

MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

4012

2005 SENATE POLITICAL SUBDIVISIONS

SCR 4012

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SCR 4012

Senate Political Subdivisions Committee

Conference Committee

Hearing Date February 24, 2005

Tape Number	Side A	Side B	Meter #
1	X		0 - 4588
Committee Clerk Signature <i>Shirley Borg</i>			

Minutes:

Chairman Cook called the Senate Political Subdivisions to order. All members (6) present.

Chairman Cook opened the hearing on SCR 4012 relating to the definition of this state's militia.

Senator Tim Mathern, District 11, Fargo, ND, introduced SCR 4012. (See attachment #1).

Senator Dever: My reading of this bill is a little different than yours. Your reading is who is allowed to serve and my reading is who is required to serve. It seems to me that when we talk about a draft, men between the ages of eighteen and forty five is the more appropriate. I am not excited about drafting ladies. I have every respect for their service in our military.

Senator Tim Mathern: Some of those kind of questions have been reviewed in terms of some of the legal cases around the country. I would see that on both sides of that issue, who is required and who is permit and I would say that we have come to a time for example where the militia acts and the authority who calls the militia into action would be guided by this and we want to

give that authority the widest latitude in terms of the needs that are there. If we had an emergency requiring calling the militia forward in the state of North Dakota certainly we would want the widest group of people to help us do that. Right now our constitution limits that group of people.

Senator Dever: We can recruit a wider group of people but we would require males between those ages to serve.

Senator Tim Mathern: Why not require a wider group of people that reflect the emergency. The emergency might require forty six year olds to solve the emergency or some women for example and this restricts that requirement.

Chairman Cook: Have you researched the Century Code to see how the reserve militia could be activated?

Senator Mathern: I believe our century code does in fact provide a broader range of how persons could be called forward in the militia. The issue we are trying to address here is the constitutional provisions which I believe are narrower. So when there is a debate what is more important, our century code laws or our constitution. I think the important thing is to try to bring those in synch with one another and these constitutional changes would do that. It would eliminate the potential conflict where someone would say we could do this by state law but someone would say you don't have authority because there is someone beyond state law and that is the constitution.

Chairman Cook : Do you support requiring women to serve if called? Should women be drafted?

Senator Mathern: The resolution that is drafted and is before you provides for some exclusions.

I do believe the situation of a draft would with this change relate the same for men and women and I believe that should be the case. Individuals should have options which I support.

Senator Triplett, Senator from District 18, Grand Forks, ND testified in support of SCR 4012.

(See attachment #2)

Chairman Cook: Can the United States draft women?

Senator Triplett: I think they can if they want to.

Representative Dekrey, District 14, Pettibone, ND, I stand before you today in violation of the ND Constitution. I am a forty eight year old man who has been in the National Guard or the army reserve for active duty since 1978. I think it is high time that North Dakota updated its constitution to include women and men over forty five which has been going on for decades. As to the issue of whether women should be drafted; first of all the constitution has nothing to do with the draft. I think women should be available to be called up by the governor in some kind of national emergency. I have been commanded by and have commanded women in the guard and reserve and I see no difference in ability and I certainly see no difference in quality.

Major Mike Haugen, The Adjutant General of North Dakota National Guard, testified in support of SCR 4012. (See Attachment #3).

Chairman Cook: I have the attorney generals opinion here. It starts out making it very clear that it is my opinion that article sixteen defines which individuals may be required to serve in the military but does not prohibit women, men over 45 or under 18, or nonresidents from serving in the National Guard. The same opinion goes on to tie all the sections of the constitution with related century code to basically say the opposite of what you are saying in your testimony.

Major Haugen: I believe that the definition of inactive militia and the active militia are the reasons that Lt. Colonel Wilz and other women can serve in the national guard. Not because our constitution allows it but because laws have since been passed that override our constitution. The equal protection clause of the Constitution of the US allows women to serve in the national guard, it allows me as an older than forty five male to serve and allows nonresidents to serve. What I am saying is the inactive militia, which by the way has never been called up and has nothing to do with the draft, allows individuals and requires individuals citizens of this state to serve if asked to serve. In New York in the nine eleven situation only volunteers from the state were required to serve. There were no outside federal agencies that were allowed to come in by the governor. It was all done by the National Guard and citizens in the state. There was no activation of the inactive militia in New York. Now if you look at an event so horrendous that the governor needs to call up the inactive militia , I find it incomprehensible that he would only ask males of eighteen to forty five to come and serve. If we had positions for nurses or people with the technical capability, why would you not be able to require them to serve. They are no less a patriot or a citizen because they are a female or happen to live across the road in Montana.

Chairman Cook: Again I will refer to the attorney generals opinion and the last statement that you just made. As I look at this bill the change that I see it making is that it would allow women to be required to serve. Right now the law makes it very clear that they can serve. The attorney generals opinion says that also. The constitution also says that the legislative assembly shall provide by law for the establishment of organizations and we have done that with law which makes it perfectly legal for women to serve in the National Guard. Now again what I believe that this bill does is change it so that women would be required to serve. Do you agree with that?

Major General Haugen: Yes I agree with that.

Senator Fairfield: Going back to that discussion requiring women to serve. Do I understand it that it also says that any of that can be exempted by the laws of the state. So we are saying in the constitution that anyone is able to serve. The state can make the decision as to who may serve. All things flow from the constitution. So we could have our state law as policy makers and we could make the decision of who is required to serve. This states that everyone is treated equally.

Major General Haugen: I agree that it is requiring the inactive militia to have to serve.

Chairman Cook: I am going to read one sentence out of the attorney generals opinion so we are clear on the relationship between the constitution and century code. Although the legislature may not reduce constitutional rights, the legislature may expand the rights of citizens beyond those given by the constitution.

Lieutenant Colonel Giselle Wilz, Lieutenant Colonel with National Guard, testified in support of SCR 4012. (See attachment # 4)

Senator Gary Lee: Are you limited in job function because of you gender?

Lieutenant Colonel Wilz: No, there are no jobs I can not do.

Jackie Huber, 16 year veteran of the North Dakota National Guard, and a two time combat veteran. I served in Operation Dessert Storm and Operation Iraqi Freedom with the 142nd Engineer Battalion. Thank you for allowing us the opportunity to be the voice for the many service women of North Dakota's National Guard past, present and future. The North Dakota National Guard has developed a global reputation as a leader that sets the standard for excellence for others to follow. This reputation is the direct result of the sacrifices, selfless service and professionalism of both the men and women that serve in the North Dakota National Guard. The

history of women in arm forces began two hundred and twenty years ago with the American Revolution and it continues on today. A World War II arm nurse is quoted as saying "Let the generations know that women in uniform also guaranteed their freedom". The service women of the North Dakota National Guard have made many sacrifices for our state and nation's defense. It is time for our state to recognize the women of the North Dakota National Guard for their services, contributions of protecting our freedom in our state constitution. In the words of the Desert Storm Veteran, then Major Rhonda Cornum, the qualities that are most important in all military jobs, things like integrity, moral courage and determination have nothing to do with gender.

