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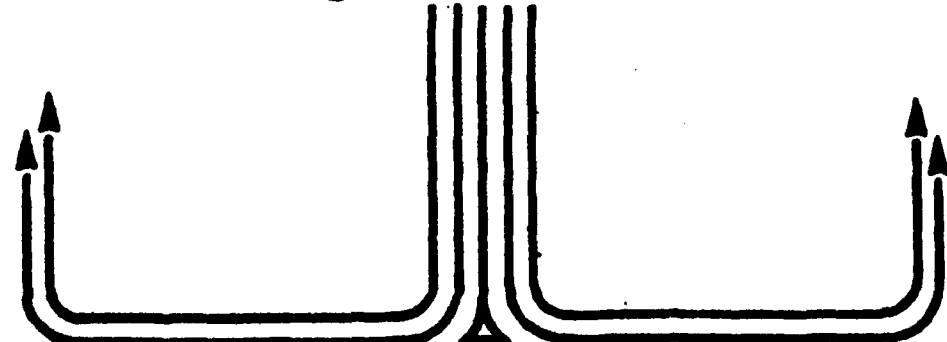


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# AIR COMMAND AND STAFF COLLEGE

## STUDENT REPORT

The National Guard--Still  
Part of the Total Force  
Major David M. Leta 87-1570  
*"insights into tomorrow"*



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## PREFACE

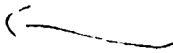
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Subject to clearance, this manuscript will be submitted to the Air Force Judge Advocate Law Review for consideration.

In November 1986, Congress amended the "Armed Force Reserve Act of 1952" to limit the governor's consent over the defense department's ordering the National Guard to active duty for annual training or for voluntary duty in peacetime. The governors argued that the amendment violated the Militia clause of the Constitution, because the Guard was originally a state organization to be called up only in several specific instances by the federal government. The Department of Defense contends the amendment was Constitutional.

This paper traces the Constitutional and legislative history of the Guard and analyses the current law.



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## ABOUT THE AUTHOR

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Major David M. Leta received his Bachelor of Arts degree and ROTC commission from Allegheny College in June 1971. He then attended Dickinson School of Law and received his Juris Doctor degree in June 1974. In December 1974, he was assigned to Loring AFB, Maine, where he was the area defense counsel. In July 1977, he was transferred to McGuire AFB, New Jersey, where he tried general courts-martial and was the deputy staff judge advocate.

In May 1981, he left active duty. From May 1981 until August 1986, Major Leta was an assistant district attorney in the New York County District Attorney's Office in New York. He tried over 25 felony jury trials ranging from narcotics to attempted murder.

Major Leta's reserve assignment is at McGuire AFB, where he is the deputy staff judge advocate for a reserve wing.

Major Leta is a member of the Pennsylvania, and New York bar. He is also admitted before the bar of the United States Supreme Court.

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## TABLE OF CONTENTS

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Preface.....	iii
About the Author.....	iv
CHAPTER ONE	
The Current Controversy over the National Guard.....	1
CHAPTER TWO	
The War Powers.....	4
The Federal Debates.....	5
The State Debates.....	5
CHAPTER THREE	
The Previous Federal Law.....	7
1792 - 1903 .....	7
1908 - 1932 .....	8
1933 - 1951 .....	9
CHAPTER FOUR	
The Current Law.....	11
CHAPTER FIVE	
Analysis.....	13
Pre 1903.....	13
The Militia Clause.....	13
The Army Clause.....	13
The Federal Tort Claims Act Cases.....	15
CONCLUSION.....	16
Footnotes.....	17



## EXECUTIVE SUMMARY

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**REPORT NUMBER** 87-1570

**AUTHOR(S)** Major David M. Leta, USAFR

**TITLE** The National Guard--Still Part of the Total Force

I. **PURPOSE:** This paper analyses the Constitutionality of the November 1986 amendment to the "Armed Forces Reserve Act of 1952" limiting the governor's authority to refuse to consent to overseas Guard missions.

II. **PROBLEM:** In 1985 and 1986, state legislatures, governors, political organizations, and local media became concerned with their Guard performing missions in Central America. Several governors refused to consent to their Guard performing exercises. Other governors stated they would carefully scrutinize future Guard missions in Central America. As a result, Congress amended the "Armed Forces Reserve Act of 1952" and limited the governor's authority to refuse to consent to overseas Guard missions. In 1987, the Governor of Minnesota instituted a lawsuit arguing the amendment was unconstitutional because it violated the Militia clause.

III. **DATA:** Historically, the Guard originates with the Constitution, which authorized Congress to call out the Militia to defend against invasions, suppress rebellions, and execute U.S. law. The Constitution also authorized Congress to prescribe rules of organization and discipline while in U.S. service--otherwise to be trained by the state. The Constitution separately provided for Congress to declare war and raise an army and a navy.

For the first 100 years of the Republic, the Guard was purely a state militia with little use to the federal government. It could not be relied upon to perform its three federal missions. Even as state organizations, they were poorly organized.

Between 1903 and 1952, the Guard evolved into its present configuration. In 1903, the federal government organized the Guard, but it would only be used to perform its Militia clause functions. With the inception of World War I, the government found it needed the Guard to fight on foreign soil, so it passed a law drafting the Guard into the Army. Many guardsmen argued the draft violated the Militia clause, and filed a lawsuit contesting the Constitutionality of the draft. The Supreme Court upheld the Constitutionality of the draft, stating that it was a proper use of Congress' Constitutional authority to raise an army.

