on the militia and thus obviating the need to raise a federal peacetime army. This option seemed plausible because there was ample opportunity to improve the inadequate scheme of militia training utilized by the old Militia Act of 1792.⁹⁹ Furthermore, the possibility of eliminating the need to raise a standing army was still an attractive option, for the reasons previously discussed.¹⁰⁰ Accordingly, this latter approach was the one selected when the Dick Act of 1903¹⁰¹ was enacted.

The Act contained numerous provisions designed to improve the readiness and training of the militia while simultaneously demonstrating a healthy respect for "the traditional militia limitations."¹⁰² It directed that the militia be equipped with standard

98. Wiener, *supra* note 25, at 193.

99. See *supra* note 87 and accompanying text.

100. See *supra* text accompanying notes 83-86.

101. Act of Jan. 21, 1903, ch. 196, 32 Stat. 775 amended by Act of May 27, 1908, ch. 204, 35 Stat. 399 [hereinafter The Dick Act]. The Secretary of War during this period was Elihu Root. It has been suggested that the option of raising an army was never seriously considered, in part, because Root "was blinded to the needs of a 'well-regulated militia.'" E. LEÉ, *supra* note 20, at 14.

102. Wiener, *supra* note 25, at 195. Every able bodied man between the ages of eighteen and forty-five who had declared an intention to become a citizen would belong to

United States Army gear¹⁰³ and prescribed a more rigorous training schedule¹⁰⁴ to combat militia ineptitude. The Act also introduced the term "National Guard" into the statutory scheme.¹⁰⁵ However, the nagging constitutional obstacles preventing the use of the National Guard "for general military purposes outside the national boundaries"¹⁰⁶ persisted. The popular theory expressed at that time was that if ever the need for troops on foreign shores exceeded the army's strength level, large numbers of militia troops, perhaps even entire units, would shed their militia status and volunteer for active service in the United States Army. But, due to a flurry of legislative activity which preceded the coming era of military hostilities (culminating in World War I), the plan's volunteer provision was never tested.

C. The Second Dick Act (1908)

The Second Dick Act¹⁰⁷ represented a final attempt by Congress to preserve its policy of reliance upon the militia. The original Dick Act of 1903 had cured the training problems which were viewed as the chief cause of militia ineptitude. The Second Dick Act tried to eliminate the constitutional bottlenecks which were thought to prohibit use of the militia abroad. The Act failed.

In amending the Dick Act of 1903, the Second Dick Act provided that the militia, when called into the service of the United States, could be used "either within or without the territory of the

the state militia (some would provide active service, the rest would occupy a reserve status). The Dick Act, *supra* note 101, at § 1. The President could call the militia into federal service for a period not exceeding nine months if needed to repel an invasion, suppress an insurrection, or execute the laws of the Union (the traditional "call" provisions enumerated in the militia clause of the Constitution). *Id.* § 4.

103. The Dick Act, *supra* note 101, at § 13 (Militia troops were to receive "such number of the United States standard service magazine arms, with bayonets, bayonet scabbards, gun slings, belts, and such other necessary accouterments and equipments as are required for the Army of the United States . . ."). This was a significant change from the Militia Act of 1792 which required each militia man to "equip himself at his own expense." *See supra* note 87.

104. The act required the states to muster their organized militia for an instructional period of five consecutive days per year. The additional requirement for twenty four individual assemblies for drill and instruction was also imposed. The Dick Act, *supra* note 101, at § 18. The Secretary of War was authorized to subsidize these various training periods for the states. *Id.* § 14. Only a single muster annually was required under the Militia Act of 1792. *See supra* note 87.

105. The Dick Act, *supra* note 101, at § 1.

106. Wiener, *supra* note 25, at 198.

107. Act of May 27, 1908, ch. 204, 35 Stat. 399 *amended by* Act of April 21, 1910, ch. 185, 36 Stat. 329 [hereinafter The Dick Act II].

United States.”¹⁰⁸ Since the members of the National Guard were seemingly agreeable to this waiver of territorial limitations¹⁰⁹ no attention was paid to the new law — “except perhaps [by] those lawyers interested enough in the subject to read the limited purposes for which the Constitution had authorized the Federal use of the militia.”¹¹⁰ The voice of such a lawyer was not heard and the issue lay unnoticed until 1912 when the Attorney General, George Wickersham, concluded that Constitutional limitations precluded “sending the militia into a foreign country in time of peace”¹¹¹ The debate over the use of the militia and the army was thus reopened. Congress responded four years later with the adoption of the National Defense Act of 1916.

D. The National Defense Act of 1916

The war festering in Europe, which was to grow into World War I, the uncertain use for which the National Guardsmen might be employed in an overseas conflict, and a defense burden spanning two hemispheres¹¹² combined to signal the departure of the important role previously enjoyed by the states in national military policy. The shift of power to the central government, pro-

108. *Id.* § 5.

109. Officials within the National Guard had long fought to obtain “full recognition” for the contribution to national defense they felt their organization was fit to deliver. *Price v. United States*, 100 F. Supp. 310, 313 (Ct. Cl. 1951) (“When the 1903 act became a law the National Guard officials thought their long fight for full recognition at last had been won.”). *See also* Wiener, *supra* note 25, at 197 (The guardsmen received their *quid pro quo* in return for accepting the territorial waiver. One of the provisions of section five required the President to turn to the National Guard instead of raising volunteers when the Regular Army required assistance to accomplish a given domestic task.). The eager attitude of the National Guard officials has carried down to the present day. The Montgomery Amendment, which portends a larger involvement of National Guardsmen within the national defense picture, is strongly supported by the National Guard because it “strips the governors of their authority to block training.” Kennedy, *supra* note 11, at 5.

110. Ansell, *Status of State Militia Under the Hay Bill*, 30 HARV. L. REV. 712, 713 (1917). Presumably State Governors of the early 1900’s did not vigorously guard federal access to their National Guardsmen as would Governor Perpich and others. *Id.* *See supra* notes 10-18 and accompanying text (in recent years several governors attempted to limit federal control by withholding their consent for training exercises of National Guard troops overseas).

111. Authority of President to Send Militia Into a Foreign Country, 29 Op. Att’y Gen. 322, 324 (1912).

112. Secretary of War Garrison offered this reason as a factor impelling an expansion of the nation’s defense forces during his testimony before the Senate in 1916. He referred to American interests in the Philippines, China, Puerto Rico, and the canal in Panama to illustrate his point. E. LEE, *supra* note 20, at 36-37.

vided for, but not required by the Constitution,¹¹³ had begun.

Two options received serious consideration. The first, supported by Secretary of War Garrison, involved the use of the army power to create a small standing army, with a reserve of 500,000 troops subject to instant call (the "continental army").¹¹⁴ Under this plan, the National Guard would be left entirely to the states.¹¹⁵ Of course, National Guardsmen would be free to volunteer for federal service if war erupted. The federal government would completely control the field of national defense — the states would be excluded. Critics claimed that such a militaristic approach "would have been a step toward erasing our historic State and community loyalties, and, as such, would have tampered with the very foundation of our Republic."¹¹⁶

The second option centered on the quest to find some means by which federal control of the National Guard could be expanded, resulting in retention by the states of influence in the area of national military affairs. "[D]o not abandon the militia, but federalize it" argued the militia lobby.¹¹⁷ Under this plan, army expansion would not be required and the community traditions, which were thought to be vital to a democratic style of government, would be preserved.

Congress incorporated the second plan in its adoption of the

113. See *supra* notes 39-43 and accompanying text.

114. The Continental Army plan called for "a small, highly trained, highly effective Regular Army, which could be expanded in wartime with the 'Federal Volunteers' who would be raised, officered, and trained in time of peace." E. LEE, *supra* note 20, at 35.

115. The Secretary held a dim view of the present system under which the federal government relied upon the National Guard. "Until we entirely abandon the idea of relying upon the impossible system of State troops for national defense, we can never build a system on any foundation that will endure or that will stand the strain of war." *Id.* at 36. "The best I think you can expect is to have them come forward to supply *wastage* . . ." *Id.* (emphasis in original). The Continental Army plan would therefore "leave the National Guard for purely State uses." *Id.* at 35.

116. *Id.* at 37. See also *supra* notes 26-28 and accompanying text.

117. E. LEE, *supra* note 20, at 43. The National Guard's Adjutant General Chase, of Colorado, used the following plea to implore the committee not to select the Continental Army plan: "We yearn with our whole souls for an opportunity to federalize. You can federalize us to any extent or do anything else on earth to make the National Guard an asset for the protection of the country, but I know that the Guard is fit." *Id.* at 67-68. The problems inherent in "federalizing" the National Guard arose due to the obstacles planted in the text of the Constitution. See *supra* notes 59-70 and accompanying text (federal access to the militia is bounded by the constitutional "call" provisions; federal government may prescribe training but may not conduct it; federal government may not appoint the militia officers).

