Does the Constitution's militia clause entitle a state to keep units at home when it disapproves of a federal training deployment?

The Guard and the Governors

BY BRUCE JACOBS

If a governor disapproves of an overseas National Guard training deployment, can he prevent his state's Guard units from participating? Or must he yield to the priorities established by the Defense Department?

That question has preoccupied the Guard and governors alike throughout three years of intense political and legal conflict. The stakes in this battle are high. The issue, as it was recently put by Maj. Gen. Philip G. Killey, Director of the Air National Guard, is nothing less than "the credibility of the National Guard."

Congress and the Pentagon have been trying to deal with the state role in decisions about Guard training for a number of years. In 1986, Congress passed a law calling for Washington to have the final say over deployment of National Guard troops for training outside the US.

That, however, was not the end of the matter. Two states—Minnesota and Massachusetts—challenged the federal law in court, seeking to overturn it. Massachusetts has lost its case outright, with the US Supreme Court last April refusing to hear an appeal from the First Circuit Court of Appeals in Boston. A broader suit brought by Minnesota, however, was still pending as of late summer. Even though the Eighth Circuit Court of Appeals in June ruled against Minnesota and in favor of the federal government, the Supreme Court has yet to issue a definitive ruling. Unless and until it does, say experts, the matter will remain unresolved.

The controversy over control of the National Guard stems from the so-called militia clause of the Constitution. It calls for the federal government to organize, arm, and discipline Guard members and employ them in service to the US. Authority to train Guard members, however, is reserved for the states.

Training in Central America

The issue emerged during 1985–86. The first instance was the refusal of California to send a small (company-size) armored task force to an exercise in Honduras. The mission was shifted to Texas, where Gov. Mark White agreed to deploy Texas National Guard members to Honduras. As the US Southern Com-

mand increased opportunities for participation by the Guard in road-building and humanitarian training missions, a number of governors expressed opposition.

Arizona Gov. Bruce Babbitt then stated his opposition to having the Arizona National Guard train in Honduras because the training, in his view, was "part and parcel of a policy" to draw the United States into the war in Nicaragua. But he did not restrain the deployment of an Arizona Army Guard military police company—and even approved an extension for the unit. Vermont Gov. Madeleine Kunin claimed that sending the Guard to Honduras was "a show of force" and "a backdoor escalation of US military action." The governors of Kansas, Washington, Ohio, and Massachusetts also issued statements reflecting concern for the safety of personnel who might be assigned for training in Central America.

When Gov. Joseph E. Brennan of Maine actually refused to send a detachment of forty-five Guard members early in 1986, the issue became a real one.

Governor Brennan's actions and the other governors' words raised concern in Washington. At an April 22, 1986, congressional hearing, Rep. Bill Chappell of Florida asked James Webb, the Assistant Secretary of Defense for Reserve Affairs, if he was concerned about the new assertiveness of the governors. Mr. Webb responded that "present policy" permitted Guard activities to be manipulated at the local level and that options were being considered to either remedy the situation or review the missions being given to the Guard.

Under a provision of the Armed Forces Reserve Act of 1952, governors had the authority to approve or turn down training outside the continental United States. For thirty-three years, this approval had been routinely granted when requested. Now, however, the arrangement seemed to be in danger.

A Plan to Curb the Governors?

Speculation was widespread that the Pentagon wanted new legislation to curb the ability of governors to influence where members of the National Guard might train. Even so, Secretary of Defense Caspar Weinberger claimed that the Pentagon had no plan to seek new legislation. He promised that DoD would conduct "a careful, thorough, methodical, and orderly review." He also noted that, "contrary to reports by the media, [Mr. Webb] did not recommend that remedial legislation."

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In mid-June, however, Republican Sens. Phil Gramm of Texas and Pete Wilson of California cosponsored new and far more stringent legislation. In language proposed for inclusion in the Fiscal 1987 Defense Authorization Bill, they sought to amend the existing law in a crucial way: All Guardsmen sent to train outside the US were to be placed in federal active-duty status.

Guard annual training had been routinely held under Title 32, which puts the Guard in federal status but retains it under state control. Guard members in Title 32 status, for example, do not count against the active service strength. With the Guard in full federal status, a governor's okay would not be needed. The senators' proposal suggested outright elimination of the need for gubernatorial consent.

The proposal failed to generate immediate support in the Manpower and Personnel Subcommittee, which Wilson chaired at the time. The issue was deemed too critical—or, perhaps, too sensitive—to be acted on without further review and hearings.