In 1933, Congress changed the status of the National Guard by creating the "National Gaurd of the United States" which made the local Militia part of the U.S. Army Reserves, and instead of drafting the Guard, they were ordered to active duty. Prior to and during World War II, the President ordered the Guard into active duty pursuant to the 1933 amendments.

In 1952, Congress enacted the "Armed Forces Reserves Act" which continued the Guard as part of the reserves of the United States. The Act provided that before the defense department could order the Guard to active duty for annual trainings or voluntary active duty during peacetime, the Governor had to consent to the order. No such consent was required during war, national emergency, or where otherwise provided by law.

In 1966, Congress authorized the President to order the Guard to active duty to fight in Vietnam. Guard members instituted lawsuits arguing that their orders to active duty violated the Militia clause of the Constitution, because the Militia clause did not authorize the Militia to fight on foreign soil. The federal courts upheld the Constitutionality of the Congressional enactment, holding it a proper exercise of its authority under the Army clause.

In 1986, Congress amended the "Armed Forces Reserve Act of 1952," because governors were objecting to the Guard's use in peacetime in Central America on their annual tours. The 1986 amendment barred the governors from withholding their consent based on location, purpose, or schedulings of missions.

In 1987, the Governor of Minnesota instituted a lawsuit arguing the 1986 amendment was unconstitutional. That lawsuit is pending.

IV. CONCLUSION: The Guard is no longer solely a state organization. It is now part of the reserves of the federal armed forces. The Supreme Court and other federal courts have upheld the Constitutionality of the Guard as a federal reserve force under the Army clause of the Constitution. The 1952 act deals almost exclusively with the Guard as a federal reserve force, and

any limits on DOD's ability to order the Guard to active duty are Congressionally imposed, not Constitutionally imposed. Therefore, the 1986 Congressional amendment is Constitutional. The one area where the federal courts have been inconsistent in their reasoning is where guard personnel have been involved in accidents in government vehicles with third parties while on annual tour or other active duty status in peacetime. In those situations, the courts have determined the Guard almost universally to be state employees, and the federal government has not been held liable for their acts of negligence or misconduct. This reasoning flies in the face of the courts' other rulings. In the future the federal government may face increased liability, but these rulings would not appear to affect the Constitutionality of the 1986 amendment.

## CHAPTER I

### THE CURRENT CONTROVERSY OVER THE NATIONAL GUARD

In 1985 and 1986, state legislatures and local media became interested in the federal missions their state national guards performed in Central America.<sup>1</sup> Headlines such as "Angry revolt over Honduras role for National Guard,"<sup>2</sup> "Pentagon Now Calls Shots for California's Weekend Warriors,"<sup>3</sup> "Nicaragua Too Close,"<sup>4</sup> "Air Guard planes transporting supplies to Nicaragua,"<sup>5</sup> "State Guard 'war' flights told,"<sup>6</sup> "State Guard Flying in Latin America for eight years, Panel told,"<sup>7</sup> "Furor over Air Guard Trips,"<sup>8</sup> screamed across the front pages of the nation's newspapers.

The local legislatures began to lobby their respective governors to prohibit further federally sponsored guard missions in this politically and militarily volatile area.<sup>9</sup> Members of the California legislature attempted to pass a state constitutional amendment requiring legislative approval for guard participation in a country where there had been a war within the previous two years.<sup>10</sup> In this, they were unsuccessful.<sup>11</sup> However, they did pass a bill requiring the Governor to notify them when the Guard was sent to Central America, which the Governor promptly vetoed.<sup>12</sup> The Americans for Democratic Action filed an unsuccessful lawsuit to stop California from sending its guard to Central America.<sup>13</sup> As a result, in 1985, the California Governor banned 450 guardsmen from participation in Ahaus Tara III, an army anti-tank exercise in Honduras.<sup>14</sup> Other governors were similarly pressed.

In January 1986, the Governor of Maine refused to allow 48 guardsmen to train in Honduras in an exercise called General Terenco Sierra 86.<sup>15</sup> The Governor of Ohio followed his brethren's lead and refused to permit Ohio guard to train in Central America.<sup>16</sup> In addition, the Governors of Massachusetts, Vermont, and Washington stated they would not allow (if asked) their guardsmen to participate in missions to Central America.<sup>17</sup> Five other governors (New York, Arizona, Texas, Puerto Rico, and New Mexico) have conditionally permitted their guard to train, but have reserved the right of approval to a case-by-case basis after a full individual review of the facts.<sup>18</sup>

As recent as September 1986, the press in Minnesota raised the issue with their governor and state adjutant general as to why the Minnesota Guard was flying missions to Honduras and whether the Governor should permit them to train there in January 1987.<sup>19</sup> The Governor of Minnesota responded that he would study the matter further.<sup>20</sup> The Minnesota State Adjutant General, however, replied as follows:

. . . he will review the mission statement for the Air Guard's scheduled tour to Panama next January and, if he believes it will entail any dangerous missions, "I would recommend (that) the governor state we do not participate. We are not going to put our personnel out on a limb beyond what happens when you go anywhere in the world. If I become aware that weapons transport would be a part of that mission, I would consider that a change of mission. My job is to protect my men."<sup>21</sup>

As a result of this controversy, a subcommittee of the Senate Armed Services Committee held hearings 15 July 1986 as to whether or not to amend federal law.<sup>22</sup> The then existing law stated in part,