National Defense Act of 1916.¹¹⁸ This legislative scheme required an intermingling and blending of both the army and militia power, ultimately giving rise to the issue at stake in the *Perpich* case.

The heart of the Act, section 111, provided that the President could implement a draft compelling "any or all members of the National Guard"¹¹⁹ to serve in the United States Army (under the army power).¹²⁰ This selective draft could be utilized whenever Congress "authorized the use of the armed land forces of the United States, for any purpose requiring the use of troops in excess of those [accessible in] the Regular Army."¹²¹

The problem with this provision was that it failed to recognize the states' right to maintain a militia force, a right secured by the adoption of the second amendment.¹²² The necessities of a "well regulated" militia would seemingly require that the federal government permit men, as well as guns, to comprise the state militia. A federal draft of "any or all" members of the state's National Guard would eliminate that state's militia force. If federal respect for state militia forces is constitutionally mandated, then National Guard service must shield National Guardsmen from compelled service in the United States Army under certain circumstances. A federal draft under the army power which randomly selects citizens, including National Guardsmen, for federal service in the army would be quite another matter.¹²³ Similarly, a

118. National Defense Act, ch. 134, 39 Stat. 166 (1916)(codified as amended in scattered sections of 10 & 32 U.S.C.).

119. National Defense Act, ch. 134, § 111, 39 Stat. 166 (1916), *repealed by* Act of Aug. 10, 1956, ch. 1041, § 2, 70A Stat. 596.

120. The Supreme Court has held that Congress' army power carries with it the implied power to institute a draft to compel military service. *Selective Draft Law Cases*, 245 U.S. 366, 377 (1918). "As the mind cannot conceive an army without men to compose it, . . . the objection that [the Constitution] . . . does not give power to provide for such men would seem to be too frivolous for further notice." *Id.*

121. National Defense Act, ch. 134, § 111, 39 Stat. 166 (1916), *repealed by* Act of Aug. 10, 1956, ch. 1041, § 2, 70A Stat. 596.

122. See *supra* notes 44-58 and accompanying text.

123. A draft structured in this fashion would be true to the claim that Congress may draft *any* of its citizens. As written, § 111 drafted only those citizens who happened also to be National Guardsmen. This meant that Congress was setting aside the majority of the population as immune from the draft (discounting for the moment the probability that Congress might enact a separate draft statute reaching all remaining citizens once the supply of National Guardsmen was exhausted). Thus, the statute operated to prevent Congress from drafting "any of its citizens." The rationale underpinning § 111 was that the "draft into the Army of the United States [was] operative upon the members of the militia, not in their status as militiamen, but in their capacity as citizens . . ." Ansell, *supra* note 110, at 714. In truth, the draft was operative upon the members of the militia in their

different issue would be presented if the federal draft selectively targeted National Guardsmen only when actual war or other national emergencies seemed imminent.¹²⁴ Such compelling circumstances would permit federal interests to justifiably override state militia rights.

The Act contained one further encroachment upon the Constitutional militia powers granted to the states, in that the states were constrained to appoint only those officers who "passed such tests as to . . . physical, moral, and professional fitness as the President shall prescribe."¹²⁵ This limited "[t]he constitutional provision 'reserving to the states . . . the Appointment of the Officers' . . ."¹²⁶ The State Governors' discretion in appointing the officers of the National Guard was thus narrowed dramatically. This new statutory rule was not without its benefits. Federal oversight could be used to prevent the Governors from using their appointment power to turn political cronies into generals, thus eliminating one of the historical causes of militia ineptitude.¹²⁷ Nevertheless, to permit Congress to invade the Governors' appointment power in this fashion was to do violence to the separation of power between state and federal governments over the militia, which was fashioned so carefully in the text of the Constitution.¹²⁸ Reliance by the federal government on the state militia carried with it the cost of shared control between the federal and respective state governments. This tradeoff involving the appointment power was created during the compromise process

capacity as citizens *because* of their status as militiamen.

124. In time of war the country calls forth its citizens to ensure national survival. The citizen "may be compelled, . . . against his will and without regard to his personal wishes . . . to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense." *Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1904). It would be anomalous to shield the National Guardsmen from this requirement while sending his neighbor off to combat. Additionally, the National Guard troops would be better prepared for service in the Army. Their military training, much of it at federal expense, better equips them to serve than their untrained neighbor. Accordingly, they should be drafted first when war is threatened because "Congress not only has the right to take those who are the best prepared to defend the Nation, but it also has the duty." Ansell, *supra* note 110, at 723.

125. National Defense Act, ch. 134, §§ 74-75, 39 Stat. 166 (1916)(codified as amended at 32 U.S.C. §§ 305, 307, 323 and 10 U.S.C. §§ 3820 & 8820 (1986)).

126. Wiener, *supra* note 25, at 201; *see also supra* note 67 and accompanying text.

127. *See supra* note 91 and accompanying text.

128. *See supra* note 67 and accompanying text. *See generally* notes 19-43 and accompanying text.

which grew out of the constitutional clash of Anti-Federalist¹²⁹ and Federalist¹³⁰ forces. They presumably had weighed the benefits of federal oversight in the appointment process, including the risk of political generals, but chose to vest plenary appointment power in the Governors.

The National Defense Act of 1916 was significant in two respects. First, it signaled a shift in national defense policy from one bottomed on local control to one controlled by the central government. Second, it provided the first example of statutory blending of the army and militia powers. This was the beginning of what became a creeping erosion of the bright line separating the militia and army powers. These are the two issues upon which the *Perpich* litigation turns.

E. The Act of 1933

Following World War I, Congress concentrated unprecedented authority in the central government by allowing, for the first time ever, a standing army in peacetime.¹³¹ In addition, planners decided that efficient use of this new resource required that all land forces in the service of the United States, including the National Guard, shed their distinctive identities by incorporating themselves full-time into the army (the "One Army" idea).¹³² This created a problem, however, because the National Defense Act of 1916 brought the National Guard into the army only when "called" into federal service under the militia clause and during those additional periods when the President drafted National Guardsmen into the army under the army clause pursuant to Congressional authorization.¹³³ The Act of 1933¹³⁴ was adopted, in part, to establish the National Guard as a full-time branch of the army. The Act accomplished this by making the National Guard a reserve component of the United States Army¹³⁵ designating it

129. See *supra* notes 23-30 and accompanying text.

130. See *supra* notes 31-38 and accompanying text.

131. See *supra* note 83 and accompanying text.

132. Wiener, *supra* note 25, at 207.

133. National Defense Act, ch. 134, § 111, 39 Stat. 166 (1916), *repealed by* Act of Aug. 10, 1956, ch. 1041, § 2, 70A Stat. 596.

134. Act of June 15, 1933, ch. 87, 48 Stat. 153 (codified as amended in scattered sections of 10 & 32 U.S.C.).

135. *Id.* § 9 (amending the National Defense Act by adding § 71(b))(current version at 32 U.S.C. § 101(3)-(5) (1986)).

the National Guard of the United States.¹³⁶ This new "National Guard of the United States" subsumed those troops already serving in the National Guard units of the several states.¹³⁷ Thus, a member of the State National Guard inherited automatic membership in the United States Army Reserves.

Since the federal army power is plenary and this new provision, by definition, brought all National Guardsmen within the ambit of the army power, the federal government had put in place a mechanism by which it could utilize State National Guard troops without regard to the constitutional militia clause restrictions. The statute, however, declined to go so far. Without mentioning militia clause restrictions, it permitted the President to bring the National Guard of the United States onto active duty *only* if Congress first "declared a national emergency . . . requiring the use of troops in excess of those of the Regular Army."¹³⁸ By placing the "national emergency" restriction upon the federal government's application of its army powers to the National Guard, the draftsmen properly accommodated the states' militia rights granted to them under the militia clause and the second amendment.¹³⁹

The only substantive change brought about by the Act of 1933 was that all National Guard troops were made a part of the Army Reserves at all times. In practice, however, the operation of the National Guard was changed little. Though defined as a part of the reserve armed forces of the United States, the Act did not treat the National Guard as such. The constitutional "call" provisions limiting federal access to National Guard assets as well as conditioning the army power upon a Congressional declaration of "national emergency" effectively left the National Guard separate from the other reserve forces. Semantics, however, were responsible for a further blending of the militia and army powers.

