Perpich v. United States Department of Defense: Who Controls the Weekend Soldier?

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PERPICH V. UNITED STATES
DEPARTMENT OF DEFENSE: WHO
CONTROLS THE WEEKEND SOLDIER?

The framers of the United States Constitution avoided a major drawback of the Articles of Confederation by creating a shared power relationship between the states and the national government. This dynamic relationship, so often the source of great con-

1 See The Federalist No. 15, at 98 (A. Hamilton) (J. Cooke ed. 1961); Amar, Of Sovereignty and Federalism, 96 Yale L.J. 1425, 1442 (1987); see also 1 B. Schwartz, A Commentary on the Constitution of the United States, The Powers of Government 10-13 (1963 & photo. reprint 1977) (framers sought to eliminate fundamental defects of government established under Articles of Confederation). One major problem with the Articles of Confederation (the “Articles”) was that the Congress was too weak to enact and enforce laws of a national character. See The Federalist No. 15, supra, at 91-93; 1 F. Thorpe, The Constitutional History of the United States 245-46 (1901 & photo. reprint 1970). In addition, the Articles were flawed because:

They operated not on the people directly, affecting individuals, but on legislatures representing the States as political corporations. The extent of their powers was limited by whatever administration the legislature might give them. They did not consolidate the people into a Nation. The extent of their authority, therefore, was federal not national. They made provision for amendments, and Canada might come into the Union.

Id. at 243-44. As a result of the weaknesses of the Articles, the new nation suffered many problems. See id. at 245-56. See generally P. Hay & R. Rotunda, The United States Federal System: Legal Integration in the American Experience 5-12 (1982) (discussion of Congress’ limited powers under Articles of Confederation and how framers attempted to expand them).

To avoid the disadvantages of the Articles, the framers of the Constitution rejected a confederate system of government, which would have allowed each state to retain its complete sovereignty. See P. Du Ponceau, A Brief View of the Constitution of the United States 13-18 (1974). In its place, the framers constructed a system of government that would not “deprive the states of more of their sovereignty and independence, than was necessary to insure the permanency of the union.” Id. at 14. The new government conferred powers on the states, but limited them, and strengthened the powers of the national government. See A. Putney, United States Constitutional History and Law 141-43 (1985); see also U.S. Const. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land”). The impor-
troversy,\(^2\) has become dominated since the New Deal era by an increasingly powerful national government.\(^3\) This dominance has

\(^2\) See K. HALL, FEDERALISM: A NATION OF STATES xi (1987). The continuing debate over the concept of federalism, "a system of government under which there exists simultaneously a federal or central government and several state governments," \(id.\) at ix, has been succinctly described as follows:

Americans during the past two-hundred years have debated incessantly the issue of federalism, and perhaps no other concept, save judicial review, has stirred more controversy. Much of this controversy has to do with states' rights. An important strain in American constitutional thought has held that the states, and not the people are the basic units of sovereign authority. That notion began with the Antifederalists' efforts to block ratification of the Constitution and continued through the Virginia and Kentucky Resolutions of the late 1790s, the Nullification Crisis of the early 1830s, the Secession Crisis of 1861, and the Massive Resistance Movement of the late 1950s.

\(id.\) at xi. Historically, this controversy has become more acute when the proponents of states' rights have challenged the Supreme Court's authority to resolve conflicts of federalism. See Schmidhauser, "States' Rights" and the Origin of the Supreme Court's Power as Arbiter in Federal-State Relations, 4 WAYNE L. REV. 101, 101-02 (1958). The Supreme Court's decisions which attempted to resolve federalism conflicts are among its most famous. See, e.g., Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 554-56 (1985) (applying provisions of Fair Labor Standards Act to state employees does not violate division of powers contained in Constitution); National League of Cities v. Usery, 426 U.S. 833, 855 (1976) (Congress' commerce clause power could not be used to force state governments into making particular policy choices) (overruled by Garcia, 469 U.S. at 531); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 80 (1831) (states had no authority under Constitution to interfere with federal treaties involving Indians); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 436 (1819) (Congress had power under "necessary and proper" clause to charter national bank immune from state taxation); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 342 (1816) (Supreme Court could exercise appellate jurisdiction over federal question decisions brought in state courts); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 425 (1793) (state could be sued by non-resident in federal court). See generally FEDERALISM: THE SHIFTING BALANCE 1-13 (J. Griffith ed. 1989) (historical overview of changes in allocation of power between states and federal government).

\(^3\) See Scheiber, American Federalism and the Diffusion of Power: Historical and Contemporary Perspectives, 9 U. TOU. L. REV. 619, 648-49 (1978). "Since the New Deal era, . . . the centralization of governmental functions, together with the augmented executive power . . . has served to undermine the limitations upon the power of those who govern." \(id.\) at 649. Through Congress' use of its constitutional power derived from the commerce clause, the national government has increased its dominance over the states. See 1 R. ROTUNDA, J. NO-WAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 4.8, at 290-91 (1986) [hereinafter SUBSTANCE AND PROCEDURE] (broad interpretation of congressional power under commerce clause). The power granted by the commerce clause is "perhaps the most important and conspicuous power possessed by the Federal Government." See A. PUTNEY, supra note 1, at 384. Under the commerce clause, Congress has the power
The power of the