At any time, an authority designated by the Secretary concerned may, without the consent of the persons affected, order any unit and any member not assigned to a unit organized to serve as a unit, in an active status in a reserve component under the jurisdiction of the Secretary to active duty for not more than 15 days a year. However, units and members of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor of the State or Territory, Puerto Rico or the Canal Zone, or the commanding general of the District of Columbia National Guard as the case may be.<sup>23</sup>

The other section impacted stated that:

At any time, an authority designated by the Secretary concerned may order a member of a reserve component under his jurisdiction to active duty, or retain him on active duty, with the consent of that member. However, a member of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this section

without the consent of the governor or other appropriate authority of the State or Territory, Puerto Rico, the Canal Zone, or the District of Columbia, whichever is concerned.<sup>24</sup>

At these hearings, Governors from New Hampshire, Florida, New Jersey, and Oklahoma opposed any new legislation--contending that the Militia clause of the Constitution provided for the states to control the National Guard and that any change to the then existing legislation would be a Constitutional violation.<sup>25</sup> Also at the hearings, the Assistant Secretary of Defense for Reserve Affairs lobbied strongly for an amendment to the current law. He stated that under the total force concept, the National Guard played a major role in national defense, and to keep the current law would degrade their capability. He also argued that an amendment would not be unconstitutional.<sup>26</sup>

In November 1986, Congress amended the foregoing law as follows:

The consent of a Governor described in subsection (b) and (d) may not be withheld (in whole or in part) with regard to active duty outside the United States, its territories, and its possessions, because of any objection to the location, purpose, or schedule of such active duty.<sup>27</sup>

In January, 1987, the Governor of Minnesota filed a lawsuit against the National Guard and the Department of Defense in federal court asking that this amendment be declared unconstitutional because it violated the so called "Militia clause" of the Constitution.<sup>28</sup>

Thus the question to be examined is does the recent amendment to federal law violate the Militia and related clauses of the Constitution?

## CHAPTER II

### THE WAR POWERS

The Constitution states in part

The Congress shall have power . . .

11. To declar (sic) War, grant Letters of Marque and Reprisal, makes Rules concerning Captures on Land and Water;

12. To raise and support Armies, but no Appropriation of Money to that use shall be for a longer Term than two years;

13. To provide and maintain a Navy;

14. To make Rules for the Government and Regulation of the land and naval forces;

15. To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections, and repel Invasions;

16. To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively the Appointment of the Officers and the Authority of training the Militia according to the discipline prescribed by Congress. . .<sup>29</sup>

It further states:

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several states, when called into the actual service of the United States; he may require the Opinion, in writing, of the principal offices in each of the executive departments upon any Subject relating to the Duties of their respective Officers and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.<sup>30</sup>

The Second Constitutional Amendment states:

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.<sup>31</sup>

Both the federal and state Constitutional debate over these clauses hinged on two issues--(1) who should control the Militia and (2) should there be a standing army.<sup>32</sup>

### THE FEDERAL DEBATES

The principal arguments in the federal debates about the Militia were the lack of uniformity.<sup>33</sup> During the Revolution, each state's militia was trained differently, which had created numerous hardships and problems.<sup>34</sup> Therefore, some of the delegates to the Federal convention were in favor of the federal government regulating the discipline and training of the Militia.<sup>35</sup> Others felt this gave the government too much authority.<sup>36</sup>

Other delegates were concerned as to whether the Militia should be of limited size or include the general population.<sup>37</sup> The principal fear was that if the Militia were limited, it would give too much power to the federal government, because the primary military body would be the army.<sup>38</sup>

The federal convention delegates also had major concerns about a standing army in time of peace. They felt that there was need for such an army and it would be used as a repressive measure.<sup>39</sup> In fact, one delegate desired that in peacetime the army be limited to no more than three thousand troops.<sup>40</sup>

### THE STATES DEBATES

The states were also divided in this matter. Six of them passed the Constitution without any questioning of the Militia clause.<sup>41</sup> However, seven were not so complaisant. Pennsylvania was one of the more vociferous states.<sup>42</sup> There were fervent supporters of a strong central government who believed in a standing army and national control of the Militia--and equally vociferous dissenters.<sup>43</sup>

The Pennsylvania dissenters proposed that each state organize, arm, and train its own militia, and that the federal or "general government" could only call them up in time of war, invasion or rebellion, but only for a two-month period unless the State legislature consented to a longer period of time.<sup>44</sup>

The major concerns of the Pennsylvania dissenters were that the (1) liberty of their men would be in jeopardy; (2) that conscientious objectors would be exempted; and (3) the Militia might be used as an instrument of tyranny by the national government against any individual states.<sup>45</sup>

Virginia had similar sentiments. Its delegates wanted "the people to have the right to bear arms."<sup>46</sup> They did not want a standing army in peacetime, rather they believed a well-trained militia was their best defense.<sup>47</sup> Further, the military should always be under strict civilian control.<sup>48</sup> They only wanted the federal government to be able to call upon the Militia in time of war, rebellion, or invasion.<sup>49</sup> In addition, they felt no soldier should be quartered in any citizen's home without his consent.<sup>50</sup> They also wanted an exemption from service for conscientious objectors.<sup>51</sup> The other five states had amendments similar to Pennsylvania and Virginia.<sup>52</sup> In the end, the states compromised and proposed one amendment to the Militia clause dealing with the right to bear arms.

The compromise led to the Constitutional provisions first cited at the beginning of this chapter.