F. The Armed Forces Reserve Act of 1952

The Armed Forces Reserve Act of 1952¹⁴⁰ has survived to the

136. *Id.* § 1 (current version at 32 U.S.C. § 101(3)-(5) (1986)).

137. *Id.* § 9 (amending the National Defense Act by adding § 71(a))(current version at 32 U.S.C. § 101(3)-(5) (1986)).

138. *Id.* § 18 (amending § 111 of the National Defense Act).

139. *See supra* notes 122-124 and accompanying text.

140. Armed Forces Reserve Act of 1952, ch. 608, 66 Stat. 481, *repealed in part by* Act of Aug. 10, 1956, ch. 1041, § 53, 70A Stat. 641.

present day with only minor modifications. Its declared purpose was not to alter the existing distribution of power between the federal and state governments over the National Guard (as it then existed under the Act of 1933). Rather, its purpose was to "bring together . . . in one statute the great number of laws relating to the reserve components of the Army, Navy, Air Force, Marine Corps, and Coast Guard, which have been enacted during past decades."¹⁴¹ The National Guard was included because of its continued role as a reserve component of the United States Army.¹⁴² As in the Act of 1933, the Act of 1952 allowed federal access to the National Guard, under the army clause, in times of "national emergency."¹⁴³

Section 233 of this Act, however, differed markedly from the statutory forerunners. This section, for the first time, used army clause powers to bring National Guardsmen into active federal service for training.¹⁴⁴ Because legislative history relating to this new feature is nonexistent,¹⁴⁵ we must assume that it was adopted

141. S. REP. NO. 1795, 82d Cong., 2d Sess., *reprinted in* 1952 U.S. CODE CONG. & ADMIN. NEWS 2005.

142. Armed Forces Reserve Act of 1952, ch. 608, § 202, 66 Stat. 481, *repealed by* Act of Aug. 10, 1956, ch. 1041, § 53, 70A Stat. 641, 682 (current version at 10 U.S.C. §§ 261-63, 267, 3221, 3224, 8221, 8224 (1986), 14 U.S.C. § 752(a)(1986), and 32 U.S.C. §§ 101-02 (1986)).

143. Armed Forces Reserve Act of 1952, ch. 608, § 233(a), 66 Stat. 481, *repealed by* Act of Aug. 10, 1956, ch. 1041, § 53, 70A Stat. 641, 682. Previous statutes allowed federal access to National Guardsmen under the army clause only when the services of the Guard were needed due to a "national emergency." *See* Act of June 15, 1933, ch. 87, § 18, 48 Stat. 153 (amending National Defense Act, ch. 134, § 111, 39 Stat. 166 (1916)).

144. Armed Forces Reserve Act of 1952, ch. 608, § 233(c), 66 Stat. 481, *repealed by* Act of Aug. 10, 1956, ch. 1041, § 53, 70A Stat. 641, 682 (current version at 10 U.S.C. § 672(b)(1986))(providing that members of all reserve components may be ordered to active duty for training, not to exceed fifteen days annually — but specifying that National Guardsmen were vulnerable to the federal training requirements only if their Governor consented).

145. Representatives from the National Guard who appeared before the Senate subcommittee which considered this legislation did not mention the new training provision contained in § 233. Instead, they used their testimony to emphasize the need for compulsory military service in the National Guard. Under the volunteer system, they claimed that manning levels stood at about 50% due to an annual turnover of one third of their personnel. Thus, National Guard commanders were unable to adequately train their troops because the demands of recruiting were draining assets and resources. Perhaps the federal training provision was a compromise. The National Guard did not get the draft it sought, however, the training problems would be alleviated by having the federal government fulfill this function. *See Armed Forces Reserve Act: Hearings on H.R. 5426 Before the Senate Subcomm. on Armed Services*, 82d Cong., 2d Sess. 104, 111-12, 114, & 131 (1952). *Cf. Perpich v. United States Dep't of Defense*, 666 F. Supp. 1319 (D. Minn. 1987), *appeal filed*, No. 87-5345-MN (8th Cir. Aug. 12, 1987)("Congress enacted these provisions in

for one of two reasons. It was either adopted because Congress thought it was merely enacting "into law policies which [were already] . . . being carried out administratively,"¹⁴⁶ or because Congress felt the new law merely preserved the National Guard's "traditional place in our defense structure."¹⁴⁷

This new federal role in the management of National Guard troops is significant for two reasons. First, it further demonstrates the pervasive application of the army clause (as expanded by the necessary and proper powers) to the National Guard. Second, and perhaps more important, it shows a continuing erosion of the state powers granted under the militia clause. With this expansion of federal power, the states lost much of their authority to train "the Militia according to the discipline prescribed by Congress."¹⁴⁸ An awareness of this problem, although articulated nowhere within the statute, can be implied from the special treatment accorded National Guardsmen and their respective State Governors whenever training was desired by federal officials. Section 233 required gubernatorial consent before National Guardsmen could be ordered onto active duty for peace time training.¹⁴⁹ No such consent requirement was imposed in the case of other reservists — Army, Navy, Air Force, Marine Corps, and Coast Guard.

National Guard officials, ever anxious for an expanded federal role,¹⁵⁰ probably encouraged this new concept. Federal training would lead naturally to an increasingly important role for the National Guard within national defense strategy. The numerous Governors were similarly loathe to challenge the federal training programs because their states enjoyed perpetual access to a federally subsidized National Guard force.¹⁵¹ During fiscal year 1985, for instance, forty-eight Governors called upon their National Guard troops on 614 separate occasions. These requests came in

response to objections from state National Guard officials who sought to limit the scope of the federalization of the National Guard in part on constitutional grounds.").

146. S. REP. NO. 1795, *supra* note 141, at 2005.

147. *Id.* at 2015.

148. *See supra* note 68 and accompanying text.

149. *See supra* note 144.

150. *See supra* note 109; *see also supra* note 117 (remarks of Adjutant General Chase).

151. "[T]he federal government accounts for more than 90 percent of overall Guard funding . . ." Kitfield, *Who Controls the Guard?*, MILITARY LOGISTICS FORUM, Oct. 1986, at 52, 57. *Accord* Montgomery, *supra* note 11, at A10, col. 3 (Representative Montgomery observes that "the federal government provides almost 100 percent of National Guard funding . . .").

response to emergencies such as blizzards, floods, tornadoes, forest fires, chemical spills, housing of the homeless, and search and rescue missions. Almost 21,000 guardsmen responded, providing in excess of 124,561 workdays for their respective states. Federal national guard appropriations defrayed the overall cost of this service thus reducing the combined fifty state outlay to only eight million dollars of the total expense.¹⁵² The Governors paid a mere sixty-four dollars per workday — an incredible bargain since the Guardsman is available any time of day or night and is fully trained and equipped to respond to virtually any civil emergency that might arise.¹⁵³

Finally, this federal training provision did not result in any meaningful loss of state power. If a Governor preferred to train his National Guard troops within his state, he could simply withhold his consent. However, it was unlikely that many Governors would exercise this prerogative since the federal training periods increased the expertise of their guardsmen at no cost to the state.

The federal/state split in authority over the National Guard which was struck by the Armed Forces Reserve Act of 1952 remained essentially untouched until the Montgomery Amendment, which removed the gubernatorial consent provision contained in section 233, was added to that legislation in 1986.

III. JUDICIAL DEVELOPMENTS

The United States Supreme Court perceives judicial authority to be quite limited in the area of national defense and military affairs.¹⁵⁴ An intrusive posture is avoided because “judges are not given the task of running the Army.”¹⁵⁵ Consistent with this view, the Court has left issues relating to the army and the militia to

152. *Department of Defense Appropriations for 1987: Hearings Before the Subcomm. on the Dep't of Defense of the House Comm. on Appropriations*, 99th Cong., 2d Sess. 625-26 (1986)(statement of Lieutenant General Emmett H. Walker, Jr., U.S. Army, Chief, National Guard Bureau).

153. *But see* NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, *supra* note 90, at 275 (criticizing National Guard effectiveness in the accomplishment of its state role during the civil riots of 1963-67).

154. *Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981)(“The case arises in the context of Congress’ authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference.”).

155. *Orloff v. Willoughby*, 345 U.S. 83, 93 (1953). *See also* *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)(the courts should avoid judicial review of the government’s military decisions because this was “the intent of the Constitution” and the courts have little “competence” on the subject).

Congress.¹⁵⁶ Most constitutional challenges to the statutes enacted by Congress have been rejected,¹⁵⁷ leaving for the Court only matters of statutory interpretation.