John L Jacobsen, North Dakota Veteran's Coordinating Council, testified in support of SCR 4012. (See attachment # 5)

Testimony in Opposition of SCR 4012.

Sophia Presler, from District 45 in Bismarck, ND. I do not believe men and women are equal. God made us very different. A man is a man and a women is a women. The two actually compliment each other. I am opposed to this bill.

No further questions or testimony on SCR 4012.

Chairman Cook closed the hearing on SCR 4012.

Afternoon 2/24/05

Chairman Cook opened the discussion on SCR 4012.

Chairman Cook: As I listened to the testimony, I hear testimony that indicated that intent of this is to make it legal for women to serve in the North Dakota National Guard. I feel it is perfectly legal today for women to serve in the National Guard. I have handed out the Attorney

General's opinion. I would encourage that the committee take that home and read it. It is my opinion that Article 16 defines which individuals may be required to serve but does not prohibit women over forty five or under eighteen from serving in the National Guard. I understand, as General Haugen pointed out, that at the very end of the attorney general's opinion it makes reference to the opinion of the Tenth Circuit Court of Appeal regarding Wyoming and that he says that it may be wise to amend the constitution. What this amendment would do if the voters were to approve this it would allow the Governor to call out the reserve militia and would be able to draft women.

Senator Cook handed out all the sections of the constitution regarding this militia section 16, 17, 18, 19, 20 and 21.

Chairman Cook closed the discussion on SCR 4012.

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SCR 4012

Senate Political Subdivisions Committee

Conference Committee

Hearing Date February 25, 2005

Tape Number	Side A	Side B	Meter #
1	X		660 - 1210
Committee Clerk Signature <i>Shirley Borg</i>			

Minutes:

Chairman Cook called the committee to order for discussion and action on SCR 4012. All members (6) present.

Senator Triplett moved a Do Pass on SCR 4012.

Senator Fairfield seconded the motion.

Discussion

Roll call vote: Yes 3 No 3 Absent 0 Motion Failed

Senator Dever moved a Do Not Pass on SCR 4012

Senator Gary Lee seconded the motion

Roll call vote: Yes 3 No 3 Absent 0 Motion Failed

Senator Hacker moved a Pass Without Committee Recommendation

Senator Triplett seconded the motion

Roll Call: 6 Yes 0 No 0 Absent

Carrier: Senator Dever

Date: 2-25-05
Roll Call Vote #: 1

2005 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SCR 4012

Senate Political Subdivisions Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass

Motion Made By Senator Triplett Seconded By Senator Fairfield

Senators	Yes	No	Senators	Yes	No
Senator Dwight Cook, Chairman		X			
Senator Nicholas P. Hacker, VC	X				
Senator Dick Dever		X			
Senator Gary A. Lee		X			
Senator April Fairfield	X				
Senator Constance Triplett	X				

Total Yes 3 No 3

Absent _____

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent: Motion Failed

Date: 2-25-2005
Roll Call Vote #: #2

2005 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SCR 4012

Senate Political Subdivisions Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Not Pass

Motion Made By Senator Dever Seconded By Senator Gary Lee

Senators	Yes	No	Senators	Yes	No
Senator Dwight Cook, Chairman	X				
Senator Nicholas P. Hacker, VC		X			
Senator Dick Dever	X				
Senator Gary A. Lee	X				
Senator April Fairfield		X			
Senator Constance Triplett		X			

Total Yes 3 No 3

Absent _____

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent: Motion Failed

Date: 2-25-05
Roll Call Vote #: #3

2005 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SCR 4012

Senate Political Subdivisions Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Pass without Committee Recommendation

Motion Made By Senator Hacker Seconded By Senator Triplett

Senators	Yes	No	Senators	Yes	No
Senator Dwight Cook, Chairman	X				
Senator Nicholas P. Hacker, VC	X				
Senator Dick Dever	X				
Senator Gary A. Lee	X				
Senator April Fairfield	X				
Senator Constance Triplett	X				

Total Yes 6 No 0

Absent _____

Floor Assignment Senator Dever

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE (410)
March 2, 2005 2:54 p.m.

Module No: SR-38-4007
Carrier: Dever
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

SCR 4012: Political Subdivisions Committee (Sen. Cook, Chairman) recommends BE PLACED ON THE CALENDAR WITHOUT RECOMMENDATION (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SCR 4012 was placed on the Eleventh order on the calendar.

2005 HOUSE CONSTITUTIONAL REVISION

SCR 4012

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SCR4012

Constitutional Revision

Conference Committee

Hearing Date 3-23-05

Tape Number	Side A	Side B	Meter #
1	x		0.4 --- 45.0
Committee Clerk Signature <i>Maria Jean</i>			

Minutes:

Chairman Koppelman: opened the hearing on SCR4012.

Sen Mathern, Dist 11: is a sponsor & appeared in support of SCR4012. (See attached testimony).

Chairman Koppelman: (3.8) This resolution deletes the age reference & while I've come to believing the 45 is very young, I'm wondering what the thought was to deleting it altogether?

Sen Mathern: I think in the case of an emergency, we would want everyone available. A 65 yr old today could be getting ready to retire, but if we had a need to call up the reserve militia in the state for some emergency, we know that there are 70-80 yr olds who could have some portion of involvement in addressing those concerns. I think also that in looking at the active militia, we're finding there are roles for people no matter what their age or disability. Some of the duties taken on are less & less physical in nature; ie, communications & technology. I think it's better to leave those kinds of details up to the Federal Government or the Governor calling people forward for

some emergency, so we address the need at that time, rather than being limited to criteria, like age.

Rep DeKrey: (5.6) I'm 48 yrs old & I guess by the ND Constitution, I should be restricted from being in the National Guard or Reserve Militia. Normal retirement age in the armed services is 60 yrs old & for some of the higher ranking offices it can be extended by promotions, etc. One of the issues that seem to be on everyone's mind over in the Senate & that's the draft & drafting women. This Constitutional amendment of the ND Constitution has nothing to do with the draft, that is not a state function, it's a federal function. If women ever get drafted, it will be decided in Congress, it will not be decided in ND. The only thing this does is make our pool larger in ND for the inactive militia, which by the way, has never ever been called. In this day & age if we had some kind of terrorist attack or a plague, or something that struck ND, where the Governor did have to call up the reserve militia, wouldn't it make sense to have all men & women available to serve the state? It would be ridiculous to exclude all women nurses & Drs if we all of sudden needed medical people. It's time, it makes sense ... WY was sued because of a very similar provision in their Constitution. I believe SD is the only other state in the nation that has language like we do in our Constitution & I've heard they're dealing with it in their legislature this session. ND prides itself in being 1st in many things, but we're just about dead last in this one.