In many respects, these Constitutional provisions were fairly sweeping pronouncements, and left Congress with a broad canvas upon which it could paint in the details.<sup>53</sup>

## CHAPTER III

### "THE PREVIOUS FEDERAL LAW" 1792-1903

From 1792 until 1903, Congress painted in only one corner of the canvas. There was only one federal law regarding the National Guard or Militia.<sup>54</sup> It did little to specify how the guard should be trained or used.<sup>55</sup> For the purposes of this paper it is an historical anachronism. It is not until 1903, under the Dick Act, that the modern day Militia was born.<sup>56</sup> Congress passed the Dick Act to form the modern Guard because under the Act of 1792 the Guard was of little value as a fighting force.<sup>57</sup> The Act of 1792 provided that all able-bodied American men between the ages of 18 and 45 were part of the Guard.<sup>58</sup> Few details regarding discipline or training were prescribed.<sup>59</sup>

When the federal government attempted to use the Guard in the War of 1812, and the Civil War, it met strong resistance from the states.<sup>60</sup> It met even more resistance when it attempted to use the Guard in the Spanish-American War.<sup>61</sup> The problem in the Spanish-American War was not just legislative, but Constitutional. Under the constitution, the militia was only to be used to repel invasions, suppress insurrections, or to execute federal laws.<sup>62</sup> The Spanish-American War required troops to serve in Cuba, the Philippines and Puerto Rico which some states refused.<sup>63</sup>

Hence, Congress passed the Dick Act in 1903, which organized the Guard and set forth specific training requirements.<sup>64</sup> The Dick Act specifically allowed the President to call forth militia "whenever the United States was invaded, or in danger of invasion from any foreign nation, or of rebellion against the authority of the Government of the United States or the President is unable with the other forces at his command, to execute the laws of the Union in any part thereof . . ."<sup>65</sup> Notably, the Dick Act also provided for the training of the Guard in federal encampments upon the request of the governor.<sup>66</sup>

## 1908-1932

By 1908, the Guard was over 105,000.<sup>67</sup> Congress desired to use the Guard in foreign territory so it amended the Dick Act to provide for the use of the Guard outside the territory of the United States, but only for the limited three purposes set forth in the 1903 Act.<sup>68</sup> Again, the governors had to request of the Secretary of War that the Army train the Guard in summer encampments.<sup>69</sup>

In 1912, the Army desired to use the Guard as an occupation force in Mexico, where there had been numerous border disputes.<sup>70</sup> Controversy arose when an Army judge advocate wrote an opinion concluding that the 1908 amendments were unconstitutional because they violated the Militia clause of the Constitution.<sup>71</sup> The United States Attorney General in 1912 concurred with that opinion stating:

. . . the Constitution confers no power to send the militia into a foreign country . . . by its specific enumeration of the only occasions for calling out the militia it clearly forbids this.<sup>72</sup>

With the onset of World War I, the controversy over the Militia became a question of some import, rather than merely an academic dispute between lawyers.<sup>73</sup> To remedy the problem, Congress passed the National Defense Act of 1916, which stated for the first time "that the Army of the United States shall consist of the Regular Army, the Volunteer Army, the Officer Reserve Corps, the Enlisted Reserve Corps, the National Guard while in the service of the United States. . ."<sup>74</sup> The Act further provided that

No state shall maintain in time of peace other than as authorized in accordance with the organization prescribed under this Act: Provided, that nothing in this Act shall be construed as limiting the rights of the states and territories in the use of the National Guard within their respective borders in time of peace. . .<sup>75</sup>

The act also provided for dual enlistment of both officers and enlisted requiring them to take a federal oath of office. For the first time Congress, in discussing encampments of the Guard, omitted the need for the governor to request the Army train the Guard.<sup>76</sup>

More importantly, members of the Militia were drafted into the Army in time of war, rather than "called out."<sup>77</sup> Once drafted they were discharged from the Militia.<sup>78</sup> With the entry of the United States into World War I, many militiamen contested their draft into the Army, contending that the draft section of the National Defense Act violated the Militia clause of the Constitution.<sup>79</sup> In what later came to be known as the Selective Draft Law Cases,<sup>80</sup> the United States Supreme Court held the draft did not violate the Militia clause of the Constitution, because the Constitution gave Congress the separate power to declare war and raise an Army.<sup>81</sup> Congress did not have to rely on volunteers to raise the Army, but could draft men as well. Otherwise their power would be impotent. The Militia clause did not limit Congress' authority to raise an army.<sup>82</sup> Decided at about the same time was Cox v. Wood,<sup>83</sup> where a militiaman argued to the Supreme Court that his draft violated the limited purposes of the Militia clause because he was going to have to fight in a foreign country. The Supreme Court referring to the Selective Draft Law Cases denied his appeal stating that the Militia clause was "for the purpose of the war power wholly incidental if not irrelevant and subordinate. . . "84

After World War I, Congress discovered a new problem-- because the militiamen had been drafted into the Army and discharged from the Militia, they did not have a unit to return to.<sup>85</sup> In their absence the states had in their absence created new units.<sup>86</sup> To correct this inequity, Congress amended the National Defense Act in 1920, to provide upon the end of war, the militiamen would be discharged from the Army and returned to the Militia in their old units.<sup>87</sup>

