AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 10: The Reagan/Bush Era—Powers of the National Government/Power to Raise Armies

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Perpich v. Department of Defense, 496 U.S. 334 (1990)

The Armed Services Reserve Act of 1952 authorized the president to call the National Guard into active duty for training purposes but only with the consent of the governor of the state from which the reserve unit is drawn. This provision became a point of political controversy in the 1980s, when governors began to object to the federal government sending National Guard units to Central America (primarily Honduras, which bordered Guatemala, El Salvador, and Nicaragua, all of which were involved in civil wars) for training purposes in conjunction. The Montgomery Amendment of 1987 modified the gubernatorial consent provision to specify that the governor could not withhold consent for active duty outside the United States based on any objection to the location, purpose, or schedule of the service. These statutes rest on the constitutional authority of Congress to call for the militia to execute the laws of the union, suppress insurrections, or repel invasions. The states retained a reserved power to appoint militia officers and training militia members "according to the discipline prescribed by Congress."

Democratic Minnesota governor Rudy Perpich immediately objected when members of the Minnesota National Guard were deployed on training missions in Central America. He sought an injunction in federal district court preventing the Department of Defense from deploying units without gubernatorial approval, but the court declined. A divided panel of the circuit court reversed that ruling, but in an en banc *hearing the entire circuit affirmed the district court's ruling. In a unanimous decision, the U.S. Supreme Court upheld the Montgomery Amendment and affirmed the lower court. Crucial to the Court's reasoning was the argument that when deploying these members of the National Guard, the Department of Defense was not "calling forth the Militia" but was instead raising an army, a distinct congressional power contained in Article I, Section 8 of the U.S. Constitution.*

JUSTICE STEVENS delivered the opinion of the Court.

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Two conflicting themes, developed at the Constitutional Convention and repeated in debates over military policy during the next century, led to a compromise in the text of the Constitution and in later statutory enactments. On the one hand, there was a widespread fear that a national standing Army posed an intolerable threat to individual liberty and to the sovereignty of the separate States, while, on the other hand, there was a recognition of the danger of relying on inadequately trained soldiers as the primary means of providing for the common defense. Thus, Congress was authorized both to raise and support a national army and also to organize "the Militia."

In the early years of the Republic, Congress did neither. In 1792, it did pass a statute that purported to establish "an Uniform Militia throughout the United States," but its detailed command that every able-bodied male citizen between the ages of 18 and 45 be enrolled therein and equip himself with appropriate weaponry was virtually ignored for more than a century, during which time the militia proved to be a decidedly unreliable fighting force. . . .

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During World War I, the President exercised the power to draft members of the National Guard into the Regular Army. That power, as well as the power to compel civilians to render military service, was upheld in the *Selective Draft Law Cases* (1918). Specifically . . . the Court held that the plenary power to raise armies was "not qualified or restricted by the provisions of the militia clause."

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Since 1933 all persons who have enlisted in a state National Guard unit have simultaneously enlisted in the National Guard of the United States. In the latter capacity they became a part of the Enlisted Reserve Corps of the Army, but unless and until ordered to active duty in the Army, they retained their status as members of a separate state Guard unit. . . .

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The unchallenged validity of the dual enlistment system means that the members of the National Guard of Minnesota who are ordered into federal service with the National Guard of the United States lose their status as members of the State militia during their period of active duty. If that duty is a training mission, the training is performed by the Army in which the trainee is serving, not by the militia from which the member has been temporarily disassociated. . . .

This change in status is unremarkable in light of the traditional understanding of the militia as a part-time, nonprofessional fighting force. . . . In a sense, all of them now must keep three hats in their closets—a civilian hat, a state militia hat, and an army hat—only one of which is worn at any particular time. . . .

This conclusion is unaffected by the fact that prior to 1952 Guard members were traditionally not ordered into active service in peace time or for duty abroad. That tradition is at least partially the product of political debate and political compromise, but even if the tradition were compelled by the text of the Constitution, its constitutional aspect is related only to service by state Guard personnel who retain their state affiliation during their periods of service. There now exists a wholly different situation, in which the state affiliation is suspended in favor of an entirely federal affiliation during the period of active duty.

. . . [T]he Militia Clauses are—as the constitutional text plainly indicates—additional grants of power to Congress.

The first empowers Congress to call forth the militia "to execute the Laws of the Union, suppress Insurrections and repel Invasions." We may assume that Attorney General Wickersham was entirely correct in reasoning that when a National Guard unit retains its status as a state militia, Congress could not "impress" the entire unit for any other purpose. Congress did, however, authorize the President to call forth the entire membership of the Guard into federal service during World War I, even though the soldiers who fought in France were not engaged in any of the three specified purposes. Membership in the Militia did not exempt them from a valid order to perform federal service, whether that service took the form of combat duty or training for such duty. The congressional power to call forth the militia may in appropriate cases supplement its broader power to raise armies and provide for the common defense and general welfare, but it does not limit those powers.

The second Militia Clause enhances federal power in three additional ways. First, it authorizes Congress to provide for "organizing, arming and disciplining the Militia." It is by congressional choice that the available pool of citizens has been formed into organized units. Over the years, Congress has exercised this power in various ways, but its current choice of a dual enlistment system is just as permissible as the 1792 choice to have the members of the militia arm themselves. Second, the Clause authorizes Congress to provide for governing such part of the militia as may be employed in the service of the United States. Surely this authority encompasses continued training while on active duty. Finally, although the appointment of officers "and the Authority of training of Militia" is reversed to the States respectively, that limitation is, in turn, limited by the words "according to the discipline prescribed by the Congress." If the discipline required for effective service in the Armed Forces of a global power requires training in distant lands, or distant skies, Congress has the authority to provide it. The subordinate

authority to perform the actual training prior to active duty in the federal service does not include the right to edit the discipline that Congress may prescribe for Guard members after they are ordered into federal service.

The Governor argues that this interpretation of the Militia Clause has the practical effect of nullifying an important State power that is expressly reserved in the Constitution. We disagree. It merely recognizes the supremacy of federal power in the area of military affairs. The Federal Government provides virtually all of the funding, the material, and the leadership for the state Guard units. . . . Moreover, Congress has provided by statute that in addition to its National Guard, a State may provide and maintain at its own expense a defense force that is exempt from being drafted into the Armed Forces of the United States. As long as that provision remains in effect, there is no basis for an argument that the federal statutory scheme deprives Minnesota of any constitutional entitlement to a separate militia of its own.

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Affirmed.