Rep Kretschmar: (7.5) Last session a bill almost identical to it passed the House by a very large majority, so you're preaching to the choir.

Sen Triplett, Dist 18, Gr Fks: (7.8) I am 1 of the sponsors of SCR4012 & since we're preaching to the choir, I'll try not to be too lengthy. Since we have distinguished leaders from the National Guard here to testify next, I'll be restricting my comments to the inactive militia, the

reserve militia. When I was researching this, I found that the original meaning of militia was ... the militia as understood by the founders of our country was not a select, well trained military unit, such as the National Guard is today, it consisted of all, able bodied citizens. The general term militia was used in contrast both to a regular standing army & more importantly to this discussion, the term was used in contrast to the phrase "select militia", which might be compared today's National Guard. This understanding was held by both political parties of the day. In ND's Constitution, the distinction between a select & general militia is carried on by using the phrase active militia (meaning the National Guard) & by implication, an inactive militia or reserve militia, consisting of all able bodied males, between the ages 18-45 who are not in the National Guard. This resolution clarifies that distinction between the active militia, which is the national guard & the inactive & now makes specific by referring to it as the reserve militia. We should expect the whole body of people who are able would respond to a call from the Governor to aid in an emergency & I have no doubt that our citizens would do just that. I think it's important that we not devalue the contribution that any willing citizen & this resolution acknowledges the desire of willing citizens to serve their state in an emergency.

Major General Michael Haugen, The Adjutant General, ND National Guard: (10.6) (See attached testimony)

Rep Klemin: (15.1) I have a question about part of the new language on this bill on the active militia on L. 18-20, it consists of individuals who volunteer & are accepted, so 1st of all the idea is the way I understand it is, you have to be a volunteer in order to be in the militia & you have to be accepted, which I assume means you have to meet eligibility requirements & physical requirements & what have you. Then it goes on to say, unless exempted by the laws of the US or

this State, that seems a little out of place, to say that you have to volunteer & be accepted, but you can't be a volunteer if you're exempted, if you were exempted, why would you be volunteering? I'm wondering why the "unless" clause is there?

Haug: I'm going to defer this to the Jag, but I understand that there are some exemptions for participation in the military. I believe we still want to have the ability to volunteer, but there are some that are still going to be exempt (conscientious objectors).

Rep Klemin: But they wouldn't be volunteering then, if they were going to be exempt for some reason.

Haug: I believe that in the organized militia, which is the National Guard, you volunteer, but in the Reserve, or unorganized militia, that is at the direction of the Governor & you can be ordered by the Governor & so we still need to exempt those by law, the conscientious objectors.

Rep Klemin: We do have that phrase in there, relating to the reserve militia, on L. 17, unless exempted & it would seem to apply there, but I'm just questioning whether it's actually applied to the active militia.

Haug: I'm going to call on Lt Thiele.

LTC, Dave Thiele, Judge Advocate, ND National Guard: (17.8) You make a pretty good point that if you volunteer & are accepted that exemption may not apply. We kept the language in because of that odd possible state law or federal law that would need to be applied & potentially (*can't understand*). The language exempted was in the original constitution, applying to all militia, so I kept that in there on the chance that it would apply to any, not just the people in the reserve militia or the inactive militia, but also the active militia involved here.

Rep Klemm: For the active militia where you have to be a volunteer, to me it doesn't quite make sense to say "unless exempted".

Thiele: I'll agree that it's unlikely that you'd have that scenario, but I think to address anybody that might have a concern that there's some law, whether state or federal, that would exclude that particular group; we want to make sure that it still applies to them.

Rep Klemm: On L. 22, dealing with conscientious objectors, & it says that they can't be compelled to bear arms in times of peace, but apparently, that wouldn't apply in times that were not at peace. On L. 22, where it says "but that individual shall pay an equivalent for a personal service." Does that mean you have to pay your way to get out of it or what?

Thiele: I have researched that & I'll be perfectly frank, I'm not sure what the historical meaning of that language was. I can tell you that as far as conscientious objector, there's a regulation that's about 70 pages long that addresses the rules for conscientious objector status that would apply to all of our soldiers. To be perfectly frank, I can't imagine the scenario where the inactive militia would be used in any way in combat scenario, so I really even think you'd have that type of situation.

Rep Klemm: I wonder if it wouldn't make sense to just put a period on L. 22 after the word "so". During times of war, that we're concerned about & a conscientious objector bearing arms & take out that L. 22 that seems to refer to requiring them to pay to be excused from serving. Wouldn't it make sense to delete that language?

Thiele: When looking at this, one of the issues we considered, by taking this language out, is somebody then going to confuse & argue that we're somehow trying to not have a conscientious objector rule that would exclude them from service. Given the fact that this language is 125 yrs

old & that particular piece of the language wasn't a great concern, it made more sense to leave it in & keep it simple. Our focus was on eliminating the age & gender restrictions, we're accomplishing that through this. We also have to make sure that everyone understands that that's the sole purpose of this, this isn't a draft, it's not going to leave the women in combat.

Chairman Koppelman: (21.8) I had some of the same questions, except it struck me as not necessarily being a cash payment, but some other kind of service that didn't involve bearing arms.

Thiele: That's likely what the historical reference was, I didn't go into great detail. I can tell you that if somebody currently requests conscientious objector status for military, one of their options is to volunteer as a non-combative, they can elect that & that seems reasonable.

Chairman Koppelman: (23.3) Thank you for your testimony. I appreciate your comments about the oath to the Constitution, because this is a really serious matter & we all want to follow our Constitution.

Jackie Huber, Major, ND National Guard: (23.9) I served for 16 yrs, I'm a 2 time combat veteran. I served in Desert Storm in 1990-91 & most recently in Operation Iraqi Freedom in 142nd Battalion. I'm going to share with you the testimony of **LTC Giselle Wilz**, she couldn't be here today. (See attached testimony)

Chairman Koppelman: Thank you for your testimony & your service.

John Jacobson, ND Vet Coordinating Council: (27.7) (See attached testimony)

Chairman Koppelman: Any further testimony in support of SCR4012, any opposition? ... if not we'll close the hearing on SCR4012. Committee, what are your wishes?