#### 1933 - 1951

The next major amendment to the National Defense Act was in 1933.<sup>88</sup> This amendment created the National Guard of the United States as part of the Army.<sup>89</sup> It was separate from "the National Guard, while in the service of the United States," which was also part of the Army. The amendment provided that the National Guard of the United States was those members of the state national guard who were federally recognized.<sup>90</sup> They could be ordered to active duty either in wartime or in peace.<sup>91</sup> No longer did the guard have to be drafted into the Army.<sup>92</sup> Now, as a reserve component, they were merely ordered to active duty. No longer were they discharged from the Militia upon entrance into the Army and later discharged from the Army back to the Militia.<sup>93</sup> The act further provided that during peacetime the National Guard

of the United States "shall be administered, armed, uniformed, equipped, and trained in their status as the National Guard of the several States. . ."94 Further the guardsmen took a dual oath as guardsmen of the United States and as guardsmen of their respective state.95

Congress did not pass another law regarding the organization and training of the Guard until 1952, which is the current law.96

## CHAPTER IV

### CURRENT LAW

The current law is the "Armed Forces Reserve Act of 1952."<sup>97</sup> It states that the reserve components are ". . . the National Guard of the United States; . . . the Army Reserve, . . . the Naval Reserve; . . . the Air National Guard of the United States; . . . the Air Force Reserve; and . . . the Coast Guard Reserve."<sup>98</sup>

This act provided in part that in time of war, or either by a Congressional declaration or Presidential proclamation of a national emergency; or where otherwise authorized by law, the National Guard of the United States could be involuntarily ordered to active duty.<sup>99</sup>

Under other circumstances (either to perform their involuntary annual training or other voluntary active duty) the Department of Defense could only order them to active duty with the consent of their governor.<sup>100</sup> Specifically, the law stated:

Except when ordered thereto in accordance with law, members of the National Guard of the United States and the Air National Guard of the United States shall not be on active duty in the service of the United States. When not on active duty in the service of the United States, they shall be administered, armed, uniformed, equipped, and trained in their status as members of the National Guard and Air National Guard of the several states. . . .<sup>101</sup>

The law defined "active duty" as "full-time duty in the active military service of the United States" and "active duty for training" as "active military service of the United States for training purposes".<sup>102</sup>

The first major test of the "Armed Force's Reserve Act" came in 1966, when Congress authorized the President to involuntarily order the reserves to active duty for two years to serve in Vietnam.<sup>103</sup> Militiamen who were ordered to active duty objected, and argued that the law violated the Militia clause of the Constitution.<sup>104</sup> The fifth circuit U.S. Court of Appeals in Johnson v. Powell<sup>105</sup> held that Congress had blended the Militia

and Army clauses and that nothing in the Constitution prohibited it from doing so.<sup>106</sup> The Court also approved the dual enlistment provisions of the 1933 and 1952 laws and further approved the 1952 provisions ordering the Militia involuntarily to active duty as members of the Army Reserves of the United State.<sup>107</sup> Other circuit courts of appeal also concurred in the fifth circuit's ruling.<sup>108</sup>

In 1985 and 1986, governors of several states began to object to their units performing their annual training in Honduras and other foreign countries.<sup>109</sup> As a result, Congress in November 1986 amended Title 10 U.S.C. 672(b) and 672(d) by limiting the governors' consent so that he could not withhold his consent "with regard to active duty outside the United States, its territories, and its possessions, because of any objection to the location, purpose, type, or schedule of such active duty."<sup>110</sup>

In January 1987, the Governor of Minnesota instituted a law suit in federal court arguing that such limitation was unconstitutional, as it violated the Militia clause of the Constitution.<sup>111</sup> He demanded that the federal court bar the Department of Defense from ordering the Guard to active duty for training outside the United States without the Governor's consent and halt the enforcement of the November 1986 amendment.<sup>112</sup> That lawsuit is pending.

## CHAPTER V

### ANALYSIS

#### PRE 1903

Historically, the current National Guard can trace its origin to the Militia clause of the Constitution.<sup>113</sup> However, little in the Constitutional debates would help answer the present question.<sup>114</sup> The framers envisioned a small standing army--not today's armada. They saw the Militia playing a key role in the defense of the Republic.<sup>115</sup> For the first hundred years the Militia was of little use to the Federal government. It was poorly trained, disciplined and completely unorganized.<sup>116</sup> Often when needed, the governors refused to allow it to serve.<sup>117</sup> Almost all American men were members of the Militia. It could not have been a useful fighting force.<sup>118</sup>

#### THE MILITIA CLAUSE

From those embarrassing beginnings, the Guard evolved. First it was organized in 1903, and provisions for training and regulating it were enacted. But it was still a state militia, organized under the Militia clause.<sup>119</sup> The federal government did not train it in the annual encampments unless the governors so requested.<sup>120</sup> The Guard could be called up when there was an invasion, rebellion, or to execute federal law. Since federal law does not apply outside the boundaries of the United States, the Guard was purely a home force.<sup>121</sup>

#### THE ARMY CLAUSE

With the onset of World War I, the United States could no longer afford the luxury of over 100,000 trained fighting men who could not be used in a war on foreign soil.<sup>122</sup> Thus, the draft provisions of the 1916 National Defense Act were needed to ensure the National Guard could be useful.<sup>123</sup> The Army and War powers clauses provided the authority for drafting the state Militia into the Army.<sup>124</sup> Congress made it clear that once in the Army their militiamen were no longer part of the state militiamen. As pointed out in the Selective Draft Law Cases,<sup>125</sup> the Constitution

gave Congress the authority to declare war and to raise an army. It also gave Congress the authority and power to do everything necessary to carry out its authority, subject to other Constitutional limitations.<sup>126</sup> The Supreme Court found that drafting militiamen into the Army did not violate the tenets of the Militia clause, because Congress needed to be able to draft men for its army--whether they were in the state militia or not.<sup>127</sup>