"[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. The importance of congressional power over commerce has increased significantly, primarily in the area of interstate commerce. See A. Putney, supra note 1, at 384-87. Prior to 1937, the concept of "dual sovereignty" reserved certain powers to the states through the tenth amendment. See 1 Substance and Procedure, supra, § 4.5, at 273-74; see also United States v. E.C. Knight Co., 156 U.S. 1, 11 (1895) (dual sovereignty theory formerly held that federal antitrust laws affected state regulated manufacturing combinations). In 1937, the Court shifted to a more expansive interpretation of the commerce clause. See, e.g., United States v. Darby, 312 U.S. 100, 115 (1941) (constitutional authority of Congress to prohibit interstate shipment of goods produced in violation of Fair Labor Standards Act); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) (Congress has power to control intra-state activities "if they have such a close and substantial relationship to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions"). Under this view, the Court has largely deferred to Congress by holding that any regulation is within the commerce clause power as long as it has a rational basis. See L. Tribe, American Constitutional Law § 5.4, at 309 (2d ed. 1988). This radical change was stimulated by the economic problems of the New Deal era and the pressures presented by President Roosevelt's "Court Packing Plan." See 1 Substance and Procedure, supra, § 4.7, at 289-90. See generally Epstein, The Proper Scope of the Commerce Power, 73 Va. L. Rev. 1387, 1443-54 (1987) (analysis of New Deal cases expanding scope of commerce clause).

Another major area in which federal power has expanded is in Congress' exercise of power under the taxing and spending clause. See 1 Substance and Procedure, supra, § 5.7, at 350. This clause provides that "Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defence and general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1. It was not until 1936 that the Supreme Court defined the scope of Congress' power under this clause. See 1 Substance and Procedure, supra, § 5.7, at 349-50. Under the Court's interpretation, the power of Congress to spend public monies for public purposes is not restricted by the enumerated powers of Congress. See United States v. Butler, 297 U.S. 1, 65-66 (1936). For a recent case examining Congress' power under the spending clause, see South Dak. v. Dole, 483 U.S. 203, 206-09 (1987) (valid exercise of congressional spending power to withhold federal highway funds from states unless they raised drinking age to 21). See generally L. Tribe, supra, §§ 5.9-10. (discussion of Congress' taxing and spending powers).

4 See Comment, The Constitution and the Training of National Guardsmen: Can State Governors Prevent Uncle Sam from Sending the Guard to Central America?, 5 J.L. & Pol. 597, 603 (1988). The history of the military, particularly the National Guard (the "Guard"), has been one of increasing federalization. Id. In Rostker v. Goldberg, 453 U.S. 57 (1981), the Court recognized Congress' dominant role in national defense and military affairs and noted that "perhaps in no other area has the Court accorded Congress greater deference." Id. at 64-65; see also Kester, State Governors and the Federal National Guard, 11 Harv. J.L. & Pub. Pol'y 177, 196 (1988) (brief discussion of congressional authority over military affairs); Wiener, The Militia Clause of the Constitution, 54 Harv. L. Rev. 181, 182-210 (1940) (chronological survey of parallel development of Regular Army and National Guard through 1940).

The military power of Congress is derived from article I of the Constitution. See U.S. Const. art. I, § 8, cl. 11 (power "[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water"); id at cl. 12 (power "[t]o raise and support Armies"); id. at cl. 13 (power "[t]o provide and maintain a Navy"); id. at cl. 14 (power "[t]o make Rules for the Government and Regulation of the land and naval Forces")
national government in this realm has been described as "broad and sweeping." Fearful of this broad and unchecked power, the

[hereinafter the preceding powers will be referred to collectively as the “army clauses power”; see also id. § 10, cl. 3 (“No State shall, without the Consent of Congress, . . . keep Troops, or Ships of War in time of Peace”). The President, by virtue of his office, is termed the “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.” Id. at art. II, § 2, cl. 1. See generally H. ROTTSCHAEFER, HANDBOOK OF CONSTITUTIONAL LAW § 184 (1939) (overview of Congress' war and military powers under Constitution).

The powerful nature of the federal government's authority under the army clauses has long been recognized. See, e.g., Tarble's Case, 80 U.S. (13 Wall.) 397, 411-12 (1871) (state judge without jurisdiction to issue writ of habeas corpus to discharge soldier in military service of United States); Martin v. Mott, 25 U.S. (12 Wheat.) 19, 30 (1827) (President had sole authority to determine necessity of calling militia). The federal government's expansive power over the military was described as follows:

[A]mong the powers assigned to the National government, is the power “to raise and support armies,” and the power “to provide for the government and regulation of the land and naval forces.” The execution of these powers falls within the line of its duties; and its control over the subject is plenary and exclusive. It can determine, without question from any State authority, how the armies shall be raised . . . .

Tarble's Case, 80 U.S. (13 Wall.) at 408 (emphasis added).