Rep Klemin: (30.1) The additional language on L. 19 about the "... unless exempted" part. I can see how that applied to the Reserve Militia, but that language is just carried over from L. 17,

down there to the active militia & I can't quite see how an referring to exemption might be applicable to someone who's volunteering. I think we should delete that clause.

Triplett: (30.6) If I may interject, there is the opportunity for people who volunteer & are serving in the active National Guard, still to become conscientious objectors at a later point if they have some kind of bad experience or if they have some kind of epiphany about the nature of war & I'm sure it's fairly rare, but I would suggest that we should leave that language in there for that potentiality.

Rep Klemin: The last sentence does refer to conscientious objectors not (*can't understand*) to bear arms, but here we're defining that act of militia as someone who volunteers or is accepted. The scenario that you described about someone having a change of mind later, does that mean that they would still be in the act of militia? If they become a conscientious objector & stay in the active militia, they're not exempted. This would seem to say, by your scenario, they'd get out of the active militia, by changing their minds.

Triplett: I don't know the details of what's in their 70 pages of regulations about the conscientious objector status, but I think it is possible for people to go from 1 status to another after they volunteer.

Rep Klemin: Wouldn't they still be in the active militia?

Triplett: I'm not sure, maybe I'm not the right person to ask.

Chairman Koppelman: I suspect that there other cases that some could be exempt (besides conscientious objectors) & that is why that isn't listed as the only exemption in the constitution. The law of the US might exempt people for various reasons & I think it's possible that someone would volunteer, be accepted & then later find out that they're accepted & think this language

allows that if this happens, that they wouldn't necessarily need to be a member of the active militia anymore.

Rep DeKrey: (33.7) People who volunteer become exempted all of the time; 1 of the main reasons is medical reasons. They volunteer & all of a sudden they find out they have an eyesight problem or heart murmur, etc which would exempt them from military service. Another situation, WW1, agricultural people were exempted because they needed them to feed the troops. I think the language is relevant although it may sound archaic, I think it should be left in.

Rep Klemm: We are talking about the definition of active militia. The other thing I had, is the part about the conscientious objectors, I think this language is a little confusing now, that when we look at L. 21 & 22. "An individual whose religious tenets or conscientious scruples forbid that individual to bear arms may not be compelled to do so in times of peace". I'm not sure that you compel them to do so even in times other than in times of peace. And that last line "... but that individual shall pay an equivalent for a personal service". If the intention there is that they're to provide some kind of equivalent service, like being a medic, or whatever, as long as we're amending the statute of the Constitution, maybe we ought to just bring this language into current terminology & instead of "pay" say "shall provide an equivalent personal service"

Chairman Koppelman: (35.9) Any member of our committee has every right to bring forth an amendment as you choose; however, I'd just like to remind the committee that this is the 2nd session that we've entertained this particular resolution & that it passed the House unanimously 2 yrs ago. I personally would be reluctant to delve further into the existing language of the Constitution & start massaging it this point. I understand your point & I think it makes sense, but one of the things that gets touchy when we amend the Constitution, is if people are confused as to

what we're trying to do, there's less of a chance of them approving that. Maybe we ought to have a technical revision act for the Constitution some time & look at some of this archaic language, but this isn't that. I'd hope with the experience we had 2 yrs ago with the letter from the AG, as we all have & with the experience of states like WY, I think this is something we need to keep as clean as possible. Again, you have the right to propose an amendment if you so choose.

Rep Klemm: I think the language the way it is now is very confusing & the fact that we focused on age, gender & residency, part of it in this session & last session, is beside the point. The other part just doesn't seem to apply, "... shall pay in equivalent in personal service". As far as having any confusion about what's intended here, that's why we're having this hearing, we're making a record of it so there's no doubt about what would be intended if we change something.

Rep Conrad: (37.7) Are you talking about putting a period after "... to do so"?

Rep Klemm: I would be talking about on L. 21, removing the words "in times of peace" & on L. 22, remove the word "pay" & insert the word "provide" & L. 22, remove the words "for a" so it would read "that individual may not be compelled to do so, but that individual shall provide an equivalent personal service".

Rep Conrad: I would be more comfortable just putting a period after "so" & taking all of it out. If we tinker with it, people are going to read into it that we'll require some kind of alternative service.

Chairman Koppelman: It may be common for conscientious objectors, for example, to be asked to serve in some capacity that doesn't require them to bear arms, so I think the content here, is in tracking that. If you have a personal issue with bearing arms, that's fine, we'll respect that but we may ask you to serve in, maybe in clerical, medical or some other nonmilitary position.

Rep Kretschmar: (39.5) I would hope that we could leave the resolution as is & present it to the people next yr in the election. If it passes it will be part of the Constitution & in the 2007 session, they can do whatever they want.

Chairman Koppelman: I want to ask the committee now if there's intent to amend, rather than doing this on the fly, I'd like to see printed amendments. If the committee is satisfied that we don't need to amend this, we can entertain a motion on it now. If we think we do need to amend it, I think what I'll do is adjourn & come back when they're printed it out. What are the wishes of the committee, Rep Conrad & Rep Klemin do you want to bring an amendment?

Rep Klemin: For my part, although I believe my concerns would clean up this language considerably, I think we've had adequate discussion & I won't be proposing an amendment.

Chairman Koppelman: It is in the record & when they go back to legislative history & it's clear what the intent of that language is. Any further comments, if not is there a motion?

Rep Kretschmar moved a "Do Pass" on SCR4012 Rep Conrad seconded it

6 Yes 1 No 0 Absent & Not Voting

Chairman Koppelman: (44.5) You each have a copy of the history that I requested from LC on the national & state militia so it will be available for you if you want reading for further research.

Carrier: Rep Kretschmar

Chairman Koppelman: (45.0) Meeting adjourned.

REPORT OF STANDING COMMITTEE (410)
March 23, 2005 10:40 a.m.

Module No: HR-53-5847
Carrier: Kretschmar
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

SCR 4012: Constitutional Revision Committee (Rep. Koppelman, Chairman)
recommends **DO PASS** (6 YEAS, 1 NAY, 0 ABSENT AND NOT VOTING). SCR 4012
was placed on the Fourteenth order on the calendar.

2005 TESTIMONY

SCR 4012

SCR 4012
Political Subdivisions Committee
February 24, 2005

same
given to
House

Chairman Cook and Members of the Senate Political Subdivisions Committee,

My name is Tim Mathern. I am the Senator from District 11 in Fargo and introduced SCR 4012. The resolution defines reserve and active militia and removes obsolete language in regard to age and gender in the reserve militia and removes residency requirements for membership in the active militia, the National Guard.