Once the 1933 amendments to the National Defense Act were law, the Guard became a true hybrid.<sup>128</sup> No longer could they be considered a state militia alone, to be drafted when needed.<sup>129</sup> They were now reserves of the United States, to be ordered to active duty when needed.<sup>130</sup> Prior to and during World War II, during Korea and during Vietnam, the President ordered the Guard to active duty.<sup>131</sup> Not all these orders to active duty were during wartime, nor were they all during a declared national emergency.<sup>132</sup> The 1940 order was well before a state of war, and so was the Vietnam order.<sup>133</sup> The Congressional authority to authorize the Presidential orders to active duty were pursuant to the Army clause, not the Militia clause.<sup>134</sup> As pointed out earlier, the federal appeals courts upheld the Presidential orders of the Guard to Vietnam.<sup>135</sup>

#### THE NATIONAL GUARD OF THE UNITED STATES

The entities referred to in sections 67b(b) and (d) of Title 10 of the United States Code are the National Guard of the United States, not the state militia.<sup>136</sup> They are reserves of the Army.<sup>137</sup> Any limits placed on them are Congressional--not Constitutional.<sup>138</sup>

When the National Guard units leave the country on their annual tours, they have to be in federal status.<sup>139</sup> It is performing its foreign mission under the Army clause of the Constitution, not the Militia clause. The Constitution provided for the Militia to perform three types of federal missions, and they were all on U.S. soil.<sup>140</sup> The annual training of the Guard is active duty, and by definition active duty is in the service of the United States.<sup>141</sup> Therefore, sections 672(b) and 672(d) only deal with federal missions.<sup>142</sup> The governors should not have the authority to limit the purpose, type, place, or schedule of federal missions performed by federal forces, especially where the missions occur on foreign soil.<sup>143</sup>

The governors have an interest in the Guard for state emergencies; e.g., floods, forest fires, riots, etc.<sup>144</sup> The recent amendment does not affect the Guard's use for those

purposes. The amendment still allows the government to object to federal use, but only on grounds other than those enumerated. State emergencies would seem to fall within that area.

#### THE FEDERAL TORT CLAIMS ACT CASES

The one area of dispute among the federal courts is when a National Guardsman is on his two-week annual tour or on voluntary active duty, and he is involved in a work-related accident with a third party.<sup>147</sup> In federal tort claims litigation, the federal courts have repeatedly held him not to be a federal but a state employee, so that the federal government would not be held liable for his negligence or other misconduct.<sup>148</sup> As recently as 1960, in Ohio, a National Guardsman (on his two week annual tour of active duty) injured a family while negligently driving a government vehicle. A federal district court found that the guardsman was not a federal employee, even though on active duty and being paid by the United States.<sup>149</sup>

There are few cases to the contrary.<sup>150</sup> In 1970, a Guardsman performing one day of active duty at Robins AFB was held by the local federal district court to be a federal employee, thus holding the United States liable for his negligence in operating a car.<sup>151</sup> The Georgia case seems to be the better view, even though it is the minority view. The courts (where liability is an issue) tend to bend over to find non-liability for the federal government.<sup>152</sup> These cases don't affect the constitutionality of the November 1986 amendment, but in light of the current litigation in Minnesota, it may well be that the federal government will be held accountable for the negligence of National Guardsmen while in an active duty status. The active duty status under 10 U.S.C. 672(b) and (d) is no different for a reservist or for a guardsman. Both are subject to the Uniform Code of Military Justice. The status is the same.<sup>154</sup> The only difference is the origins of the pure reservist and the militiaman. While on active duty, both are in the service of the United States.<sup>155</sup>

## CONCLUSION

The federal courts should find the 1986 amendment Constitutional. While initially the Guard was a state organization to be called up for the defense of the nation and the government on American soil, it has evolved into part of the reserves of the federal armed forces. Under the Army clause, Congress has the authority to order its reserves into active duty in peacetime.<sup>156</sup> The consent of the governor for annual tours or voluntary active duty recognizes the Guard function as a force needed for state emergencies. It was not intended as a check on the federal use of the Guard. The federal tort claims act cases holding that guardsmen are state employees while in their federal status on their annual training are contrary to the "Armed Forces Reserves Act of 1952." They do not raise a constitutional issue, but represent an anomaly which eventually will be overruled. The federal government will then face increased liability for the negligence or misconduct of the guardsmen while in federal status.

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## FOOTNOTES

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<sup>1</sup>James H. Webb, Jr., "Training Authority and the National Guard", Defense Issues, Vol. 1, iss. 51 (1986) p. 4. Mr Webb's remarks were originally part of his testimony in U.S. Congress, Senate, Subcommittee on Manpower, and Personnel of the Armed Services Committee, Federal Authority over National Guard Training, hearings on S.R. 232A, 99th Cong., 2d sess, 1986, p. 56 (Hereafter referred to as "Webb").

<sup>2</sup>"Angry Revolt over Honduras role for National Guard," Oxford Daily Times, 3 May 1986, p. 1.

<sup>3</sup>"Pentagon Now Calls Shots for California's Weekend Warriors," Los Angeles Times, 4 July 1986, p. I 3.