The modern expansion of the power of the federal government under the army clauses occurred during the World War I era, when Congress aggressively exercised its plenary power. See, e.g., Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146, 164-68 (1919) (War-Time Prohibition Act was constitutional exercise of war powers of Congress even though bill was enacted post-Armistice); Selective Draft Law Cases, 245 U.S. 366, 387-88 (1918) (power of Congress to compel military service under Selective Draft Law during World War I was constitutional exercise of war powers). See generally C. MAY, IN THE NAME OF WAR: JUDICIAL REVIEW AND THE WAR POWERS SINCE 1918, at 254-75 (1989) (historical discussion and analysis of use of war powers to handle problems during and immediately after World War I).

Since World War I, there have been numerous decisions exemplifying the broad latitude of power conferred upon the national government by the army clauses. See, e.g., Chappell v. Wallace, 462 U.S. 296, 300-01 (1983) (Court noted the plenary power of Congress under army clauses); Johnson v. Powell, 414 F.2d 1060, 1063-64 (5th Cir. 1969) (national government's calling of National Guard during Vietnam War was constitutional under army clauses); United States v. Fenno, 167 F.2d 593, 595 (2d Cir.), (statute which made member of fleet reserve subject to naval laws while on inactive duty was constitutional as valid exercise of congressional power under army clauses), cert. dismissed, 335 U.S. 806 (1948). There are limitations, however, on these powers. See infra notes 33-62 accompanying text.

* United States v. O'Brien, 391 U.S. 367, 377 (1968). In O'Brien, the Court held that there was a substantial governmental interest in preventing the burning of draft cards which outweighed the defendant's right to engage in symbolic speech and was based in part on Congress' "broad and sweeping" power to raise and support armies. Id. at 377-78. Justice Douglas, in dissent, suggested that this broad power of Congress might exist only when there is a declared war, and that this is "a question upon which the litigants and the country are entitled to a ruling." Id. at 389 (Douglas, J., dissenting) (citing Holmes v. United States, 390 U.S. 936 (1968) (Douglas, J., dissenting)); see also Chappell, 462 U.S. at 300-01 (Congress has plenary power over military forces of United States); Fenno, 167 F.2d at 595 (Congress has broad power to subject members of the reserve to military law). See generally
framers authorized Congress to recognize a militia\(^6\) that was largely controlled by the states.\(^7\) Throughout our history, the states generally have maintained control over the militia during times of peace,\(^8\) but not during war or national emergency.\(^9\) Recently, how-

* infra notes 44-52 and accompanying text (discussion of broad nature of congressional power under army clauses power and how power changes during wartime).

\(^6\) See U.S. Const. art. I, § 8, cl. 16. Congress has the power:

[t]o 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 . . . .

Id. (emphasis added). In addition, the Bill of Rights states that "[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." Id. at amend. II.

The militia has evolved from a disorganized force consisting of all male citizens of fighting age to an organized component of the United States defense system, known as the National Guard. See Weiner, *supra* note 4, at 182, 195; see also Maryland ex rel Levin v. United States, 381 U.S. 41, 46 ("National Guard is the modern Militia reserved to the States"), vacated, 382 U.S. 159 (1965); Hirsch, *The Militia Clauses of the Constitution and the National Guard*, 56 U. Cin. L. Rev. 914, 943-46 (1988) (discussion of history and development of National Guard).

\(^7\) See U.S. Const. art. I, § 8, cl. 16. Pursuant to the constitutional command that "training the Militia [be] according to the discipline prescribed by Congress" the federal government regulates the training and equipment of the National Guard. *See* 32 U.S.C. §§ 701-706 (1982). However, judicial decisions have recognized that the militia/National Guard is fundamentally a state organization. See, e.g., Maryland ex rel Levin, 381 U.S. at 46-47 (National Guard officer while not in federal service is state official for Federal Tort Claims Act purposes and federal government not liable for his negligence until Guard is federalized); New Jersey Air Nat'l Guard v. FLRA, 677 F.2d 276, 279 (3d Cir.) (National Guard is federal/state hybrid organization whose civilian employees are not subject to Federal Labor Relations Act), cert. denied, 459 U.S. 988 (1982); Mela v. Callaway, 378 F. Supp. 25, 28 (S.D.N.Y. 1974) (National Guard basically a state organization).

Each of the 50 state constitutions designates its respective governor as commander-in-chief of the state's National Guard. See, e.g., Mass. Const. pt. 2, ch. 2, § 1, art. VII ("governor shall be the commander-in-chief"); Minn. Const. art. 5, § 3 ("[the governor] is commander-in-chief of the military and naval forces and may call them out to execute the laws, suppress insurrection and repel invasion"); N.Y. Const. art. 4, § 3 ("governor shall be commander-in-chief of the military and naval forces of the state").


Federalization occurred because of the disorganization of the various state militias during the Spanish-American War. *See id.* at 193-94. As a result, Congress passed the Dick Act, which was the first attempt at organization. *See* Act of Jan. 21, 1903, ch. 196, 32 Stat. 775; Weiner, *supra* note 4, at 193-94. Far-sighted framers had predicted the problems incumbent in relying on an unorganized militia for national defense purposes. *See* The Federalist No. 25, *supra* note 1, at 161-62 (A. Hamilton).

\(^9\) See U.S. Const. art. I, § 8, cl. 15. Under this clause of the Constitution, Congress is
ever, in *Perpich v. United States Department of Defense*, the Court of Appeals for the Eighth Circuit, sitting en banc, reversed a panel decision and held that the Montgomery Amendment (the "Amendment"), which permits the President to send a state's National Guard (the "Guard") abroad on training missions during times of peace without the governor's consent, was constitutional.