Our state constitution limits participation in the militia, and, in turn, membership in the National Guard based on gender, age, and residency. While a federal court might find these provisions unconstitutional the time has come to amend our Constitution to reflect the make-up of today's military. This is the reason for the bill before you.

North Dakota's Constitution states that the militia shall consist of all *able-bodied male persons residing in this state, between the ages of eighteen and forty-five . . .*" Art. XI, Sec. 16. A surface reading would prohibit membership in the National Guard for all females, all men over the age of forty-five, and non-state residents. We have ignored constitutional limitations on service for these affected groups. If we restricted the membership of the National Guard based on these provisions, an affected party may have an argument based on the Privileges and Immunities Clause, or the Equal Protection clause of the United States Constitution, that our State law is unconstitutional.

Why amend our constitution now?

We know it is no longer correct, so we should correct it.

A proactive approach is better then appearing surprised by a lawsuit and this is an opportunity to prevent frivolous lawsuits.

The most important reason is that making these changes respects the service provided under threat of death and injury. Women, and men over 45 serve, we are told, to curtail extremism contrary to democracy in Iraq and other places of hostility in the world. These people risk their life while not being recognized in our constitution.

Our present constitutional provisions made sense when they were put in place; life span was shorter, men and women roles were different, and our guard was not so involved in fighting the nation's wars. To my knowledge one state has had an outdated constitutional provision successfully challenged. In that case the court struck down a provision of the Wyoming Constitution. Let's prevent such unneeded legal activity and notoriety.

Others are here to add more testimony. I ask for your Do Pass recommendation on SCR 4012. Thank you for your attention.

Political Subdivisions Committee
Senator Dwight Cook, Chairman
February 24, 2005
RE: SCR 4012

Chairman Cook and fellow members of the Political Subdivisions Committee:

My name is Connie Triplett. I am a Senator from District 18 in Grand Forks. I am a sponsor of SCR 4012, along with Senator Mathern.

Senator Mathern has already mentioned the valuable service of the members of our National Guard, and we have two distinguished leaders of the North Dakota National Guard here to testify next, so I will discuss the notion of the "inactive militia".

Let's start with the original meaning of the word "militia". The militia, as understood by the Founders of our country, was not a select, well-trained military unit such as the National Guard of today. Rather, the militia consisted of all able-bodied citizens. The general term militia was used in contrast both to a regular, standing army, and, more importantly to this discussion, the term was used in contrast to the phrase "select militia", which might be compared with today's National Guard.¹ This understanding of the meaning of the word militia was held by both political parties of the day.

Among the Federalists, Alexander Hamilton described the militia as "the great body of the people" and as "the whole nation". Edmund Randolph, leader of the Virginia delegation to the Constitutional Convention, equated the militia with "the whole mass" of the people.²

Among Anti-Federalists, George Mason, during the Virginia Ratifying Convention, asked rhetorically: "Who are the militia? They consist now of the whole people". The Federal Farmer, a leading Anti-Federalist essayist, explained that "the militia, when properly formed, are in fact the people themselves".³

In North Dakota's Constitution, the distinction between a select militia and a general militia is carried on by using the phrase "active militia", meaning the

National Guard, and, by implication, an "inactive militia" consisting of all able-bodied males between the ages of 18 and 45, who are not in the National Guard. Our resolution clarifies that distinction between the active militia (i.e., the National Guard) and the inactive militia (here, referred to as the "reserve militia").

In these days of counter-terrorism and homeland security, we should expect that the whole body of people who are able *would* respond to a call from the Governor to aid in an emergency. I have no doubt that our citizens would do just that.

It is not likely that we in North Dakota will ever be called upon to raise our guns against the British, as was the case during the American Revolution, but we can imagine other scenarios. One of the most powerful images ever to appear on television is the mass of people racing toward the Federal Building in Oklahoma City within seconds after the bombing incident, to assist in any way they could. Those of us living in Grand Forks in 1997 will never forget the generosity of people across the State and the Nation who willingly took flood victims into their homes and provided them shelter for days or even weeks after the flood. In the aftermath of 9/11, we are all asked to be ever-vigilant in airports, malls, arenas, and anywhere else that terrorists might attack. We can imagine a bioterrorist incident in which retired nurses are called upon to assist with a mass vaccination. Many of them might be both women and over the age of 45.

All of these are examples of situations where a modern-day, reserve militia "of the whole people" might be called upon. Let us not devalue the contribution of any willing citizen. Please support SCR 4012.

¹ *From* Memorandum Opinion for the Attorney General, "Whether the Second Amendment Secures an Individual Right", August 24, 2004, <http://www.usdoj.gov/olc/secondamendment2.htm>, p.12.

² *Id.*

³ *Id.*

TESTIMONY OF
MAJOR GENERAL MICHAEL HAUGEN, THE ADJUTANT GENERAL
NORTH DAKOTA NATIONAL GUARD
BEFORE THE
SENATE POLITICAL SUBDIVISIONS COMMITTEE
FEBRUARY 24, 2005
SENATE CONCURRENT RESOLUTION 4012

Mr. Chairman, Members of the Committee:

This Resolution proposes to amend our Constitution to reflect current requirements for membership in the National Guard, bring our state Constitution into accord with the Federal Constitution and eliminate obsolete gender and age restrictions to the inactive militia.

In 1889, North Dakota became the thirty-ninth state in the union. At that time we also adopted our constitution to include Article XI, section 16 which defines the militia of this state. The militia at that time was defined as all resident able-bodied males between the ages of 18 and 45. Based on societal norms at that time such a definition made sense; women were not part of the military and the average life expectancy for a male in 1889 was 45 years old. Thankfully we are past such an era and not only do women now serve in the military but they serve with distinction. We also recognize that age, in and of itself, is not an impediment but we look to the abilities of the individual.

Because Section 16 of Article XI places gender and age limits on membership in the military forces of this state it is arguably unconstitutional under the Federal Constitution. Under Federal rules we must allow qualified applicants, regardless of age, gender or residence, to join the North Dakota National Guard. The reality is that we do not follow our State Constitution, since a large percentage of our force is female, over the age of 45, or a resident of another state. The fact of the matter is that we would not have an adequate, trained force to respond to State and Federal emergencies without these soldiers and airmen.