<sup>4</sup>"Nicaragua Too Close," Vanguard, August, 1986, p. 10.

<sup>5</sup>"Air Guard Planes transporting supplies to Nicaragua," The Camarillo Daily News, 13 May 1986, p. 1.

<sup>6</sup>"State guard 'war' flights told", The Tribune, 13 May 1986, p. 1.

<sup>7</sup>"State guard flying in Latin America for 8 years, Panel told," Los Angeles Times, 13 May 1986, p. 3.

<sup>8</sup>"Furor over Air Guard Trips; States Demos assail flights to Latin war front," San Francisco Examiner, 13 May 1986, p. A-1.

<sup>9</sup>"Webb", p. 4.

<sup>10</sup>Ibid, p. 5.

<sup>11</sup>Ibid.

<sup>12</sup>Ibid.

<sup>13</sup>Ibid., p. 4.

<sup>14</sup>Ibid.

<sup>15</sup>Ibid., p. 5.

<sup>16</sup>Ibid.

<sup>17</sup>Ibid.

<sup>18</sup>Ibid.

<sup>19</sup>"What is Minnesota's Air National Guard Doing in Central America? And Will Rudy Perpich Stop It?" Twin Cities Reader, 27 August - 2 September 1986, p. 12.

<sup>20</sup>Ibid., p. 13.

<sup>21</sup>Ibid.

<sup>22</sup>U.S. Congress, Senate, Subcommittee on Manpower and Personnel of the Armed Services Committee, Federal Authority over National Guard Training, hearing on S.R. 232A, 99th Cong., 2d sess., 1986, pp. 2-3 (Hereafter cited as "1986 Senate Hearings").

<sup>23</sup>Act of July 9, 1952. (Armed Forces Reserve Act of 1952) ch. 608, 66 Stat. 490 (1952), 10 U.S.C. Sec. 672(b) (1952).

<sup>24</sup>Ibid., Sec 2330 (d), Sec 672(d).

<sup>25</sup>"1986 Senate Hearings," attached statements.

<sup>26</sup>"Webb," p. 5.

<sup>27</sup>Act of November 14, 1986 (Defense Authorization Act for Fiscal Year 1987) 100 Stat. 386, 3871 (hereafter referred to as "1986 Amendment").

<sup>28</sup>Perpich v. Dept of Defense, Civil No. \_\_\_\_ (D. Minn., filed January 28, 1987) (Hereafter referred to as Perpich v. DOD); see also, "President's new control over National Guard is challenged," Christian Science Monitor, 9 February 1987, p. 5.

<sup>29</sup>U.S. Const. Art, I, Sec. 8.

<sup>30</sup>U.S. Const. Art, II, Sec. 2.

<sup>31</sup>U.S. Const. Amend. II.

<sup>32</sup>U.S., Congress, Senate, The Militia; Extracts from the Journals and Debates of the Federal Convention, the State Constitutional Conventions, The Congress, the Federalist, Together with other papers relating to the militia of the United States, S. Doc. 695, 64th Cong., 2d Sess., 1917, pp. 32, 33, 39, 42, 47-49, 97-99.

<sup>33</sup>Ibid., p. 32.

<sup>34</sup>Ibid.

<sup>35</sup>Ibid.

<sup>36</sup>Ibid.

<sup>37</sup>Ibid., pp. 33-35.

<sup>38</sup>Ibid.

<sup>39</sup>Ibid., p. 31.

<sup>40</sup>Ibid.

<sup>41</sup>Ibid., pp. 44, 45, 46, 47.

<sup>42</sup>Ibid., pp. 39-42.

<sup>43</sup>Ibid.

<sup>44</sup>Ibid., p. 43.

<sup>45</sup>Ibid.

<sup>46</sup>Ibid., p. 93.

<sup>47</sup>Ibid., p. 94.

<sup>48</sup>Ibid.

<sup>49</sup>Ibid.

<sup>50</sup>Ibid.

<sup>51</sup>Ibid.

<sup>52</sup>Ibid., pp. 47, 95, 97-98, 100.

<sup>53</sup>J.B. Kester, "Preliminary Memorandum on Governor's Consent with Respect to Activities of the National Guard and the National Guard of the United States," paper presented before Senate Armed Services Subcommittee on Manpower and Personnel, Washington D.C., 15 July 1986, pp. 19, 25 (hereafter cited as "Kester").

<sup>54</sup>Weiner, "The Militia Clause of the Constitution," 54 Harv. L. Rev. 187 (1940) (hereafter cited as "Wiener").

<sup>55</sup>Act of May 8, 1792, ch 33, 1 Stat. 273. (hereafter cited as Act of 1792").

<sup>56</sup>Act of January 21, 1903 (The Dick Act) ch. 196, 32 Stat. 775, 780 (hereafter cited as "the Dick Act").

<sup>57</sup>"Weiner," 187-193.

<sup>58</sup>"Act of 1792," 275.

<sup>59</sup>Ibid.

<sup>60</sup>"Weiner," 188-191.

<sup>61</sup>Ibid., 192.

<sup>62</sup>Ibid., 193.

<sup>63</sup>Ibid., 192.

<sup>64</sup>"The Dick Act," 778.

<sup>65</sup>Ibid., 776.

<sup>66</sup>Ibid., 777.

<sup>67</sup>"Weiner," 197.

<sup>68</sup>Ibid.

<sup>69</sup>Act of May 27, 1908, ch. 204, 35 Stat. 402.

<sup>70</sup>"Weiner," 198.