Such a hearing was held on July 15. It turned out to be a bleak day for the reputation of the National Guard. The Guard found itself assailed by witnesses who challenged its credibility as a partner in the total force. The arguments focused not on training, but on whether the Guard could be counted by the nation's leaders as a reliable mobilization entity.

The centerpiece of the hearing was the unveiling of an argument that the militia clause of the Constitution had been superseded by the army clause. The latter empowers Congress to raise armies. The argument was made that, because the 1933 National Defense Act had created the component known as "National Guard of the United States," this was now the prevailing legal authority. Thus, this argument ran, the militia clause no longer had any serious effect with respect to control of the Guard.

The Montgomery Amendment

In light of all these factors, Rep. G. V. "Sonny" Montgomery (D-Miss.) came to the conclusion that a simple fix could be devised. His objectives were to ensure that the Guard would continue to train in accordance with Army and Air Force readiness requirements and to accomplish this goal within the framework of the militia clause of the Constitution.

In late summer 1986, Representative Montgomery proposed a measure, later known as the "Montgomery Amendment," which sharply defined a limitation on the veto authority of the governors. His proposal was aimed at prohibiting any gubernatorial objection to overseas training based on objection to location or purpose of the training. It passed both chambers.

There was considerable consternation in statehouses around the nation. Confusion and frustration were evident at the annual meeting of the National Governors' Association in Hilton Head, S. C., in the waning days of August. Hanging over all was the suspicion that a move was under way to take peacetime command of the National Guard away from the governors.

The operative portion of the Montgomery Amendment reads thus: "The consent of a Governor . . . may not be withheld . . . 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."

A Challenge in Federal Court

The measure was signed into law in October 1986. However, the idea that passage of the Montgomery Amendment had put the basic issue to bed was soon dispelled. Opposition came right away from Minnesota Gov. Rudy Perpich.

Minnesota's Attorney General, Hubert H. Humphrey III, advised his governor on December 17, 1986, that he believed that "a challenge to the law in the federal court is probably the only manner in which its validity can be finally resolved." Governor Perpich contacted fellow governors to test support for an assault by Minnesota on the Montgomery Amendment. In a letter to Gov. Bill Clinton of Arkansas, he suggested that the governors act as a group in challenging the new federal law. Despite Governor Perpich's suggestions, there were few takers at the time.

Governor Perpich filed his lawsuit against the Department of Defense, the services, and the National Guard Bureau on January 22, 1987, in Minnesota federal court. The date for a trial on the merits was set for June 15 in St. Paul. In late May, Iowa and Massachusetts took the lead in proclaiming that twelve more states had joined Minnesota's legal action.

Neutral observers studied with astonishment the list of states in support of Governor Perpich. Listed as joining the suit were Maine, Massachusetts, Rhode Island, Iowa, Vermont, Arkansas, Colorado, Ohio, Delaware, Kansas, Louisiana, and Hawaii. A little investigation, however, showed that some state attorneys general had acted prematurely and that, in a few cases, governors had not even been consulted. A number of governors acted quickly to withdraw their states from the Perpich action. When the dust settled, the hard-core support for Governor Perpich came down to only five states: Massachusetts, Maine, Vermont, Ohio, and Colorado. At the same time, twenty-three governors rallied behind a brief, filed by the National Guard Association of the US, supporting the new law.

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Following arguments in US District Court in St. Paul, US District Judge Donald Alsop issued his decision on August 3, 1987. He dismissed the Perpich case in its entirety. The Montgomery Amendment, he held, easily passed constitutional muster.

Crucial Timing

The timing of the decision was extremely important. At the time, many in Congress had begun to doubt the constitutionality of the Montgomery Amendment. Some questioned whether it was possible to enforce the law, even if it were constitutional. Senators had begun considering legislation that would restore full authority to the governors, but make it possible for the President to send National Guard troops overseas for training if he could certify that it was in the national interest. This putative plan of action, however, was abandoned.

Undeterred, Minnesota moved quickly to file its motion in appeal and requested an expedited hearing. This was granted, and the Eighth US Circuit Court of Appeals put the matter on the docket for hearing on February 9, 1988. The "expedited hearing" took place before a three-judge panel in the St. Paul Court, and the judges took the matter under advisement.

Meanwhile, the situation was made more complex by the actions of a Democrat then little-known outside of Massachusetts—Gov. Michael Dukakis. Governor Dukakis's evident anxiety about the lack of legal progress in Minnesota caused him to take direct legal action against Washington to prevent a thirteen-member Guard unit from deploying to Central America.