In 2004 we requested an Attorney General's Opinion on whether Article XI, Section 16 was unconstitutional. While determining that the section does not prohibit women and those over 45 from volunteering for the North Dakota National Guard the Attorney General stated in a footnote:

"I conclude that, when read in conjunction with other constitutional provisions, the age, gender, and residency terms of N.D. Const. art. XI, Sec. 16, do not restrict voluntary membership in the North Dakota National Guard. In reaching this conclusion I am mindful of the Tenth Circuit Court of Appeal's decision in *Nelson v. Geringer*, 295 F. 3d 1082 (10th Cir. 2002) in which the litigants successfully argued that residency restrictions imposed on certain members of the Wyoming National Guard violated the United State Constitution. **I find the rationale of that court persuasive and strongly encourage you to seek a concurrent resolution of the North Dakota Legislature to remove or amend the age, gender, and residency terms of N.D. Const. art. XI, Sec. 16.** "

(Letter Opinion 2004-L-61, footnote 6)

While there are solid legal reasons for amending the constitution, what we are doing in the proposed resolution is simply recognizing that women and members over 45 are a valuable part of our military and also can, and will, assist in a time of crisis that would warrant activation of the inactive militia. The resolution clarifies that we have an active militia; the National Guard of this state composed of those who volunteer and an inactive militia; composed of all residents over the age of 18 of able-body. The inactive militia can be called upon during a period of emergency. While most would believe it is unlikely that the Governor will ever have to activate the inactive militia of this state, since September 11, 2001 we all recognize we must prepare for scenarios previously unimaginable. To limit the inactive militia in today's world to males between 18 and 45 makes no sense. If we have a crisis of such magnitude that the Governor must call out the inactive militia every able-bodied citizen can, and should, provide assistance without regard to gender or age.

As an example of how limiting the inactive militia makes no sense, if Governor Hoeven were to activate the militia of North Dakota to respond to a crisis he would call me, The Adjutant General, and direct that I take the necessary steps to call up those individuals necessary to respond the crisis. The first thing that I would do is call LTC

Giselle Wilz, Director of Military Support to Civil Authorities, who would in turn take steps to activate those citizens necessary to respond to the particular crisis. As our Constitution currently reads, LTC Wilz would not even qualify to be a member of the North Dakota National Guard or the inactive militia!

When our State Constitution was drafted, limiting militia membership to male residents between 18 and 45 likely made sense; however, in the past 50 years the Guard's role in national defense, as well as the role women play in the Guard, have both expanded, making our current Constitution obsolete. We do not know what the future holds, but we need to change with the times and be ready to respond to situations with the necessary individuals and utilize their strengths without regard to gender or age. On behalf of all soldiers and airman of the North Dakota National Guard we respectfully request a Do Pass on SCR 4012.

I would be pleased to respond to any questions, Mr. Chairman.

MINNESOTA:

Sec. 9. **MILITIA ORGANIZATION.** The legislature shall pass laws necessary for the organization, discipline and service of the militia of the state.

MONTANA:

Section 13. Militia. (1) The governor is commander-in-chief of the militia forces of the state, except when they are in the actual service of the United States. He may call out any part or all of the forces to aid in the execution of the laws, suppress insurrection, repel invasion, or protect life and property in natural disasters.

(2) The militia forces shall consist of all able-bodied citizens of the state except those exempted by law.

SOUTH DAKOTA:

§ 1. Composition of militia. The militia of the state of South Dakota shall consist of all able-bodied male persons residing in the state, between the ages of eighteen and forty-five years, except such persons as now are, or hereafter may be, exempted by the laws of the United States or of this state.

WISCONSIN:

Article IV, §29

Militia. Section 29. The legislature shall determine what persons shall constitute the militia of the state, and may provide for organizing and disciplining the same in such manner as shall be prescribed by law.

WYOMING:

97-17-001. Of whom militia constituted.

The militia of the state shall consist of all able-bodied qualified residents of the state, and those nonresidents who are accepted into service, between the ages of seventeen (17) and seventy (70) years; except those exempted by the law of the United States or of the state. But all residents having scruples of conscience averse to bearing arms shall be excused therefrom upon conditions as shall be prescribed by law.

INDIANA

ARTICLE 12. Militia

Section 1. Composition

Section 1. A militia shall be provided and shall consist of all persons over the age of seventeen (17) years, except those persons who may be exempted by the laws of the United States or of this state. The militia may be divided into active and inactive classes and consist of such military organizations as may be provided by law.

(History: As Amended November 3, 1936; November 5, 1974).

MICHIGAN

§ 4 Militia.

Sec. 4.

The militia shall be organized, equipped and disciplined as provided by law.

History: Const. 1963, Art. III, § 4, Eff. Jan. 1, 1964

Former Constitution: See Const. 1908, Art. XV, §§ 1-3.

OHIO:

Article 9 - Militia

§ 01 Who shall perform military duty

All citizens, residents of this state, being seventeen years of age, and under the age of sixty-seven years, shall be subject to enrollment in the militia and the performance of military duty, in such manner, not incompatible with the Constitution and laws of the United States, as may be prescribed by law.

CONSTITUTION OF NORTH DAKOTA

Article V—Executive Branch

Section 7. . . . The governor is commander-in-chief of the state's military forces, except when they are called into the service of the United States, and the governor may mobilize them to execute the laws and maintain order. . . .

Article XI—General Provisions

Section 16. The militia of this state shall consist of all able-bodied male persons residing in the state, between the ages of eighteen and forty-five years, except such as may be exempted by the laws of the United States or of this state. Persons whose religious tenets or conscientious scruples forbid them to bear arms shall not be compelled to do so in times of peace, but shall pay an equivalent for a personal service.

Section 17. The militia shall be enrolled, organized, uniformed, armed and disciplined in such a manner as shall be provided by law, not incompatible with the constitution or laws of the United States.

Section 18. The legislative assembly shall provide by law for the establishment of volunteer organizations of the several arms of the service, which shall be classed as active militia; and no other organized body of armed men shall be permitted to perform military duty in this state except the army of the United States, without the proclamation of the governor of the state.

Section 19. All militia officers shall be appointed or elected in such a manner as the legislative assembly shall provide.

Section 20. The commissioned officers of the militia shall be commissioned by the governor, and no commissioned officer shall be removed from office except by sentence of court-martial, pursuant to law.

Section 21. The militia forces shall in all cases, except treason, felony or breach of the peace, be privileged from arrest during their attendance at musters, parades and elections of officers, and in going to and returning from the same.

CONSTITUTION OF THE UNITED STATES

Article 1—The Congress

Section 8. The Congress has the power:

. . . To raise and support armies; but no appropriation of money to that use shall be for a longer term than two years.

To provide and maintain a navy.

To make rules for the government and regulation of the and naval forces.

To provide for calling forth the militia to execute the laws of the union, suppress insurrections, and repel invasions.

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 state respectively the appointment of the officers and the authority of training the militia, according to the discipline prescribed by Congress. . . .

Article 2—The Executive

Section 2. The president shall be commander-in-chief of the army and navy of the United States, and the militia of the several states when called into the actual service of the United States. . . .