Handicapped by the Court's reluctance to closely examine the army power, this section nevertheless undertakes to measure the breadth of that power. The ultimate issue, however, is not whether the army power is subject to limit — but whether the state militia power may properly serve as one such limit. This section concludes with an analysis of that question.

A. Cases Supporting an Expansive Interpretation of the Army Power

Of the many cases offering an expansive interpretation of the power to raise and support armies, two are offered herein — *Ex Parte Dostal*¹⁵⁸ and the *Selective Draft Law Cases*.¹⁵⁹

The *Dostal* litigation was brought by John Hackenberg, an Austrian immigrant who enlisted in the Ohio National Guard by falsifying his citizenship and age. Two weeks after passage of the 1916 National Defense Act, the President drafted Hackenberg's National Guard unit into the United States Army for service on the Mexican border pursuant to section 111 of that Act.¹⁶⁰ Hackenberg was discharged along with his unit nine months later. However, four months after his discharge, Hackenberg's entire unit was drafted once again for federal service. This recall onto active duty was premised not on section 111 of the 1916 National Defense Act, but rather, on provisions contained within the Selective Draft Law.¹⁶¹ A federal draft under section 111 would target only National Guardsmen while a federal draft under the Selective Draft Law would encompass all citizens. Hackenberg challenged the legitimacy of the Selective Draft Law. He argued that he could not be made to occupy the status of soldier against his will. The court summarily rejected this claim, observing that Con-

156. See *supra* notes 75-153 and accompanying text (demonstrating the pervasive degree of Congressional activity).

157. See *infra* notes 158-94 and accompanying text.

158. 243 F. 664 (N.D. Ohio 1917).

159. 245 U.S. 366 (1918).

160. See *supra* notes 119-21 and accompanying text (explaining how § 111 of the 1916 Defense Act operates).

161. Act of May 18, 1917, ch. 15, 40 Stat. 76 *eliminated by* Act of June 15, 1917, § 4, 40 Stat. 217 (specifying that the Act of May 18, 1917 was to expire within four months after the conclusion of World War I).

gress' power to raise armies and to provide for the common defense of the country is "practically unlimited."¹⁶² Therefore, "[a]ny contention that compulsory service is in violation of the Constitution is utterly frivolous."¹⁶³

The *Selective Draft Law Cases*¹⁶⁴ were decided by the Supreme Court four months later. Faced with constitutional challenges to the same Selective Draft Law, the court agreed with *Dostal*. It reasoned that the army powers contained "complete authority" in the realm of national defense.¹⁶⁵ On the strength of this case it is now settled law that the army power, combined with the necessary and proper power, authorizes the existence of a compulsory draft statute.¹⁶⁶

B. Cases Suggesting That the Army Power, Though Broad, Is Not Limitless

Congress is not "free to disregard the Constitution when it acts in the area of military affairs."¹⁶⁷ Application of this principle has served to circumscribe the breadth of the army power in a variety of contexts.

The courts first applied this principle when a Civil War era draft statute¹⁶⁸ was challenged in 1863. The statute provided that all able bodied males were liable to military service in the United States Army if called upon by the President.¹⁶⁹ In *Antrim's Case*,¹⁷⁰ the district court recognized, consistent with *Dostal* and

162. *Ex Parte Dostal*, 243 F. at 675.

163. *Id.*

164. 245 U.S. 366 (1918).

165. *Id.* at 382.

166. The court stated:

[Authority to enact a compulsory draft statute] must be found in the clauses of the Constitution giving Congress power "to declare war . . . to raise and support armies . . . to make rules for the government and regulation of the land and naval forces." Article I, § 8. And of course the powers conferred by these provisions like all other powers given carry with them as provided by the Constitution the authority "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." Article I, § 8. As the mind cannot conceive an army without the men to compose it . . . the objection that it does not give power to provide for such men would seem to be too frivolous for further notice.

Id. at 377.

167. *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981).

168. Act of March 3, 1863, ch. 75, 12 Stat. 731.

169. *Id.* § 1.

170. 1 F. Cas. 1062 (C.C.E.D. Pa. 1863)(No. 495). See also Shaw, *supra* note 6, at

the *Selective Draft Law Cases*, that the constitutional power to raise and support armies allowed the national government to draft private persons into military service. The court held, however, that this power was not without limit because situations exist where it might encroach upon constitutional principles. The court recognized that preservation of our republican form of government was one such principle.¹⁷¹ To prevent encroachment on the offices of government, certain governmental officials must be immune from the reach of the draft statute. Under the statute in question in *Antrim's Case* the Vice-President of the United States, judges, heads of the departments of government, and Governors of the several states were exempt from the draft.¹⁷² The court further determined that any draft statute must contain limitations upon the duration of service required of draftees — the statute involved in *Antrim's Case* provided for a term of two years.¹⁷³ The court reasoned that these two safeguards were needed in order to ensure that a military government would have no opportunity to wrest power from the established republican government.¹⁷⁴

The religious guarantees of the first amendment¹⁷⁵ have also been held to impose limits upon Congress in exercising its army power. This issue arose when two conscripts challenged a Viet Nam era draft law¹⁷⁶ in *Gillette v. United States*.¹⁷⁷ Although it upheld the statute, the Court specified that the army power must accommodate the establishment clause of the first amendment.¹⁷⁸ Additionally, the Court determined that the statute would have overreached the bounds of the army power if the burdens imposed on the free exercise clause of the first amendment had been more than "incidental."¹⁷⁹

171. Presumably the court's authority for this principle was the Republican Government clause. U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . .").

172. Act of March 3, 1863, ch. 75, § 2, 12 Stat. 731.

173. *Id.* § 11.

174. 1 F. Cas. at 1064.

175. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I.

176. Military Selective Service Act of 1948, § 6(j), 50 U.S.C. app. § 456(j) (1986)(The Act, although adopted in 1948 and amended a number of times, still retained its original name.).

177. 401 U.S. 437 (1971).

178. For the statute to survive analysis under the Establishment Clause "there must be neutral, secular reasons to justify the line that Congress has drawn . . ." *Id.* at 449 n.14.

179. *Id.* at 462 ("The incidental burdens felt by persons in petitioners' position are

In *United States v. O'Brien*¹⁸⁰ the Supreme Court examined the interplay between the first amendment's guarantee of free speech¹⁸¹ and the army power. In defiance of a federal statute which prohibited destruction of Selective Service cards,¹⁸² David O'Brien burned his Selective Service card before a crowd of people near the South Boston courthouse.¹⁸³ The Supreme Court upheld O'Brien's conviction under the statute only after a satisfactory showing by the government that the army power had successfully accommodated first amendment free speech values. In striking the balance between these two constitutional provisions, the Court circumscribed the statutory use of the army power to those situations which further an "important . . . governmental interest"¹⁸⁴ and place only an "incidental restriction on . . . First Amendment freedoms."¹⁸⁵

The Court has, in addition, required Congress to use the army power in a manner consistent with the equal protection guarantees of the fifth amendment.¹⁸⁶ In *Rostker v. Goldberg*,¹⁸⁷ the Supreme Court passed on the constitutionality of the Military Selective Service Act which authorized the President to register men for the draft, but not women.¹⁸⁸ President Carter had suggested that Congress amend the statute to include women.¹⁸⁹ After considering the President's proposal "at great length"¹⁹⁰ Congress refused to extend the statute's coverage to include both sexes. The statute was subsequently challenged in the Supreme Court on the theory that it amounted to "unlawful gender-based

strictly justified by substantial governmental interests . . .").

180. 391 U.S. 367 (1968).

181. "Congress shall make no law . . . abridging the freedom of speech . . ." U.S. CONST. amend. I.

182. Military Selective Service Act of 1948, § 12, 50 U.S.C. app. § 462(b)(3) (1986)(section (b)(3) was added to the Act in 1965 by an Act of Aug. 30, 1965, Pub. L. No. 89-152, 79 Stat. 586).

183. *O'Brien*, 391 U.S. at 369.

184. *Id.* at 377.

185. *Id.*

186. The fifth amendment does not contain an Equal Protection clause. The Court has, through the doctrine of "reverse incorporation," implied into the fifth amendment the fourteenth amendment's Equal Protection provision. *See, e.g., Bolling v. Sharpe*, 347 U.S. 497 (1954).

187. 453 U.S. 57 (1981).

188. Military Selective Service Act of 1948, § 3, 50 U.S.C. app. § 453 (1986).

189. 453 U.S. at 60.

