LAW REVIEW[1] 19057
June 2019

Supreme Court Explains the Hybrid Federal-State Nature of the National Guard

By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]
Update on Sam Wright

1.1.3.3—USERRA applies to National Guard service

***Perpich v. Department of Defense,* 496 U.S. 334 (1990).[3]**

In June 1973, 46 years ago this month, the last young man entered by United States Army by conscription (the draft). Almost two generations ago, Congress abolished the draft and established the All-Volunteer military (AVM). The AVM has been a great success, and I hope that it will never be necessary to reinstate the draft.[4] Just a decade ago, Representative Charles

[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1700 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1500 of the articles.

[2] BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 36 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

[3] This is a 1990 decision by the United States Supreme Court. The citation means that you can find this decision in Volume 496 of *United States Reports,* starting on page 334.

[4] I am in favor of requiring young men to register with the Selective Service, just in case reinstatement of the draft at some point becomes necessary, and I think that mandatory registration should be extended to include women as well as men.

Rangel of New York introduced a bill to reinstate the draft, but he was unable to find a single co-sponsor.

There is one small downside to the end of the draft 46 years ago. With each passing year, a greater percentage of the people who decide things have no military experience whatsoever, and no one in their families has served, and they have no close friends who have served. They have no personal knowledge and a lot of misconceptions about the lives, activities, and contributions of those who serve our country in uniform, whether in the full-time active duty military or the National Guard and Reserve. Those who are confused and ill-informed include judges, lawyers, personnel directors of large companies and government agencies, and owner-operators of small and medium-sized private employers.

One issue that confuses many people, including some veterans, is the complex, hybrid state-federal nature of the Army National Guard and Air National Guard. The complicated history and current nature of the National Guard is described in detail in this 1990 Supreme Court decision, as follows:

> Two conflicting themes, developed at the Constitutional Convention and repeated in debates over military policy during the next century, led to a compromise in the text of the Constitution and in later statutory enactments. On the one hand, there was a widespread fear that a national standing Army posed an intolerable threat to individual liberty and to the sovereignty of the separate States, while, on the other hand, there was a recognition of the danger of relying on inadequately trained soldiers as the primary means of providing for the common defense. Thus, Congress was authorized both to raise and support a national army and also to organize "the Militia."
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> In the early years of the Republic, Congress did neither. In 1792, it did pass a statute that purported to establish "an Uniform Militia throughout the United States," but its detailed command that every able-bodied male citizen between the ages of 18 and 45 be enrolled therein and equip himself with appropriate weaponrywas virtually ignored for more than a century, during which time the militia proved to be a decidedly unreliable fighting force.
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> The statute was finally repealed in 1901, it was in that year that President Theodore Roosevelt declared, "Our militia law is obsolete and worthless." The process of transforming "the National Guard of the several States" into an effective fighting force then began.
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> The Dick Act divided the class of able-bodied male citizens between 18 and 45 years of age into an "organized militia" to be known as the National Guard of the several States, and the remainder of which was then described as the "reserve militia," and which later statutes have termed the "unorganized militia." The statute created a table of

organization for the National Guard conforming to that of the Regular Army, and provided that federal funds and Regular Army instructors should be used to train its members. It is undisputed that Congress was acting pursuant to the Militia Clauses of the Constitution in passing the Dick Act. Moreover, the legislative history of that Act indicates that Congress contemplated that the services of the organized militia would "be rendered only upon the soil of the United States or of its Territories." H. R. Rep. No. 1094, 57th Cong., 1st Sess., 22 (1902). In 1908, however, the statute was amended to provide expressly that the Organized Militia should be available for service "either within or without the territory of the United States."

When the Army made plans to invoke that authority by using National Guard units south of the Mexican border, Attorney General Wickersham expressed the opinion that the Militia Clauses precluded such use outside the Nation's borders. In response to that opinion and to the widening conflict in Europe, in 1916 Congress decided to "federalize" the National Guard. In addition to providing for greater federal control and federal funding of the Guard, the statute required every guardsman to take a dual oath -- to support the Nation as well as the States and to obey the President as well as the Governor -- and authorized the President to draft members of the Guard into federal service.

The statute expressly provided that the Army of the United States should include not only "the Regular Army," but also "the National Guard while in the service of the United States," and that when drafted into federal service by the President, members of the Guard so drafted should "from the date of their draft, stand discharged from the militia, and shall from said date be subject to" the rules and regulations governing the Regular Army. § 111, 39 Stat. 211.

During World War I, the President exercised the power to draft members of the National Guard into the Regular Army. That power, as well as the power to compel civilians to render military service, was upheld in the *Selective Draft Law Cases,* 245 U.S. 366 (1918). Specifically, in that case, and in *Cox v. Wood,* 247 U.S. 3 (1918), the Court held that the plenary power to raise armies was "not qualified or restricted by the provisions of the militia clause."

The draft of the individual members of the National Guard into the Army during World War I virtually destroyed the Guard as an effective organization. The draft terminated the members' status as militiamen, and the statue did not provide for a restoration of their prewar status as members of the Guard when they were mustered out of the Army. This problem was ultimately remedied by the 1933 amendments to the 1916 Act. Those amendments created the "two overlapping but distinct organizations" described by the District Court -- the National Guard of the various States and the National Guard of the United States.