In *Perpich*, the Governor of Minnesota sued in federal district court seeking a declaratory judgment that the Montgomery Amendment was an unconstitutional infringement on the states' authorized "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." *Id.* Congress has delegated this power to the executive branch, where the President acts through the governors of the various states. See 10 U.S.C. § 3500 (1988). This power extends to situations where invasion is imminent. *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 29-30 (1827). The power to repel invasion also includes the power to place the rebellious areas under military governance. *See Raymond v. Thomas*, 91 U.S. 712, 714-15 (1875). There is some precedent to indicate that the President has no authority to federalize the militia in order to send it into a foreign country as part of an army of occupation. *See 29 Op. Att'y Gen. 322 (1912).*

For a general view of the power of the national government under the militia clauses, see *Hirsch*, *supra* note 6, at 945-46; *see also* 10 U.S.C. § 101(11) (1988) (Army National Guard of the United States); *id.* § 101(13) (1988) (Air National Guard of the United States). The call-up of the National Guard under the dual system is regulated by statute. *Id.* § 672 (1988).


11 *See Perpich*, 880 F.2d at 14; *Perpich v. United States Dep't of Defense*, No. 87-5345, *slip op.* (8th Cir. Dec. 6, 1988). This panel decision had reversed the decision of the district court finding the statute constitutional. *See Perpich v. United States Dep't of Defense*, 666 F. Supp. 1319, 1325 (D. Minn. 1987).

10 U.S.C. § 672(f) (1988). The Montgomery Amendment (the "Amendment") states: "The consent of a Governor described in subsections (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, type, or schedule of such active duty." *Id.* Subsections 672(b) and (d) provide the "federal government with authority to call state guardsmen to active duty with the consent of their state governors." *Perpich*, 880 F.2d at 32 (Heaney, J., dissenting) (emphasis in original).

The Amendment was named for Representative Sonny V. Montgomery of Mississippi, who proposed the Amendment to a Defense Authorization Bill in response to Maine Governor Joseph E. Brennan's refusal, under 10 U.S.C. § 672 (1982) to permit a detachment of the Maine National Guard to participate in a road building exercise in Honduras. *See Kester*, *supra* note 4, at 177-80. The Governor was opposed to the Reagan Administration's Central American policy. *Id.* The Amendment was opposed by a long list of governors. *Id.*

12 *Perpich*, 880 F.2d at 14.

authority to train the militia.\textsuperscript{15} The trial court held that the dual-enlistment system of the present-day National Guard, in which a soldier joining the Guard automatically becomes a member of both the state national guard and the National Guard of the United States, was a valid exercise of congressional power.\textsuperscript{16} Therefore, the governor’s consent was not required to send the guard on training missions while in federal service.\textsuperscript{17} A divided three judge panel of the Eighth Circuit reversed,\textsuperscript{18} and held that since the Montgomery Amendment did not require the President or Congress to declare a national security emergency before federalizing the National Guard, it thereby granted the federal government unconstitutional control over the militia. On rehearing en banc, the Eighth Circuit vacated the panel decision and affirmed the judgment of the district court, holding that the Montgomery Amendment was a constitutional exercise of congressional power.\textsuperscript{19}

Writing for the court, Circuit Judge Magill recognized that the dual-enlistment system involves conflicting claims of sovereignty between the states and the national government.\textsuperscript{20} The court reasoned that since the dual-enlistment system is a “necessary and proper exercise of Congress’ army power,” it is therefore constitutional.\textsuperscript{21} However, in framing its inquiry, the court examined

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\item[\textsuperscript{15}] Perpich, 880 F.2d at 13. After passage of the Montgomery Amendment, members of the Minnesota National Guard participated in a Central American training mission during January of 1987. \textit{Id.} After the units returned, Governor Perpich objected to the training mission as violative of his power as commander-in-chief to consent to the deployment of the Minnesota National Guard and filed suit with the State of Minnesota. See \textit{id.}
\item[\textsuperscript{16}] Perpich, 666 F. Supp. at 1323.
\item[\textsuperscript{17}] \textit{Id.} at 1324.
\item[\textsuperscript{18}] Perpich v. United States Dep’t of Defense, No. 87-5345, slip op. at 4-5 (8th Cir. Dec. 6, 1988). In addition, the court held that the Amendment contravened the intent of the framers and violated the plain meaning of the constitution. \textit{Id.} at 4-5. The court also found that:
\begin{quote}
the gubernatorial veto power over federal requests for National Guard troops when the national security is not threatened, does not impermissibly involve the states in defense or foreign policy decisions. . . . [T]he government has not demonstrated that the effectiveness of either the national defense or the National Guard will be diminished by adherence to the constitutional principle of basic state control over national guard forces, absent a declaration of war or national exigency.
\end{quote}
\textit{id.} at 6.
\item[\textsuperscript{19}] Perpich, 880 F.2d at 14.
\item[\textsuperscript{20}] \textit{Id.} at 14-16. The decision also presents a capsulized history of the dual enlistment system. See \textit{id.}
whether the governor of a state, as the commander-in-chief of the state's militia, has any veto power when Congress exercises its authority in this area. Judge Magill acknowledged that "[t]he authority given to Congress by the army clause is plenary and exclusive." Therefore, the court concluded that the states have no constitutional authority to restrain Congress' power to deploy state national guardsmen under the army clauses. Noting that this analysis alone would have been sufficient to affirm the district court judgment, Judge Magill nevertheless considered the scope of the militia clauses because of Governor Perpich's vigorous arguments concerning those clauses. After a brief review of the relevant case law, the court concluded that the states' constitutional control over the militia during times of peace could not serve to override congressional power under the army clauses.

