Regulation of the Militia

The power of Congress over the militia "being unlimited, except in the two particulars of officering and training them . . . it may be exercised to any extent that may be deemed necessary by Congress. . . . The power of the state government to legislate on the same subjects, having existed prior to the formation of the Constitution, and not having been prohibited by that instrument, it remains with the States, subordinate nevertheless to the paramount law of the General Government. . . ." [1671] Under the National Defense Act of 1916,[1672] the militia, which had been an almost purely state institution, was brought under the control of the National Government. The term "militia of the United States" was defined to comprehend "all able-bodied male citizens of the United States and all other able-bodied males who have . . . declared their intention to become citizens of the United States," between the ages of eighteen and forty-five. The act reorganized the National Guard, determined its size in proportion to the population of the several States, required that all enlistments be for "three years in service and three years in reserve," limited the appointment of officers to those who "shall have successfully passed such tests as to . . . physical, moral and professional fitness as the President shall prescribe," and authorized the President in certain emergencies to "draft into the military service of the United States to serve therein for the period of the war unless sooner discharged, any or all members of the National Guard and National Guard Reserve," who thereupon should "stand discharged from the militia." [1673]

The militia clauses do not constrain Congress in raising and supporting a national army. The Court has approved the system of "dual enlistment," under which persons enlisted in state militia (National Guard) units simultaneously enlist in the National Guard of the United States, and, when called to active duty in the federal service, are relieved of their status in the state militia. Consequently, the restrictions in the first militia clause have no application to the federalized National Guard; there is no constitutional requirement that state governors hold a veto power over federal duty

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[1671] Houston v. Moore, 18 U.S. (5 Wheat.) 1, 16 (1820). Organizing and providing for the militia being constitutionally committed to Congress and statutorily shared with the Executive, the judiciary is precluded from exercising oversight over the process, Gilligan v. Morgan, 413 U.S. 1 (1973), although wrongs committed by troops are subject to judicial relief in damages. Scheuer v. Rhodes, 416 U.S. 233 (1974).

[1672] 39 Stat. 166, 197, 198, 200, 202, 211 (1916), codified in sections of Titles 10 & 32. *See* Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181 (1940).

[1673] Military and civilian personnel of the National Guard are state, rather than federal, employees and the Federal Government is thus not liable under the Federal Tort Claims Act for their negligence. Maryland v. United States, 381 U.S. 41 (1965).