190. *Id.* at 61.

discrimination."¹⁹¹ The Court upheld the statute but acknowledged that the army power could not be used in a manner inconsistent with the "test of *Craig v. Boren*."¹⁹² Because the statute used a gender based classification scheme, use of the army power would have been impermissible had it not furthered an "important governmental interest."¹⁹³

The underlying rationale of these cases¹⁹⁴ is that Congress is checked in its ability to legislate under the army power by those specific guarantees found elsewhere within the Constitution. Further support for this principle is found in Supreme Court cases which explicitly recognize limitations on other constitutional powers closely analogous to the army power.

The war power is closely related to the army power.¹⁹⁵ In *Hamilton v. Kentucky Distilleries*,¹⁹⁶ the Supreme Court held that the war power was not plenary. Instead, the court declared that "[t]he war power of the United States, like its other powers . . . is subject to applicable constitutional limitations."¹⁹⁷

This principle was also applied by the Supreme Court to limit the federal government's use of the war power in *Ex Parte Milligan*.¹⁹⁸ During the Civil War, the general in command of union forces in Indiana caused a civilian resident of that state to face charges before a military tribunal instead of the local federal district court. The government sought to justify this conduct by arguing that "in a time of war the commander of an armed force . . . has the power . . . to suspend all civil rights."¹⁹⁹ The Supreme Court rejected this claim and overturned the lower court's conviction. The Court held that the war power did not justify abridgment of the defendant's fourth, fifth and sixth amendment rights.²⁰⁰

191. *Id.* at 62.

192. *Id.* at 70.

193. *Id.*

194. *See supra* notes 167-93 and accompanying text.

195. The term "war power" is used by the court to refer to the collection of various military powers found in article I, § 8 and article II, § 2 of the Constitution. The war power therefore encompasses the army power along with several other enumerated military powers. *See Lichter v. United States*, 334 U.S. 742, 758 (1948) (framing the issue to be whether a statute was a law necessary and proper for implementing "the war powers of Congress and especially its power to support armies").

196. 251 U.S. 146 (1919).

197. *Id.* at 156.

198. 71 U.S. (4 Wall.) 2 (1866).

199. *Id.* at 124.

200. *Id.* at 118-31. *But see Lichter v. United States*, 334 U.S. 742, 758 (1948) (im-

Closely related to the army power is the congressional power found in article I, section 8, clause 14 of the Constitution. This passage empowers Congress to “make Rules for the Government and Regulation of the land and naval Forces.” In *Reid v. Covert*,²⁰¹ the Supreme Court held that this power is not plenary. The case arose when the civilian wife of a United States serviceman was accused of his murder. Since the couple was posted to an overseas duty assignment, the government sought to bring the wife to trial before a military court martial instead of returning her to the United States for trial. The government argued that “the Necessary and Proper Clause when taken in conjunction with Clause 14 allows Congress to authorize the trial of [the wife] . . . by military tribunals and under military law.”²⁰² The Court recognized that the government’s theory would clash with the wife’s constitutional rights under “Article III and the Fifth, Sixth and Eighth Amendments.”²⁰³ Accordingly, the government’s theory failed because it ran counter to “the steadfast bulwark of the Bill of Rights.”²⁰⁴

Taken together, the army power, the war power, and the military rules power cases demonstrate that the army power is not plenary. Instead, it must be exercised in harmony with other constitutional guarantees. What remains to be decided is the issue presented by the *Perpich* case. The Court must decide what limitations, if any, the state militia power imposes upon the federal army power.

C. Cases Examining the Interplay Between the Militia and Army Powers

The Supreme Court had no reason to address this question prior to 1916 because, until that time, Congress had not intermin-

plying that the war power is limitless because “[i]t is impossible . . . to picture adequately all that might have been ‘necessary and proper’ in 1942-1944 to meet the unprecedented responsibility facing Congress”); *Korematsu v. United States*, 323 U.S. 214, 217-18 (1944)(holding that “the war power of Congress and the Executive [permits them to exclude] those of Japanese ancestry from the West Coast war area”); *Schenck v. United States*, 249 U.S. 47, 52 (1919)(holding that the war power can override first amendment rights).

201. 354 U.S. 1 (1957).

202. *Id.* at 20.

203. *Id.* at 21.

204. *Id. Accord Toth v. Quarles*, 350 U.S. 11 (1955).

gled the army and militia powers.²⁰⁵ Between the passage of the Militia Act of 1792 and the passage of the National Defense Act of 1916, Congress exercised its powers under the militia and army clauses in a manner which maintained the separateness of their two identities.²⁰⁶

Contrary to the thesis of this Note, no case directly holds that the state militia power limits the army power. Indeed, *Ex Parte Dostal*²⁰⁷ and the *Selective Draft Law Cases*²⁰⁸ are cited as authority for the proposition that the state militia power cannot constrain the army power. A closer analysis of these two cases, however, reveals room for interpretive differences.

In *Ex Parte Dostal*, the court was confronted with a challenge to the Selective Draft Law enacted pursuant to the army power. It swept this challenge aside but, in dicta, addressed the relationship between the army and militia powers by assessing the constitutionality of the federal draft provision contained in section 111 of the 1916 National Defense Act. The court observed that a draft which targets National Guardsmen is permissible *in view of the existing emergency*.²⁰⁹ Neither the statutes involved nor the analysis offered by the court suggested that a preferential draft taking National Guardsmen before other available citizens would be permissible absent a "national emergency." The resulting inference is that the army powers would not enjoy such a broad application but for the compelling circumstance of a "national emergency." Though offered as an army power case, the influence of the war power line of cases is apparent.²¹⁰

205. *But see* the numerous cases litigated in the Confederate States of America during the Civil War. These cases analyzed the constitutionality (under the Confederate Constitution) of various Confederate draft statutes. Certain southern states objected on the ground that these statutes interfered with their militia rights. The Confederate courts uniformly held that the state militia power must yield to the army power. These cases are collected and analyzed in Shaw, *supra* note 6, at 61-62. *See also* *Selective Draft Law Cases*, 245 U.S. 366, 388 (1918) ("The seceding States wrote into the constitution which was adopted to regulate the government which they sought to establish, in identical words the provisions of the Constitution of the United States which we here have under consideration.").

206. *See supra* note 77 and accompanying text.

207. 243 F. 664 (N.D. Ohio 1917). *See also supra* notes 158, 160-63 and accompanying text.

208. 245 U.S. 366 (1918).

209. 243 F. at 674.

210. *See* cases cited *supra* note 200. *See also supra* note 195 (explanation of the war power).

The *Selective Draft Law Cases*²¹¹ are the leading authority for the rule that the militia powers cannot inhibit the army powers. There, the defendants argued that the Constitution required the use of an army comprised of non-consenting citizens to be limited to those services for which the militia may be used.²¹² The Court dismissed this argument, holding instead that the militia and army clauses are wholly distinct and that the militia clause does not constrain the army clause. Furthermore, the Court reasoned that the states' control of the militia exists only to the extent that such control is "not taken away by the exercise by Congress of its power to raise armies."²¹³ As strong as this language may seem, blind reliance upon the case for such a sweeping principle is ill-founded for several reasons.

First, the Court premised its conclusion regarding the interrelationship between the army and militia powers upon article I, section 10 of the Constitution. This provision conferred on Congress the power to deny the states the right to keep troops in time of peace.²¹⁴ Since Congress could deny states the right to maintain a militia altogether, the Court reasoned that the states' Constitutional militia powers were but mere privileges which could not impact the central government's army power. This argument, however, fails to recognize that there is more in the Constitution than article I, section 10. Adoption of the second amendment modified article I, section 10, so that maintaining militia troops by the states was thereafter permitted as a matter of right.²¹⁵ Because the Court failed to recognize that the second amendment repealed the consent provision of article I, section 10, its conclusion is suspect.

Second, the case was decided in the midst of World War I. It might even be more properly classified as a war power case, which would make its rule inapplicable to the *Perpich* army power litigation. Nevertheless, the wartime setting was especially conducive to

211. 245 U.S. 366 (1918). See also *supra* notes 159, 164-66 and accompanying text.

212. 245 U.S. at 381-82.

213. *Id.* at 383.

214.

In supplying the [army] power it was manifestly intended to give it all and leave none to the States, since besides the delegation to Congress of authority to raise armies the Constitution prohibited the States, without the consent of Congress, from keeping troops in time of peace or engaging in war.