In a strong dissent, Senior Circuit Judge Heaney argued that the Perpich court's decision effectively eliminated the militia clauses from the Constitution. The dissent examined the history of the constitutionality of the dual-enlistment system, which had previously been upheld. See Johnson v. Powell, 414 F.2d 1060, 1064 (5th Cir. 1969); Drifka v. Brainard, 294 F. Supp. 425, 427 (W.D. Wash. 1968). But see Johnson v. Powell, 393 U.S. 920, 920 (1968) (order denying stay of deployment of members of National Guard). Justice Douglas stated "I am not yet persuaded that either the Army or the Solicitor General can play loosely with the concept of 'militia.'" Id.; see also United States v. Peel, 4 M.J. 28, 29 (C.M.A. 1977) (state officials have sole authority under Constitution to order guardsmen to active duty).

The Perpich court relied heavily upon the Selective Draft Law Cases, 245 U.S. 366 (1918). In this decision, the Supreme Court consolidated several draft cases and addressed the constitutionality of the wartime draft. See id. at 375. The Court held that "[t]he possession of authority to enact the statute [instituting the draft] must be found in the clauses of the Constitution giving Congress power 'to declare war; . . . to raise and support armies . . . [and] to make rules for the government and regulation of the land and naval forces.'" Id. at 377 (quoting U.S. Const. art. 1, § 8). The Perpich court relied on this analysis indicating that the militia clauses of the Constitution do not interfere with congressional power to conduct a draft during wartime. Perpich, 880 F.2d at 17; see also Cox v. Wood, 247 U.S. 3, 6 (1918) (explaining holding in Selective Service Draft Cases); infra notes 45-50 and accompanying text (analysis of sweep of army clauses during both war and peace under facts of Perpich).

Judge Heaney wrote the prior panel decision. Perpich v. United States Dep't of Defense, No. 87-5345, slip op. (8th Cir. Dec. 6, 1988).
of the militia clauses, by looking first to the intent of the framers and then proceeding to the pertinent case law. From this case history analysis, Judge Heaney argued that the militia clauses placed an important limitation on congressional power by requiring that a state of "national exigency" exist before Congress' army power can override the power reserved to the states in those clauses. The dissent reviewed the relevant statutes concerning federalization of the National Guard and argued that before the Montgomery Amendment, federalization without consent of the governor could occur only where such a national emergency existed. Based on this analysis of the militia clauses, the dissent concluded that the Montgomery Amendment represented an unconstitutional infringement on the power reserved to the states.

It is submitted that the Eighth Circuit's decision in Perpich will serve to erode the constitutional role of the states to a point where they will have virtually no control over the training or general administration of the state national guard. Judge Heaney's dissent, while correct in its conclusion that the Perpich court's analysis effectively eliminated the militia clauses from the Constitution, failed to address the broader impact of the decision. Alternatively, the majority's sweeping interpretation of congressional

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29 Perpich, 880 F.2d at 19-22 (Heaney, J., dissenting). The dissent contended that the framers perceived the militia clause as an important and necessary limitation on the power of the national government. Id. "Strange as it may now seem, the Framers feared that if the militia did not exist to protect state interests, the army might be used by the federal government to oppress the states and their citizens." Id. at 24 (Heaney, J., dissenting).

30 Id. at 26-31 (Heaney, J., dissenting). The dissent asserted that "[n]either of the cases [Selective Draft Law Cases and Cox] supports the majority's opinion" because there the Supreme Court declared that "in war the federal government can use all its military powers combined to supersede the states' reserved authority over the militia." Id. at 27 (Heaney, J., dissenting) (emphasis added). Since Perpich did not involve wartime, by negative implication, the states' reserved authority over the militia was not superseded. Id. at 30-31 (Heaney, J., dissenting); see infra notes 45-50 and accompanying text (discussion of impact of wartime on congressional power under army clauses).

31 Perpich, 880 F.2d at 30 (Heaney, J., dissenting). The dissent noted that "before the legislative or executive branch can use the authority of the Army Clause to overcome reserved state authority over the National Guard, Congress or the President must first affirmatively assert the existence of a national exigency or of a specific threat to the national security." Id. (Heaney, J., dissenting).

32 Id. at 31-35 (Heaney, J., dissenting). "From time to time over the past 200 years, the Congress of the United States has taken steps to improve the effectiveness of the National Guard. Until 1986, however, it always recognized the restraints of the Militia Clauses of the United States Constitution." Id. at 35 (Heaney, J., dissenting).