<sup>71</sup>Ansell, "Status of State Militia Under the Hay Bill,"  
<sup>30</sup> Harv. L. Rev. 713 (1917).

<sup>72</sup>29 Op. Atty. Gen. 322 (1912).

<sup>73</sup>"Weiner," 199.

<sup>74</sup>Act of June 3, 1916 (National Defense Act of 1916) ch.  
134, 39 stat. 166 (hereafter cited as "National Defense  
Act").

<sup>75</sup>Ibid., 198.

<sup>76</sup>Ibid., 201.

<sup>77</sup>Ibid., 206, 207.

<sup>78</sup>Ibid., 211.

<sup>79</sup>"Weiner," 204.

<sup>80</sup>Arver v. U.S., et al, 245 U.S. 366 (1918).

- <sup>81</sup>Ibid.
- <sup>82</sup>Ibid.
- <sup>83</sup>Cox v. Wood, 247 U.S. 3 (1918).
- <sup>84</sup>Ibid., 5.
- <sup>85</sup>"Weiner," 204-205.
- <sup>86</sup>Ibid.
- <sup>87</sup>Act of June 4, 1920, 41 Stat. 759, 784-785.
- <sup>88</sup>Act of June 15, 1933, ch. 87, 48 Stat. 153.
- <sup>89</sup>Ibid.
- <sup>90</sup>Ibid.
- <sup>91</sup>Ibid., 155.
- <sup>92</sup>Ibid., 160.
- <sup>93</sup>Ibid., 161.
- <sup>94</sup>Ibid.
- <sup>95</sup>Ibid., 156.
- <sup>96</sup>"Kester," p. 11.
- <sup>97</sup>Act of July 9, 1952 (Armed Forces Reserve Act of 1952) ch 608, 66 Stat. 481 (hereafter cited as "Armed Forces Reserve Act").
- <sup>98</sup>Ibid., 481.
- <sup>99</sup>Ibid., 483.
- <sup>100</sup>Ibid., 489.
- <sup>101</sup>Ibid., 503.
- <sup>102</sup>Ibid., 481.
- <sup>103</sup>Act of October 15, 1966, 80 Stat. 981.
- <sup>104</sup>Johnson v. Powell, 414 F. 2d 1060 (5th Cir., 1969), stay dnd. 393 U.S. 920.
- <sup>105</sup>Ibid.

- 106 Ibid.
- 107 Ibid., 1063.
- 108 Drifka v. Brainard, 294 F. Supp. 425, 426 (W.D. WA, 1968); Winters v. U.S., 231 F. Supp. 289 (E.D. NY, 1968) Affmd, 390 F. 2d 879; Morse v. Boswell, 289 F. Supp. 812 (MD, 1968) affmd. 401 F. 2d 544 (4th Cir., 1968); affnd. 393 U.S. 802.; Linsalata v. Clifford, 209 F. Supp. 338 (S.D. NY 1968); Goldstein v. Clifford, et al, 290 F. Supp. 275 (NJ, 1968).
- 109 "Webb", p. 4.
- 110 "1986 Amendment."
- 111 Perpich v. DOD, supra.
- 112 Ibid.
- 113 "Kester," pp. 3-5.
- 114 Ibid., 3.
- 115 "Weiner," 185-187.
- 116 Ibid., 188-190.
- 117 Ibid.
- 118 Ibid.
- 119 "The Dick Act," 775.
- 120 Ibid., 778.
- 121 29 Op. Atty. Gen., 322, 324.
- 122 Ibid.
- 123 "Weiner," 203-204.
- 124 Selective Draft Law Cases, supra., 368.
- 125 Ibid.
- 126 U.S. Const., Art I, §8, cl. 18; See also "Kester," p. 28.
- 127 Selective Draft Law Cases, supra., 367.
- 128 Johnson v. Powell, 414 F. 2d 106 (5th cir. 1969).
- 129 "1933 Amendments," 155.

- 130 Ibid., 160.
- 131 Act of August 27, 1940, ch. 689, 54 Stat. 858-859; see also "Kester," p. 23.
- 132 Ibid.
- 133 Ibid.; See also Johnson v. Powell, supra., 1062.
- 134 Ibid.
- 135 Ibid.
- 136 "Armed Forces Reserve Act of 1952," 490.
- 137 Ibid., 483.
- 138 "Kester," 24.
- 139 "Webb," 3.
- 140 U.S. Const., Art. I, §8, cl. 14.
- 141 "Armed Forces Reserve Act of 1952," 481.
- 142 "Kester," p. 20.
- 143 Ibid, p. 22.
- 144 "Armed Forces Reserve Act of 1952," 503.
- 145 "1986 Amendment."
- 146 Federal Tort Claims Act, 28 U.S.C. 1346(b).
- 147 Courtney v. U.S., 230 F 2d 112, 57 ALR 2d 1444, 1455 (2d cir., 1957); (hereafter referred to as Courtney).
- 148 Ibid.
- 149 Spangler v. U.S., 185 F. Supp. 536, 538 (S.D. OH, 1960).
- 150 Courtney, supra., 1455
- 151 Johnston v. U.S., 310 F. Supp 1 (N.D. GA, 1970).
- 152 Courtney, supra., 1455.
- 153 "Armed Forces Reserve Act of 1952," 490.
- 154 Johnston v. U.S., supra., 3.

155 "Armed Force Reserve Act of 1952," 481.

156 "Kester," pp. 19-24.

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