245 U.S. at 381. See also *supra* note 50 and accompanying text.

215. See *supra* notes 44-58 and accompanying text.

broad assertions regarding Congressional exercise of its army powers because the country's survival was at risk.²¹⁶ Thus, the Court, perhaps prudently, declined to provide a rationale implying limitation of any kind on the army powers. The Court, however, has not always accorded such deferential treatment to the army power. Numerous Supreme Court cases support the proposition that the army powers are not plenary and may be subject to the limitations posed by other constitutionally enumerated powers.²¹⁷

Finally, the relationship between the militia and army powers was an issue that was, at best, tangential to the cause of action before the Court. Central to the case was the defendant's frontal assault upon the draft statute premised mainly upon the notion that the federal government was without the power to compel military service of its citizens. It was claimed that the power to draft was not expressly granted and could not be implied and that compelled service was contrary to notions of individual liberty. This argument comprised the substance of the defendant's claim. He next made a host of throw away arguments,²¹⁸ including the claim²¹⁹ which prompted the Court's oft-cited rule regarding the relationship between the militia and army powers.²²⁰ The Court could easily have disregarded this argument on the ground that it was wholly unsupportable. In addressing the issue, no rigorous analysis by the Court was necessary. Any possibility of rigorous analysis was made even more difficult because of the lack of precedent.²²¹ Thus, the Court's reasoning included only a cursory examination of the plain language contained in the army and the militia passages of the Constitution. Accordingly, the Court's ruling that the militia powers cannot limit the army powers is weakened because the issue was not focused upon fully. A truly dispositive ruling which would merit application beyond the precise facts before that Court would be impossible absent fuller analysis.

216. See war power cases cited *supra* notes 195-200 and accompanying text.

217. See *supra* notes 167-94 and accompanying text.

218. The defendant claimed that the statute was void because, *inter alia*, it delegated federal power to state officials, it violated separation of powers by vesting both administrative and judicial officers with legislative discretion and it violated the religious establishment, free speech, and involuntary servitude clauses of the Constitution. *Selective Draft Law Cases*, 245 U.S. 366, 389-90 (1918).

219. See *supra* text accompanying note 212.

220. See *supra* text accompanying note 213.

221. See *supra* note 205 and accompanying text. The court utilized precedents decided in the Confederate States of America due to the lack of its own case law. 245 U.S. at 388.

It would overstate the holdings of these two cases to suggest that the army power is plenary. Instead, the army power must be amenable to limitation where its exercise contravenes explicit constitutional guarantees. The states' right to maintain militia forces should be one such guarantee. The facts of the *Perpich* case offer the court the opportunity to finally resolve this constitutional conflict.

IV. THE PERPICH LITIGATION

A. Background in Which the Case Arose

The necessity for federal training of Governor Perpich's National Guardsmen would never have arisen if federal reliance upon the National Guard had been discarded entirely.²²² Although the role in national defense policy reserved for the National Guard had fluctuated over the years, elimination of the unpopular draft, which accompanied the end of the Viet Nam conflict, required a "massive and fundamental transformation"²²³ in the orientation of the United States' defense policy. The Total Force Policy was enacted in 1973²²⁴ to compensate for the inevitable loss of military manpower which would accompany the end of the draft.²²⁵ Under the new doctrine, military readiness would be maintained by making the National Guard and other reserve forces an integral part of the active armed forces.²²⁶

The role played by the National Guard was on the rise. By 1986, forty-five percent of the United States Army's combat units were provided by the National Guard.²²⁷ Thus, if the United

222. This approach was first suggested by Secretary of War Garrison in 1916. See *supra* notes 114-16 and accompanying text. Federal reliance upon the National Guard was diminished in favor of a standing army at the close of World War I. See *supra* note 83.

223. Philbin, *States' Rights*, NATIONAL GUARD, April, 1987, at 21, 23.

224. *Id.*

225. Glickman, *supra* note 11, at 4, col. 3.

226. *Id.* See also *MacFarlane v. Grasso*, 696 F.2d 217, 222 (2d Cir. 1982).

227. *Department of Defense Appropriations for 1987: Hearings Before the Subcomm. on the Dep't of Defense of the House Comm. on Appropriations*, *supra* note 152, at 626. See also Burrelli, *National Guard Overseas Training Missions: An Issue For U.S. Military Manpower Policy*, CONGRESSIONAL RESEARCH SERVICE REPORT NO. 86-181 F, at 9 (Dec. 1, 1986)(One hundred percent of the TOW light anti-tank infantry battallions, infantry scout troops and heavy helicopter companies are provided to the U.S. Army by the National Guard); *Perpich v. United States Dep't of Defense*, 666 F. Supp. 1319 (D. Minn. 1987), *appeal filed*, No. 87-5345-MN (8th Cir. Aug. 12, 1987)(seventy five percent of the army divisions available in the event of war would be provided, at least in part, by the National Guard).

States were to go to war, "nearly half of the troops available for combat duty in the Army would come from the National Guard."²²⁸ Such a policy would be doomed to failure if the National Guard troops were not properly trained. Since the army would undoubtedly be deployed to overseas locations during war-time, actual overseas training for National Guardsmen was seen as indispensable.²²⁹ This reasoning caused overseas training of National Guardsmen to grow explosively in the 1980's.²³⁰ In 1985 and 1986, the entire overseas training program was threatened when certain Governors decided to exercise their gubernatorial veto power, provided for in section 233(c) of the Armed Forces Reserve Act of 1952.²³¹

Congress had three options at its disposal with which to respond, short of amending the consent provision out of the statute. First, participation of the National Guard in the overall defense scheme could be eliminated so that the foregone training opportunities would be of little consequence to the federal government.²³² Implementation of this particular approach would entail expanding the army so that it alone could provide for the nation's defense. This could be accomplished by re-instituting the draft or by making a career in the armed services more attractive so that sufficient numbers of volunteers would fill the ranks. A second option would be to limit National Guard participation in the national defense strategy to only those National Guard units residing in states that could be relied upon to cooperate. Under this approach, overseas training opportunities would only be provided for those guardsmen located in cooperative states. The third approach would involve freezing the National Guard federal subsidy funds and making release of them to the states contingent upon gubernatorial cooperation.²³³ The final, and most effective solution

228. Glickman, *supra* note 11, at 4, col. 3.

229. "Situations arise in actual overseas deployments that simply can not be replicated." Burrelli, *supra* note 227, at 13.

230. *See supra* note 13 and accompanying text.

231. *See supra* note 144; *see generally* notes 144-53 and accompanying text.

232. This option was proposed by the Secretary of War as far back as 1916. *See supra* note 222.

233. This option held a particularly high probability of success from the federal vantage point. It amounted to nothing more than using the tremendous federal subsidies given the states each year for support of their respective National Guard organizations as "bribes" to sweep away gubernatorial opposition to overseas training missions. *See supra* notes 151-53 and accompanying text. It is clear that federal officials contemplated this very course of action prior to enactment of the Montgomery Amendment. *See Carney, Army*

would be to amend the Armed Forces Reserve Act of 1952 by either narrowing or removing altogether the section 233(c) gubernatorial consent provision. Congress selected this latter option and Governor Perpich brought suit.

The district court held that Congress could constitutionally withdraw the consent provision since it was included in the Act merely as an accommodation to the states.²³⁴ The court based its conclusion upon the rule set forth in the *Selective Draft Law Cases*. There, the United States Supreme Court determined that the states' militia powers do not inhibit the federal government's exercise of the army power.²³⁵ This conclusion should be re-examined for the reasons stated previously.²³⁶

A more complete analysis of this problem would examine the burden placed upon the various states' militia rights. If that burden exceeded the "merely incidental" threshold, then the court would have to decide the appropriate level of scrutiny to apply to the statute. The final step in the analysis would be to examine the federal "ends" furthered by the Montgomery Amendment and the "means" embodied by the statutory scheme.

B. How the Montgomery Amendment Affects the States' Militia Rights

The states enjoy the constitutionally guaranteed right to maintain their own militia.²³⁷ The initial question in *Perpich* is whether use of the army power as embodied in general federal legislation, and the Montgomery Amendment in particular, infringes upon the militia powers reserved to the states.

Prior to adoption of the Montgomery Amendment, federal law saddled all National Guardsmen with mandatory duty as Army Reservists.²³⁸ This federal requirement persists.²³⁹ Under

Threatens To Withhold Support From Ohio Guard, Army Times, June 22, 1987, at 4, col. 1.

234. *Perpich v. United States Dep't of Defense*, 666 F. Supp. 1319 (D. Minn. 1987), appeal filed, No. 87-5345-MN (8th Cir. Aug. 12, 1987). *Accord Dukakis v. United States Dep't of Defense*, 686 F. Supp. 30 (D. Mass. 1988), *aff'd*, No. 88-1510 (1st. Cir. Oct. 25, 1988)(per curiam).

235. *Perpich*, 666 F. Supp. at 1323-24 (citing *Selective Draft Law Cases*).