33 Id. at 39 (Heaney, J., dissenting). This argument was further supported by a detailed policy analysis of the need for and the efficacy of the statute. Id. at 35-39.
power under the army clauses will serve to place severe limitations on the concept of federalism. This Comment will suggest that the Montgomery Amendment violates the limitations placed on federal legislative power through the Bill of Rights and concepts of federalism, and, in turn, will assert that the Perpich court erred in upholding the constitutionality of the Amendment.

I. LIMITATIONS ON CONGRESSIONAL POWER

The United States' constitutional scheme of government provides two types of limitations on the enumerated article I powers of Congress. The first category is internal limitations, those restrictions that are inherent in the granting of the enumerated power. Because of the great deference the judiciary has granted Congress, particularly with respect to the commerce clause, internal limitations on congressional power have gone largely unenforced. The power of Congress has not gone unchecked, however, for the courts have used the second category, external limitations.

34 The enumerated article I powers are those delegated to Congress by the United States Constitution. See U.S. Const. art. I, § 8. These powers include the power Congress possesses under the army clauses. See id. at cls. 15-16; supra notes 6-7.

35 L. Tribe, supra note 3, § 5.1, at 297. Such internal limitations can be found among the enumerated powers themselves. See, e.g., U.S. Const. art. I, § 8, cl. 1 (congressional exercise of taxing power must be uniform throughout the states); id. at cl. 12 (congressional power to raise and support armies subject to appropriations limit of two years); id. at cl. 3 (congressional commerce clause power limited to regulation of foreign commerce and commerce among the several states).

36 See L. Tribe, supra note 3, § 5.8, at 316 ("Contemporary commerce clause doctrine grants Congress such broad power that judicial review of the affirmative authorization for congressional action is largely a formality"). The Supreme Court has generally deferred to the judgment of Congress when determining whether a congressional action falls within the scope of the commerce power. See, e.g., Heart of Atlanta Motel v. United States, 379 U.S. 241, 258-59 (1964) (Title II of Civil Rights Act of 1964, designed to prevent racial discrimination in public places, falls within congressional power under commerce clause); United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942) (commerce clause allows congressional regulation of marketing and production of milk sold intrastate because of competition with interstate commerce); see also supra note 3 (describing shift toward more expansive view of commerce clause).

37 See L. Tribe, supra note 3, § 5.8, at 316. With respect to the commerce clause, the Supreme Court has adopted the "cumulative effect" principle, whereby individual transactions which, when examined alone, are too minor to have any impact on interstate commerce are aggregated to show such an impact. See Wickard v. Filburn, 317 U.S. 111, 127-28 (1942). This type of concession is indicative of the Court's abandonment of internal controls. See L. Tribe, supra note 3, § 5.5, at 310.

38 The term "external limitations" will be used to denote those limitations on congressional power which are not included within the enumerated grants of powers.
to temper congressional power.\textsuperscript{39} External limitations on congressional power include the separation of powers doctrine,\textsuperscript{40} article I restrictions,\textsuperscript{41} the Bill of Rights,\textsuperscript{42} and the concept of federalism.\textsuperscript{43}

A. Internal Limitations

The \textit{Perpich} court analyzed the constitutionality of the Montgomery Amendment by examining solely the internal limitations created by the militia clauses.\textsuperscript{44} This analysis was flawed because of its failure to consider the expanding and contracting nature of congressional war power.\textsuperscript{45} The war powers of the national government, which include those powers enumerated in the Constitution\textsuperscript{46} as well as those derived from powers which all sovereign na-


\textsuperscript{40} \textit{See} \textit{SUBSTANCE AND PROCEDURE}, \textit{supra} note 3, § 3.12, at 249-52. Under the separation of powers doctrine, Congress cannot overstep its bounds and perform tasks which are more pertinent to the executive or judicial branches. \textit{See} Bowsher v. Synar, 478 U.S. 714, 733-34 (1986) (portions of Balanced Budget and Emergency Deficit Control Act of 1985 (Gramm-Rudman-Hollings Act) allowing legislative officer to perform executive branch functions held unconstitutional); INS v. Chadha, 462 U.S. 919, 952-59 (1983) (single house legislative veto held unconstitutional as violative of division of power between legislative and executive branches); \textit{see also} Mistretta v. United States, 109 S. Ct. 647, 658-61 (1989) (analysis of division of powers between legislature and judiciary).

\textsuperscript{41} \textit{See} \textit{U.S. Const.} art. I, § 9. Article I restrictions on congressional power include limitations on the suspension of habeas corpus, issuance of bills of attainder, and enactment of ex post facto laws; taxes must be proportional to the census; no preference is to be given to the commerce of a particular state; and expenditures must be made in accordance with a statement of account procedure. \textit{Id.}; \textit{see} J. \textit{KING}, A COMMENTARY ON THE LAW AND TRUE CONSTRUCTION OF THE FEDERAL CONSTITUTION 377-84 (1985) (discussion of article I limitations on congressional power).

\textsuperscript{42} \textit{U.S. Const.} amends. I-X. The Bill of Rights was considered necessary to supplement the separation of powers in order to protect individual liberty. \textit{See} L. \textit{TRIBE}, \textit{supra} note 3, § 1.2, at 4.


\textsuperscript{44} \textit{Perpich}, 880 F.2d at 17.