TESTIMONY OF
LIEUTENANT COLONEL GISELLE WILZ, DIRECTOR OF MILITARY SUPPORT
NORTH DAKOTA NATIONAL GUARD
BEFORE THE
SENATE POLITICAL SUBDIVISIONS COMMITTEE
FEBRUARY 24, 2005
SENATE CONCURRENT RESOLUTION 4012

Mr. Chairman, Members of the Committee:

I stand before you today as a 21 year veteran of the North Dakota National Guard, having served in Operation Desert Storm, and having also participated in several state emergencies. As a female soldier I have not been alone in my endeavors. Women have been a part of your North Dakota National Guard since 1967, and were recognized as a part of the armed forces in February 1901 when the Army Nurse Corps was established. I say recognized, because women have been serving this country since the Revolutionary War, and have been a part of every conflict. Women have also paid the ultimate sacrifice throughout our history. Over 30 servicewomen have lost their lives serving this great country in Iraq alone.

Women currently comprise over 10% of the National Guard nationwide, well over 35,000 soldiers and airmen. In North Dakota women represent 16.5 % of our Army Guard and nearly 19% of our Air Guard. Numerous Air Guard members deployed to the theater of operations since 2001 have been women. Of the 1300+ Army Guard soldiers that have deployed to Iraq in support of Operation Iraqi Freedom, over 10% have been women. 139 female combat soldiers have served as vital members of the 142nd Engineer Battalion, the 957th Multi- role Bridge Company, and most recently the 141st Combat Engineer Battalion. They served not in stereotypical roles but as engineers, bridge crew members, mechanics, transporters, logisticians. They are also leaders; serving throughout

the ranks as commanders, platoon leaders, and senior non-commissioned officers (NCOs).

It is now time to remove the antiquated gender and age language in our State Constitution and recognize that service to our great State and Nation, whether defined within the Constitution or not, has never been and never will be, gender or age defined. If the Governor would have to call up the inactive militia to come to the aid of our citizens in a time of overwhelming natural disaster, state crisis, or God forbid a terrorist act against our communities and our state, the citizens of this state will come forward to serve in whatever capacity necessary based on their skills and abilities; not their gender or age. We won't do it because it is written into the Constitution, we will do it for the same reason we have always done it, because of our commitment as citizens of North Dakota and the United States.

I stand before you as a field-grade officer of the North Dakota National Guard requesting your support for this resolution. The fact that I am also a woman should not be relevant and with your support of SCR 4012, gender and age will thankfully not be a factor in the near future. Thank you Mr. Chairman and members of the committee, I would be happy to answer any questions.

North Dakota Veteran's Coordinating Council

My name is John L. Jacobsen. I am the chairman of the Legislative Committee of the North Dakota Veterans Coordinating Council. I am a member of both the VFW and the American Legion. I am also a member of the VFW National Legislative Committee. We work directly with our Members of Congress on legislation at the national level.

The NDVCC membership is comprised of 15 members representing the five (5) veterans' organizations in the state. (3 from each organization) They are:

- American Legion
- AMVETS
- Disabled American Veterans (DAV)
- Veterans of Foreign Wars (VFW)
- Vietnam Veterans of America (VVA)

These organizations represent approximately 61,000 veterans currently living in North Dakota.

I am a member of the Legislative Committee of the NDVCC. I am not a member of the NDVCC but report directly to them. In order for the Legislative Committee to support any bill brought up before our Legislature, concurrence must be unanimous, that is all 15 members must agree that we should support the bill. A single negative response will kill our support.

I have been instructed to ask you to support this bill.
Thank you.

*Sen. Cook passed out
inf. from
Attorney General*

**LETTER OPINION
2004-L-61**

October 5, 2004

Major General Michael Haugen
Adjutant General
North Dakota National Guard
PO Box 5511
Bismarck, ND 58506-5511

Dear Major General Haugen:

Thank you for your letter questioning whether section 16 of Article XI of the North Dakota Constitution unconstitutionally prohibits women and nonresidents from being members of the National Guard. It is my opinion that article XI, § 16 defines which individuals may be required to serve in the military, but does not prohibit women, men over 45 or under 18, or nonresidents from serving in the National Guard.

ANALYSIS

The North Dakota Attorney General's office has long recognized that North Dakota's statutes are presumed to be constitutional until declared to be otherwise by a court having competent jurisdiction, and only where a statute is clearly and patently unconstitutional will this office deviate from this presumption of constitutionality. N.D.A.G. 2003-L-54; N.D.A.G. Letter to Tangedahl (Apr. 15, 1980). Further, the Attorney General owes a duty to uphold and defend both the North Dakota Constitution and the United States Constitution. N.D.A.G. 2003-L-54; N.D.A.G. Letter to Adams (Oct. 28, 1983). Therefore, when it is alleged that a section of the North Dakota Constitution violates the United States Constitution, this office will defend the North Dakota Constitution unless the challenged provision is manifestly contrary to the federal constitution and it is beyond a reasonable doubt that the state constitutional provision will be declared void by a court of competent jurisdiction. Accordingly, any analysis of your question must be tempered by a strong presumption of constitutionality. N.D.A.G. 2003-L-54.

In construing constitutional provisions, every effort must be made to take into account the entire constitution. State ex rel. Sanstead v. Freed, 251 N.W.2d 898, 908 (N.D. 1977) (superseded on other grounds by N.D. Const. art. V, § 7). Generally, principles of

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construction applicable to statutes are also applicable to constitutional provisions. Id.
As the North Dakota Supreme Court has stated:

In construing and interpreting the Constitution we must give effect and meaning to every provision and reconcile, if possible, apparently inconsistent provisions.

...

"In ascertaining both the intent and general purpose, as well as the meaning, of a constitution or a part thereof, it should be construed as a whole. As far as possible, each provision should be construed so as to harmonize with all the others, with a view to giving effect to each and every provision in so far as it shall be consistent with a construction of the instrument as a whole. . . .

Different sections, amendments, or provisions relating to the same subject, or of the same matter so that they can be said to be in *pari materia*, are to be construed together and read in the light of each other."

Id. (citations omitted).

The North Dakota National Guard is the active militia of this state. N.D.C.C. § 37-01-01(1). The reserve militia consists of all person subject to service in the active militia and who are not serving in the National Guard of this state. N.D.C.C. § 37-01-01(7). The reserve militia are included within the active militia when called to active service. N.D.C.C. § 37-01-01(1).