236. See *supra* notes 211-21 and accompanying text.

237. See *supra* notes 44-58 and accompanying text.

238. See *supra* notes 135-37 and accompanying text.

239. 32 U.S.C. § 101(3)-(5) (1986)(members of the National Guard are members of the Army Reserve as well).

the Montgomery Amendment, these same reservist/guardsmen are required to participate in substantial federal training maneuvers.²⁴⁰ The states bear the burden of demonstrating that these federal applications of the army power have interfered with their ability to maintain their respective state militia.

There exists little evidence suggesting that the guardsmen's mandatory service in the Army Reserve has hampered the National Guard's recruiting efforts.²⁴¹ There is, however, some indication that a federal training program which is too rigorous could disenchant many individuals who would otherwise consider duty with the Guard.²⁴² Federal training requirements implemented under the Montgomery Amendment may cause numerous citizens to avoid National Guard service thereby intruding upon the states' right to maintain a militia.

Another concern is the level of danger involved when the National Guardsmen are shipped away on federal training missions.²⁴³ The Army tends to involve National Guard troops, who are on federal training missions, in combat scenarios. National Guardsmen from Washington state, while on a three week federal training mission, were used in an in-flight refueling mission during the 1986 bombing raid on Libya.²⁴⁴ Arkansas National Guards-

240. See *infra* note 242.

241. Although there has been gathered no such evidence, it is entirely possible that persons morally opposed to service in the U.S. Army are deterred thereby from serving in the National Guard. A further possibility is that prospective National Guardsmen would be steered away because the possibility of foreign duty in the army would take them away from their families and homes. See Kitfield, *supra* note 151, at 53 (Of the National Guardsmen sent to Honduras for training, "many of the teenage men were away from their families for the first time and were obviously homesick, and one of [the best sergeants in the unit] had faced the penalties of being absent without leave rather than making the trip.").

242. "In the late 1970's, all enlisted men and officers trained [with the army] 39 days a year; today, enlisted men average between 40 days and 50 days of training [with the army] and officers 70 days." Kitfield, *supra* note 151, at 57. One National Guard commander claims that the federal government seems to hold the erroneous belief that it "commands the guardsmen seven days a week, 24 hours a day . . . while [t]he state [governments] know that . . . [i]f you just keep piling on requirements, then one of these days we'll probably crack under the strain." *Id.*

243. Ohio Governor Celeste wanted to prevent his Ohio National Guard troops from travelling to Honduras for federal training because of the close proximity to "war-torn Nicaragua." *Nicaragua Training for Guard in Doubt*, The Plain Dealer (Cleveland), Oct. 12, 1987, at B2, col. 4. Concern for the safety of National Guardsmen was voiced within the House of Representatives as well. 132 CONG. REC. H6,266 (daily ed. Aug. 14, 1986)(statement of Representative Bonior)("Training National Guardsmen in Honduras presents risks which need not be taken . . .").

244. Nelson, *National Guard Now Used as Auxiliary Fighting Force*, L.A. Times,

men, while on federal training, participated in the 1983 Grenada operation.²⁴⁵ Incidentally, the Governors often do not learn that their National Guardsmen were involved in offensive combat operations until after the fact.²⁴⁶ Even the recent training exercises in Central America involve danger to the Guardsmen because of their proximity to hostile enemy forces.²⁴⁷ If the states can show that this hazardous duty frustrates National Guard recruiting efforts, then their militia rights are being arguably infringed upon.

Finally, the federal training programs may make any state conducted training impractical.²⁴⁸ Training of the militia is a prerogative expressly reserved to the states.²⁴⁹ This provides State Governors with the alternative argument that excessive federal training under the Montgomery Amendment precludes state conducted training exercises.

Whichever approach the Governors select, they have a difficult burden of proof in demonstrating federal interference with state militia rights. The Supreme Court has displayed a general reluctance to overturn Congressional legislation under the army power,²⁵⁰ as seen in numerous rulings where the Court argues that

Aug. 10, 1986, at E1, col. 4 (“[A] crew of eight Air National Guardsmen from Washington state took part in the raid on Libya—refueling aircraft used in the operation from a tanker over the Atlantic, while they were officially on a three-week ‘training mission’ in Morocco.”). See also Glickman, *supra* note 11, at 4, col. 4 (“[A] Washington Air Guard plane refueled U.S. jets headed for the bombing of Libya.”).

245. Nelson, *supra* note 244, at E1, col. 4 (“Another [Air National Guard] crew, this one from Arkansas, participated in the Grenada operation, also while on a ‘training mission.’”). See also Glickman, *supra* note 11, at 4, col. 4 (“Arkansas Air Guard units refueled planes on their way to the December 1983 Grenada invasion.”).

246. See, e.g., Nelson, *supra* note 244, at E1, col. 5 (“Washington state Gov. Booth Gardner did not have prior knowledge of his state Air National Guard’s deployment in the Libya bombing.”).

247. See Wootten, *Honduras: U.S. Military Activities*, CONGRESSIONAL RESEARCH SERVICE ISSUE BRIEF Order Code IB84134, at 10 (Sept. 23, 1987)(authored by James P. Wootten, Foreign Affairs and National Defense Division)(“Opponents of National Guard participation in Honduran training exercises see Honduras as a tinderbox and do not believe that training should be conducted where there is a danger of hostilities.”). Nicaraguan troops have been known to venture as far as twelve miles into Honduran territory to attack contra troops. *Id.* at 5. Furthermore, National Guard officials within the Pentagon claim that the President could deploy “Guard units on maneuvers in Honduras into combat against Nicaragua” under certain circumstances. Glickman, *supra* note 13, at 8. Nicaraguan President Daniel Ortega has suggested that the Honduran training missions could “turn into a direct confrontation” between National Guardsmen and his own troops. Nusser, *Ortega Says U.S. Forces Near Nicaraguan Border*, Wash. Post, Dec. 4, 1986, at A27.

248. See *supra* note 242.

249. See *supra* note 68 and accompanying text.

250. See *supra* notes 158-93 and accompanying text.

the particular constitutional right infringed upon by the army power has suffered only an "incidental" burden.²⁵¹ A finding that there exists only an incidental burden will result in virtually no scrutiny and an automatic upholding of the statute.²⁵² On the other hand, if sufficient interference with state militia rights is shown, then the burden of justifying the statute shifts to the federal government. The difficulty in meeting this burden will depend on which "level of scrutiny" the Court decides to apply.

C. Level of Scrutiny

Analogy to the substantive due process branch of constitutional jurisprudence aids in this analysis. The analogy is appropriate because a state's second amendment right to maintain "a well regulated Militia"²⁵³ compares favorably with the various liberties guaranteed to individuals by the Bill of Rights. This mode of analysis begins with the simple proposition that whenever government action interferes with the full enjoyment of a constitutional right the court must decide which one of the two will prevail.

The initial step in this analysis is to examine the nature of the constitutional right involved. The importance of the infringed right will determine how closely the federal government's action will be scrutinized. Statutes which encumber highly valued constitutional rights will be analyzed under the "strict scrutiny"²⁵⁴ standard. Constitutional rights of lesser importance trigger "intermediate"²⁵⁵ or even "deferential"²⁵⁶ scrutiny of the governmental conduct. Application of heightened scrutiny favors a state challenge of the Montgomery Amendment because it increases the burden upon the federal government in justifying the statute.

In setting the level of judicial scrutiny, a finding that a particular right has been historically sheltered from government intrusion has been held to lead to a strict scrutiny level of review.²⁵⁷

251. See *supra* notes 175-85 and accompanying text.

252. *Id.*

253. U.S. CONST. amend. II.

254. See, e.g., *Graham v. Richardson*, 403 U.S. 365, 376 (1971)(governmental interest must be "compelling" and means must be "necessary").

255. See, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976)(governmental interest must be "important" and means must be "substantially related").

256. See, e.g., *Cleland v. National College of Business*, 435 U.S. 213, 220 (1978)(governmental interest must be "legitimate" and means must be "rationally related").

257. See, e.g., *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)("Appropriate

Likewise, those rights which are textually committed are often protected by application of strict scrutiny.²⁵⁸

Certainly, both of these theories favor application of strict scrutiny whenever the federal government infringes state militia rights. Militia rights have been accorded tremendous respect throughout our nation's history. Federal reluctance to infringe state militia rights began in the pre-Constitutional years²⁵⁹ and has extended into the twentieth century.²⁶⁰ Additionally, the state militia rights are textually committed because they are found in the second amendment.²⁶¹ The fact that these rights are secured by the text of the Constitution suggests that they should not be lightly cast aside.