\textsuperscript{45} In analyzing the Selective Draft Law Cases, 245 U.S. 366 (1918), the \textit{Perpich} court made no distinction between the wartime circumstances of 1918 and peacetime circumstances of 1988-89. \textit{See} \textit{Perpich}, 880 F.2d at 16.

\textsuperscript{46} \textit{See} \textit{U.S. Const.} art. I, § 8, cls. 11-14 (the army clauses); \textit{id.} at art. I, § 8, cls. 15-16 (militia clauses); \textit{id.} at art. II, § 2, cl. 1 (the power of the President as the Commander-in-Chief of the armed forces).
tions inherently possess, are utilized to their fullest only when the circumstances require. As a result, the breadth of the powers of the national government will be greatest when a state of war or similar emergency exists. At that point, the limitations on congressional power become de minimus at best.

The case law relied on by the court in Perpich was based on the existence of a state of war, whether de jure or de facto. In

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47 See 1 B. Schwartz, supra note 1, at 60-62. The grant of war power to Congress is both specifically and impliedly authorized. Id. The concept of inherent war powers comes from the "necessary and proper" clause. U.S. Const. art. I, § 8, cl. 18. The inherent war powers are not dependent on affirmative grants of power but rather are based on the nation's existence as a sovereign state. See United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936). These powers include the power to wage war, maintain diplomatic relations, and enter treaties and collective security agreements. Id. Because states do not possess inherent war power, federalism limitations on national power would not impede congressional exercise of this power during war. See id. at 316. See generally Lofgren, United States v. Curtiss-Wright Export Corporation: An Historical Reassessment, 83 Yale L.J. 1, 3-5 (1973) (federal powers in foreign affairs are independent of state power).

48 L. Tribe, supra note 3, § 5.16, at 353-55. As Professor Tribe has explained: The Supreme Court has held that these war powers, in conjunction with the necessary and proper clause, grant Congress authority to take actions in wartime which would be unconstitutional in peacetime. Such congressional action may both assume responsibilities ordinarily left to the states and restrict the scope of private rights. Id. at 353.

This expansion can best be seen through wartime economic regulation. See Woods v. Cloyd W. Miller Co., 333 U.S. 138, 141 (1948) (Congress' extensive power over economic regulation during wartime justifies rent control until emergency has ended); Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146, 168 (1919) (wartime prohibition justified and may continue until demobilization and reason for emergency has ceased); see also 1 Substance and Procedure, supra note 3, § 6.11, at 406 ("Because the power to wage war is the power to wage it successfully, the context of a war or preparations for a war or its winding down may justify extensive legislative and executive power"). See generally W. Revelley, The Constitution and the Conduct of Foreign Policy 83-125 (F. Wilcox & R. Frank eds. 1976) (extensive discussion of nature of war power under Constitution).

49 See Schenck v. United States, 249 U.S. 47, 52 (1919). "When a nation is at war many things that might be said in time of peace are such a hindrance to [the war] effort that their utterance will not be endured . . . [and] no Court could regard them as protected by any constitutional right." Id. During the Vietnam War, an argument was presented that Congress could not exercise war powers because no formal state of war existed. See Holmes v. United States, 391 U.S. 937-39 (1968) (Douglas, J., dissenting) (denying certiorari).

50 See Rostow, The Japanese-American Cases: A Disaster, 54 Yale L.J. 489 passim (1945); see also L. Tribe, supra note 3, § 5.16, at 355 (illustrates wartime expansion of power that may infringe on individual liberties).

Perpich, however, no such situation existed.\(^5\) Therefore, it is submitted that the Perpich court's analysis, based on a broad reading of the powers of the national government under the army clauses, must fail. When there is no state of war or similar emergency, the army clauses should not be given such a wide interpretation and, as such, the internal limitation of the militia clause should be given greater weight.\(^5\)

B. External Limitations

A constitutional analysis based on the external limitations of congressional power would have revealed to the Perpich court that the Montgomery Amendment was an impermissible extension of congressional power. The doctrine of external limitations on congressional action has been derived from related concepts of federalism\(^5\) and state sovereignty.\(^5\) Under this doctrine, there are certain components of the Constitution, outside the enumerated powers of Congress, which, when taken together, limit the national government's power to intrude into state activities and institutions.\(^5\) It is submitted that this doctrine, which the Supreme Court is employing with increasing frequency to resolve issues of federal-state relations,\(^7\) should have been applied by the Perpich

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\(^{78}\) Stat. 384 (1964).

\(^{52}\) Perpich, 880 F.2d at 13 (federal activation of state National Guard for peacetime training).

\(^{53}\) Cf. United States v. Cohen Grocery Co., 255 U.S. 81, 88 (1921) (wartime does not suspend fifth and sixth amendments); Ex parte Milligan, 71 U.S. (4 Wall.) 2, 127 (1866) (post-war exercise of war powers that infringe on civil liberties will be struck down); L. Tribe, supra note 3, § 5.16, at 355 (role of judiciary to restrain congressional power during peacetime).

\(^{54}\) See supra note 1. Federalism refers to the shared power relationship between the states and the national government. See B. Schwartz, Constitutional Law 37-40 (1972).

\(^{55}\) See 1 Subs. and Proc., supra note 3, § 3.6, at 221-22. State sovereignty is the concept that each state has control over its own affairs, subject to the federal scheme of government. Id. at 222.