Just before the hearing in St. Paul, Massachusetts Attorney General James M. Shannon filed suit in US District Court in Boston. He stated that the Governor wanted to block the forthcoming training mission of the 65th Public Affairs Detachment, Massachusetts Army National Guard, to Central America. Shannon further noted that, "in the event that other Massachusetts National Guard units are called to active duty for training in Central America, the Governor intends to withhold consent if he objects to the location, purpose, type or schedule of such training."

To get a decision in his case, Governor Dukakis would not have to wait as long as Governor Perpich. Less than one month after arguments were heard on April 9, 1988, US District Judge Robert Keeton announced his ruling: The Montgomery Amendment was valid, and Governor Dukakis could not block the deployment.

The judge wrote: "The Militia Clause retains meaning and purpose both (a) as it limits congressional power over the militia when it is not on active duty as a part of the army and (b) as it enables Congress to exercise more sparingly its broad army power. This blend of limiting and enabling functions serves the framers' intent that Congress have the power to provide for the defense of the nation while maintaining only a small standing army. The Montgomery Amendment is a valid exercise of Congress's power under the Armies Clause and does not violate the Militia Clause."

Governor Dukakis, though by that time busy with presidential campaigning, had his attorney general file an appeal. By the time the appeal was heard, the 65th Public Affairs Detachment had long since completed its training mission in Central America, but the underlying issue remained alive. On October 4, the First US Circuit Court of Appeals in Boston announced that appellate justices had voted unanimously to uphold Judge Keeton's trial-court ruling.

Heading for the Supreme Court

With opponents of the Montgomery Amendment being routed repeatedly in courtrooms, it seemed that the issue would speedily be resolved. This, however, was not to be. Matters were thrown into disarray with the decision, on December 6, 1988, of another federal appeals court. A three-judge panel of the Eighth US Circuit Court of Appeals, headed by US District Judge Gerald Heaney, announced its decision in the Perpich case. By a two-to-one vote, the panel backed the Minnesota governor against the new law.

The appellate court's reversal of the decision by Judge Alsop confronted the Guard with contradictory results in two different jurisdictions. This might lead to a drawn-out battle that would almost inevitably have to find its way to the Supreme Court.

Government attorneys moved quickly for a rehearing before the full appellate court, with all justices participating in the decision. Meanwhile, in Boston, Massachusetts Attorney General Shannon sought to get his governor's views before the US Supreme Court with a writ of *certiorari* asking the high court to review the ruling by the First Circuit Court.

With the two legal cases proceeding on these two different tracks, the issue of training the National Guard outside the continental US dragged on into a third year of controversy. On February 16, a panel of nine judges of the Eighth Circuit Court convened in St. Paul and listened intently to the arguments. Again there would be long months of silence from the St. Paul courtroom.

Guard members believe that this dispute could have, and should have, been resolved without recourse to the bitter public debate that ensued.

The first signs of a definitive judgment in the matter came this past spring. On April 16, 1989, the Supreme Court announced its decision not to disturb the findings of other courts in the Massachusetts case. The Supreme Court, though it did not issue an opinion of its own, simply chose not to review Governor Dukakis's defeat. This was a blow to advocates of the Dukakis-Perpich position.

Another Setback

Then, on June 28, they suffered another major courtroom setback. From St. Louis, headquarters of the Eighth Circuit Court, came the announcement that the full appeals panel had voted seven to two to overturn the three-judge panel's decision and thus had restored the judgment of Judge Alsop. Once more, a court in the Minnesota case held that the states' authority to train their militias did not inhibit the power of Congress to provide for active-duty training of the National Guard of the United States.

Minnesota officials, after the decision, held open the possibility of carrying their case all the way to the Supreme Court, where it would be likely to receive a full review. Whether there will be a further challenge is uncertain. Even if Minnesota chooses not to take this step, the matter seems certain to remain a significant legal issue until the high court issues a definitive ruling.

In the main, Guard members believe that this dispute could have, and should have, been resolved without recourse to the bitter public debate that ensued. Events made it impossible for the system to fix itself, and so the need arose for a legislative measure such as the one embodied in the Montgomery Amendment.

With the ruling on the Minnesota case, it appears that the dispute is ending. The author of the amendment, Representative Montgomery, had this comment on the events:

"I hope this ruling will get the National Guard out of the courtroom and back to the business of training. Having the ability to go overseas will allow the Guard the chance to offer its personnel the best training available, so it can continue to maintain the highest possible level of readiness." ■

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