Notwithstanding the factors compelling application of strict scrutiny to the Montgomery Amendment, prior cases indicate that the Supreme Court is inclined to uphold army power legislation.²⁶² The Court has established a limited role for itself in deciding these cases.²⁶³ Because the Constitution allows the elected branches of government to decide the limits of the army power,²⁶⁴ and because of the Court's perceived lack of competence in the area,²⁶⁵ intermediate or perhaps even deferential scrutiny will be applied to the *Perpich* litigation.

No matter which level of scrutiny is deemed appropriate, two final inquiries must be made: (1) the ends furthered by the statute must be examined, and (2) the means chosen to effectuate the

limits on substantive due process come . . . from careful respect for the teachings of history [and] solid recognition of the basic values that underlie our society.”).

258. See *Gideon v. Wainwright*, 372 U.S. 335, 343-44 (1963)(holding that provision of counsel, as mandated by the sixth amendment, was “a fundamental right, essential to a fair trial”). Numerous other cases have, similar to *Gideon*, designated textually committed rights as deserving of special treatment. See *Benton v. Maryland*, 395 U.S. 784 (1969)(the sixth amendment double jeopardy prohibition); *Duncan v. Louisiana*, 391 U.S. 145 (1968)(the sixth amendment jury trial guarantee); *Washington v. Texas*, 388 U.S. 14 (1967)(the sixth amendment right to compulsory process for obtaining the presence of favorable witnesses); *Malloy v. Hogan*, 378 U.S. 1 (1964) (the fifth amendment self incrimination prohibition); *Sherbert v. Verner*, 374 U.S. 398 (1963)(the first amendment right to religious freedom); *Ker v. California*, 374 U.S. 23 (1963) (the fourth amendment right to be free from unreasonable searches and seizures).

259. See *supra* notes 4-8 and accompanying text.

260. See *supra* note 77 and accompanying text. Even as late as 1952 this trend was apparent. See *supra* notes 148-49 and accompanying text.

261. See *supra* notes 44-58 and accompanying text.

262. See *supra* notes 158-93 and accompanying text.

263. See *supra* note 154.

264. See *supra* note 155.

265. *Id.*

statutory goals must be analyzed. The level of scrutiny applied by the Court is of little concern in the Court's analysis of the ends furthered by the Montgomery Amendment. The statute's ends will pass constitutional muster even under the strictest of scrutiny. However, the level of scrutiny assumes a larger, perhaps even outcome determinative role, when the propriety of the statute's means are measured.

D. Ends Analysis

There are two federal interests apparent in the Montgomery Amendment: (1) fulfillment of the federal duty to provide an effective national defense; and (2) preservation of federal power over foreign affairs by excluding state interference.

Responsibility to provide an effective national defense for the benefit of the states and all their citizens is explicitly allocated to the federal government in the text of the Constitution.²⁶⁶ The power to provide for the common defense is the most basic obligation of our government and has received broad construction in the courts.²⁶⁷ The Montgomery Amendment enables federal training of the National Guard so that these troops will respond in an able fashion²⁶⁸ when needed. The statute is clearly intended to enhance the nation's ability to defend herself. The magnitude of this interest is made compelling because of the central role which the National Guard plays in our national defense system.²⁶⁹

Similar to its obligation to secure the defense of the nation, the federal government is also required to conduct the nation's foreign affairs.²⁷⁰ The United States cannot accomplish this diffi-

266. "The Congress shall have Power To . . . provide for the common Defence and general Welfare of the United States . . ." U.S. CONST. art. I, § 8, cl. 1. *See also supra* note 43 and accompanying text.

267. *See supra* note 162 and accompanying text.

268. *See supra* note 229 and accompanying text.

269. *See supra* notes 223-28 and accompanying text.

270. It is well established that the power to determine foreign policy rests with the federal government alone. The Constitution accomplished this by expressly granting foreign policy powers to the President and the Congress while concomitantly denying them to the states. U.S. CONST. art. II, § 1, cl. 1 (President shall be commander in chief of the army); U.S. CONST. art. II, § 2, cl. 2 (President has power to make treaties and appoint ambassadors); U.S. CONST. art. I, § 8, cl. 3 (Congress has power to regulate commerce with foreign nations); U.S. CONST. art. I, § 8, cl. 10 (Congress has power to define and punish felonies on the high seas and offenses against the law of nations); U.S. CONST. art. I, § 10, cl. 1 (states may not enter into treaties); U.S. CONST. art. I, § 10, cl. 2 (restricting states' ability to interfere with foreign commerce); U.S. CONST. art. I, § 10, cl. 3 (restricting states' ability to conduct war). *See also* Note, *Notes on Presidential Foreign Policy Powers*, 11 *HOF-*

cult task unless she is able to speak in one unified voice in her dealings with the international community.

The Federal Government, representing as it does the collective interests of the forty-eight states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference.²⁷¹

By refusing to allow their National Guard troops to train in Honduras, the Governors sought to impose their foreign policy ideas on the President.²⁷² This result is wholly unacceptable. It would effectively allow fifty different people to pass on the propriety of the United States' military presence in different parts of the world. Even if the Governors could be trusted to always exercise their National Guard prerogatives consistent with the overall national interest,²⁷³ this intrusive meddling in foreign policy would be disastrous. The country would be pulled in fifty different directions. This would result in internal chaos and would damage the image of the United States before the world community.

The exercise of the various foreign policy powers ranks as a "compelling" governmental interest. The Montgomery Amendment advances this interest by protecting the federal government's ability to formulate foreign policy free from the distracting influence of those State Governors who would otherwise interfere.

The final step in the analysis is to examine the means selected to provide for the national defense in the Montgomery Amendment.

STRA L. REV. 413, 441 (1982)(a theme running throughout the Constitution is the subordination of the states to the national government in the area of foreign affairs). See generally *Dames & Moore v. Regan*, 453 U.S. 654 (1981)(President has broad discretion when responding to hostile acts of foreign sovereigns); *Zscherniq v. Miller*, 389 U.S. 429 (1968)(state laws that intrude on the area of foreign affairs will not be upheld); *Takahashi v. Fish & Game Comm'n*, 334 U.S., 410 (1948)(Congress determines the conditions governing the admission, naturalization, and residence of aliens; the states can neither add to nor take from these conditions); *United States v. Curtiss-Wright Corp.*, 299 U.S. 304 (1936)(President has broad discretion in the field of international relations).

271. *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941).

272. See *supra* note 18 and accompanying text.

273. History teaches that certain Governors might misuse their control over the National Guard to further their own political careers. See *Brown v. Board of Educ.*, 347 U.S. 483 (1954)(Governor Fabus of Arkansas deployed National Guard troops to block U.S. Supreme Court ordered integration of a Little Rock high school).

E. Means Analysis

The level of scrutiny²⁷⁴ will determine how penetrating the judicial analysis will be. If the scrutiny is strict then the means must be "necessary."²⁷⁵ This suggests the unavailability of alternative means to effectuate the statutory goal. If the scrutiny chosen is intermediate or deferential then the means chosen in the statute will more easily survive analysis. Intermediate scrutiny requires means that are "substantially related"²⁷⁶ to the statutory ends; deferential scrutiny imposes the minimal "rationally related"²⁷⁷ standard.

As noted previously, there existed several viable alternatives short of amending the statutory gubernatorial consent provision.²⁷⁸ The availability of these alternatives, all less burdensome upon state militia rights, forecloses the possibility of the Montgomery Amendment surviving principled constitutional analysis under the strict scrutiny standard.

If, on the other hand, some lesser form of scrutiny is applied, then it is unclear whether the statute will satisfy the appropriate standard. Notwithstanding the availability of alternatives, the statutory means probably do meet the "rationally related" test.

Under the "substantially related" standard, however, the issue becomes very close indeed. Perhaps under this intermediate standard the availability to the federal government of alternatives suggests that the state interest should prevail. Another important factor would be the cost involved if the federal government were to pursue the alternative means. Prohibitive cost would eliminate apparent alternatives from the equation, thus strengthening the federal government's argument in support of the statute.

CONCLUSION

The language in the main constitutional text has been considered dispositive by the courts and the commentators in their writings dealing with issues of shared federal/state control of the National Guard. This Note argues that the second amendment must be considered as well. There are several implications of this new

274. See *supra* notes 253-65 and accompanying text.

275. See *supra* note 254.

276. See *supra* note 255.

277. See *supra* note 256.

278. See *supra* text accompanying notes 232-33.

analysis. Indeed, it might alter the outcome of cases such as *Perpich* because it presupposes that adoption of the second amendment elevated the state militia rights to a more protected constitutional status. Thus, careful balancing of the relative state and federal interests must be undertaken before Congressional legislation impacting state militia rights can successfully pass constitutional muster.

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