\(^{56}\) See supra notes 37-42 and accompanying text.

The constitutional components of this doctrine are derived from the guarantee clause, the enumerated powers contained in article I, and the tenth amendment. These components, when considered together, place limitations on the power of the national government. Specifically, through these components, a state, as an independent entity within our scheme of government, is constitutionally protected. This protected status has caused the courts to develop certain methods of analysis to ensure that state sovereignty is preserved.

1. Bill of Rights

The first method of analysis employed is an examination of the Bill of Rights. Facialy, the second amendment appears to be implicated. The Supreme Court, in considering challenges to handgun control measures, has developed an analysis which rec-
ognizes that the primary purpose of the amendment, as intended by the framers, is to prevent federal interference with the militia. It is submitted, therefore, that the second amendment places an external limit on congressional control over the militia which was not considered by the Perpich court.

2. Federalism and State Sovereignty Analysis

Federalism and state sovereignty, as external limitations on congressional power, present two theories of analysis. The first theory, based largely on the commerce clause, but equally applicable to Congress’ other article I powers, ensures that the states are adequately represented in the political process when the possibility of infringement on state sovereignty occurs. Legislation such as the Montgomery Amendment would be valid only if it delegated responsibility for the administration of the legislation to an entity capable of preserving the interests of the states. It is submitted that the Perpich court should have employed this test and concluded that the Montgomery Amendment failed because the President, through the Department of Defense, makes all pertinent decisions regarding the training of the National Guard, and, as a result, precludes the adequate representation of the states in the decision-making process. The second component of the first does not implicate second amendment concerns); Presser v. Illinois, 116 U.S. 252, 265 (1886) (state firearm control laws do not implicate second amendment); United States v. Cruikshank, 92 U.S. 542, 553 (1875) (second amendment does not apply to municipal legislation controlling private ownership of handguns).

67 See Miller, 307 U.S. at 178 (“[a bsent] any evidence tending to show that possession . . . [of a handgun] has some reasonable relationship to the preservation or efficiency of well regulated militia, we cannot say that the second amendment [is implicated]”). See generally Hardy, The Second Amendment and the Historiography of the Bill of Rights, 4 J.L. & Pol. 1 (1987) (discussion of framers intent in drafting second amendment).

68 See supra notes 53-56 and accompanying text.

69 See Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543, 543 (1954). The federal system, through its political safeguards, insures that state interests will be taken into account in legislative decisions. Id. at 558. This is done through several constitutional devices. Id. at 543. First, the Constitution ensures that the states remain separate entities. Id. Second, the Constitution bestows upon the states a significant role in the appointment of a central administration. Id. Finally, the Constitution delegates powers between the nation and several states. Id.

70 L. Tribe, supra note 3, § 5.20, at 384 (for such legislation to be valid there must be structural evidence that states were adequately represented in any legislation that significantly burdens state governmental activity); see also Note, Municipal Bankruptcy, the Tenth Amendment and the New Federalism, 89 Harv. L. Rev. 1871 (1976).
method of analysis is a "less drastic means" mode of scrutiny.

The Perpich court failed to recognize that the Montgomery Amendment would not pass scrutiny under this test because control over the training of the Guard could be achieved through more traditional and less imposing means.

The second theory of analysis concerns the concept that the Constitution is based on the structural assumptions of state sovereignty and federalism, a notion supported by the component parts of the Constitution mentioned above. Under this analysis, any congressional action which denies a state its independent status in the federal system is void. It is submitted that the Montgomery Amendment denies states a fundamental precept of their independent status—control over the militia. The Constitution recognizes a militia that will be under the general control of the states, and this institution is an important element of state sovereignty. The Perpich court's refusal to recognize Minnesota's control over this institution seriously infringes on the sovereignty of the states.

II. CONCLUSION

When reference is made to the various external limitations imposed upon Congress' article I powers it becomes apparent that the court in Perpich was incorrect in holding the Montgomery Amendment constitutional. While on a public policy level the Montgomery Amendment may appear to be desirable so that the national government can have a coherent and responsive foreign policy, its danger of straining the delicate balance between the states and the federal government far outweigh the public policy concerns. The framers of the United States Constitution intended a government

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71 L. Tribe, supra note 3, § 5.21 at 384 (there must be evidence that "state interests were fully heard and reasonably weighed").

72 See Coyle v. Smith, 221 U.S. 559, 580 (1911). In Coyle, the Supreme Court reviewed a law passed by Congress which admitted Oklahoma into the Union as the 48th state, provided that the capital was moved to Oklahoma City. Id. at 564-65. The Coyle Court held that as a sovereign state, Oklahoma could not be forced to give up a fundamental tenet of its independence, the right to choose a capital. Id. at 579. Similarly, the Supreme Court has refused to become a court of last resort in decisions based on state common law. See Murdoch v. City of Memphis, 87 U.S. (20 Wall.) 590, 633 (1874). The Court has recognized that congressional power under the army clause is as broad in scope as that of the commerce clause. See Ullmann v. United States, 350 U.S. 422, 436 (1956).

73 See supra notes 6-8 and accompanying text.

74 See id.
that was truly federal and, as such, this system should be preserved.

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