> Since 1933 all persons who have enlisted in a state National Guard unit have simultaneously enlisted in the National Guard of the United States. In the latter capacity they became a part of the Enlisted Reserve Corps of the Army, but unless and until ordered to active duty in the Army, they retained their status as members of a separate state Guard unit. Under the 1933 Act, they could be ordered into active service whenever Congress declared a national emergency and authorized the use of troops in excess of those in the Regular Army. The statute plainly described the effect of such an order.
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> "All persons so ordered into the active military service of the United States shall from the date of such order stand relieved from duty in the National Guard of their respective States, Territories, and the District of Columbia so long as they shall remain in the active military service of the United States, and during such time shall be subject to such laws and regulations for the government of the Army of the United States as may be applicable to members of the Army whose permanent retention in active military service is not contemplated by law. The organization of said units existing at the date of the order into active Federal service shall be maintained intact insofar as practicable." § 18, 48 Stat. 160-161. "Upon being relieved from active duty in the military service of the United States all individuals and units shall thereupon revert to their National Guard status.'" Id., at 161.
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> Thus, under the "dual enlistment" provisions of the statute that have been in effect since 1933, a member of the Guard who is ordered to active duty in the federal service is thereby relieved of his or her status in the state Guard for the entire period of federal service.
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> Until 1952 the statutory authority to order National Guard units to active duty was limited to periods of national emergency. In that year, Congress broadly authorized orders to "active duty or active duty for training" without any emergency requirement, but provided that such orders could not be issued without gubernatorial consent. The National Guard units have under this plan become a sizeable portion of the Nation's military forces; for example, "the Army National Guard provides 46 percent of the combat units and 28 percent of the support forces of the Total Army." Apparently gubernatorial consents to training missions were routinely obtained until 1985, when the Governor of California refused to consent to a training mission for 450 members of the California National Guard in Honduras, and the Governor of Maine shortly thereafter refused to consent to a similar mission. Those incidents led to the enactment of the Montgomery Amendment and this litigation ensued.[5]

Because during the Reagan Administration several Governors had objected to training duty for National Guard members outside the United States, apparently based on political objections to

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[5] *Perpich,* 496 U.S. at 340-46.

the location or purpose of the training, Representative G.V. "Sonny" Montgomery of Mississippi persuaded his colleagues in Congress to enact the "Montgomery Amendment" as part of the National Defense Authorization Act (NDAA) for Fiscal Year 1987.[6]

The Montgomery Amendment added a new subsection (f) to section 672 of title 10 of the United States Code, as follows:

> The consent of the Governor [for deployment of National Guard members outside the United States] described in subsections (b) and (d) may not be withheld (in whole or in part) with regard to 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.[7]

The purpose and effect of the Montgomery Amendment was to constrain the power of any Governor to veto the deployment or training of National Guard members based on political objections to the President's foreign policy. Now, a Governor can veto the deployment of National Guard members of the Governor's state only if he or she can show that so many National Guard members have been deployed that there are not enough left in the state to respond to state emergencies like floods, tornadoes, riots, etc.

Governor Rudy Perpich of Minnesota filed suit against the United States Department of Defense in the United States District Court for the District of Minnesota, contending that the Montgomery Amendment was unconstitutional under the "militia clauses" of the United States Constitution. The District Court upheld the constitutionality of the Montgomery Amendment.[8]

Governor Perpich appealed to the United States Court of Appeals for the Eighth Circuit, the federal appellate court that sits in St. Louis and hears appeals from district courts in Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota. In accordance with the standard practice in the federal appellate courts, the appeal was heard by a panel of three judges, and they voted to find the Montgomery Amendment unconstitutional and reversed the decision of the District of Minnesota.[9]

The United States Department of Defense applied to the 8th Circuit for en banc reconsideration, and the application was granted.[10] After en banc reconsideration, the 8th Circuit reversed the

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[6] Section 522, Public Law 99-661, 100 Stat. 3871.

[7] Years later, as part of a reorganization of title 10, this subsection moved. It can now be found at 10 U.S.C. 12301(d).

[8] *Perpich v. Department of Defense,* 666 F. Supp. 1319 (D. Minn. 1987).

[9] *Perpich v. Department of Defense,* 1988 U.S. App. LEXIS 16494 (8th Cir. February 9, 1988).

[10] When a federal appellate court grants en banc reconsideration, there are new briefs and a new oral argument before all the active judges (those who have not taken senior status) of that court.

panel decision and affirmed the District Court decision upholding the constitutionality of the Montgomery Amendment.[11]

The final step in the federal appellate process is to apply to the United States Supreme Court for certiorari (discretionary review). Certiorari is denied in more than 99% of the cases where it is sought, and the denial of certiorari means that the Court of Appeals decision is final. At least four of the nine Supreme Court Justices must vote for certiorari, or it is denied.

Governor Perpich applied to the Supreme Court for certiorari, and the Court granted the application because of the importance of the constitutional issue. In a scholarly decision written by Justice John Paul Stevens and joined by all eight of his Supreme Court colleagues, the Supreme Court affirmed the en banc 8th Circuit decision and upheld the constitutionality of the Montgomery Amendment. In the paragraphs that I have quoted, above, Justice Stevens' scholarly opinion explains in detail the history and current hybrid status of the National Guard.

I hope that this article, and especially the Supreme Court decision paragraphs that I have quoted, will be helpful to judges, lawyers, and others in understanding the hybrid state-federal status of the National Guard.

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ROA is almost a century old—it was established in 1922 by a group of veterans of "The Great War," as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's national defense needs.

Through these articles, and by other means, we have sought to educate service members, their spouses, and their attorneys about their legal rights and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA or eligible to join, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

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[11] *Perpich v. Department of Defense,* 880 F.2d 11 (8th Cir. 1989).

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