Three sections of the North Dakota Constitution relate to service in the National Guard. Article XI, § 16 of the North Dakota Constitution provides that "[t]he militia of this state shall consist of all able-bodied male persons residing in the state, between the ages of eighteen and forty-five years, except as may be exempted by the laws of the United States or of this state." Article XI, § 17 provides that the militia shall be enrolled in the manner provided by law not incompatible with the constitution or laws of the United States. Article XI, § 18

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provides that the "legislative assembly shall provide by law¹ for the establishment of volunteer organizations of the several areas of the service, which shall be classed as active militia."² Under the principles of constitutional construction set out above, these provisions must be read together as a whole to construct a consistent meaning on the single subject of membership in the North Dakota National Guard. See State ex rel. Sanstead v. Freed, 251 N.W.2d 898, 908 (N.D. 1977).

Although the Legislature may not reduce constitutional rights, the Legislature may expand the rights of citizens beyond those given by the constitution. Johnson v. Wells County Water Resource Bd., 410 N.W.2d 525, 529 (N.D. 1987).³ Participating in the National Guard is a privilege under the Privileges and Immunities Clause of the United States Constitution. Nelson v. Geringer, 295 F.3d 1082, 1090 (10th Cir. 2002). See also U.S. Const. art. IV, §2, cl. 1 (providing, "The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several states."). Consistent with the principle set forth in Johnson, and under the authority of Article XI, §§ 17 and 18, the Legislature has expanded the classes of individuals who may join the National Guard beyond the statement concerning the militia contained in Article XI, § 16. N.D.C.C. §§ 37-02-01, 37-02-02. Particularly, the militia also includes all able-bodied male citizens, all able-bodied males of foreign birth who have declared intention to become citizens, "and other volunteers allowed by law." N.D.C.C. § 37-02-01. Further, the North Dakota National Guard consists of regularly enlisted and enrolled members within the age limits prescribed by federal law, N.D.C.C. § 37-02-02, and the National Guard is defined to mean that part of the military forces of this state organized, equipped, and federally recognized under the National Defense Act, N.D.C.C. § 37-01-01(5). Therefore, the

¹ The phrase "by law" as used in the constitution has an acquired meaning. "Constitutional provisions directing the Legislature to implement a constitutional provision "by law" operate to permit the Legislature to enact laws for the operation of those provisions, and any such constitutional right must be exercised in accordance with the law the Legislature enacts." N.D.A.G. 98-F-14.

² Article XI, § 18 also states that the militia shall be organized by law and, without proclamation of the Governor, prohibits any other "organized body of armed men" from performing military duty in North Dakota except for the Army of the United States. The statement concerning "armed men" should be interpreted consistently with the Legislature's enactments concerning enrollment in the militia.

³ While the United States Constitution is an instrument of grants of authority allowing Congress to enact legislation, the North Dakota Constitution is an instrument of limitation of authority on the Legislature's ability to enact legislation. State v. Ertelt, 548 N.W.2d 775, 776 (N.D. 1996). The North Dakota Legislature has plenary powers except where limited by the state constitution, and certain federal enactments or treaties. Id. The North Dakota Legislature does not need to have explicit constitutional authority to grant greater rights to the public than those rights which are required to be provided to the public under the state constitution.

Legislature has expanded the opportunity of citizens to serve in the militia to include those persons qualified to join the National Guard under federal law.

The National Defense Act does not prohibit women from serving, contains no residency requirements, and allows 17 year olds to serve with parental consent. 10 U.S.C. § 505. Specific laws relating to the National Guard are similar.⁴ 32 U.S.C. §§ 307(a), 313. Federal law further provides that persons in the National Guard (as part of the organized militia) may serve up to age 45, except where allowed under 32 U.S.C. § 313. 10 U.S.C. § 311. 32 U.S.C. § 313 allows original enlistments in the National Guard from ages 17 to 45, reenlistments for those under 64, and original enlistment for former regular members of the armed forces if under 64.⁵

Your letter indicates that litigation has ensued in other states based on arguments that comparable state constitutional age, gender, and residency statements may be interpreted as restrictions. There is a rule of statutory interpretation stating that the expression of one thing in a statute excludes all others, but this rule should only be applied where it appears to point to legislative intent and it does not apply if there is some special reason for mentioning one thing and none for mentioning the second. Juhl v. Well, 116 N.W.2d 625, 628 (N.D. 1962). As noted earlier, the principles of construction applicable to statutes are also applicable to constitutional provisions. Sanstead, 251 N.W.2d at 908. In this instance, the terms of Article XI, § 16 were consistent with federal laws setting out those persons who were required to belong to the militia when the North Dakota Constitution was adopted. See Perpich, 496 U.S. at 341-42. It is reasonable to believe that the drafters of the 1889 North Dakota Constitution recognized federal supremacy in military matters when drafting Article XI, §§ 16 and 17, and therefore incorporated these federal provisions because they were the governing law at the time.

⁴ The National Defense Act was supplemented by the Armed Forces Reserve Act of 1952, P.L. 82-476, § 201(b), 66 Stat. 482. Therefore, federal laws concerning the National Guard contained in Title 30 of the United States Code are considered as a part of the National Defense Act contained generally in Title 10.

⁵ These laws reflect Congress's constitutional authority over the armed forces, including state militia. "Since 1933 all persons who have enlisted in a state national guard unit have simultaneously enlisted in the National Guard of the United States." Perpich v. Department of Defense, 496 U.S. 334, 345 (1990). Congress has constitutional authority 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 state respectively the appointment of the officers and the authority of training militia according to the discipline prescribed by Congress." U.S. Constitution, Article I, § 8. Further, the United States Supreme Court has observed since 1872 "that the constitutional allocation of powers . . . gave rise to a presumption that federal control over the armed forces was exclusive." Perpich at 353, citing Table's Case, 80 U.S. 397 (1872).

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If Article XI, § 16 stood alone and was interpreted to be a restriction on who may be members of the North Dakota National Guard, the restriction would likely violate federal statute and the United States Constitution.⁶ Nelson v. Geringer, 295 F.3d 1082 (10th Cir. 2002) (residency requirements violated United States Constitution). Some restrictions, however, may be permissible. In reaching this conclusion, I recognize the distinction between persons who are required to serve in the militia through an order to active service and those who may serve as volunteers.

As recently as 1981, the United States Supreme Court determined that women could be statutorily excluded from selective service registration. Rostker v. Goldberg, 453 U.S. 57 (1981). This exclusion from draft registration was based on the general exclusion of women from combat roles, even while Congress authorized the expenditure of funds to recruit women, and while there has been an expansion of women's opportunities in the military. Id. at 63, 72-83.⁷ As noted earlier, however, all sections of the constitution relating to the same subject matter must be construed together and read in light of each other. Therefore, when section 16 is interpreted together with sections 17 and 18, it is apparent that the classifications made in section 16 relate to those persons who may be compelled by law to join the militia. See also N.D. Const. art. I, § 21, North Dakota's Privileges and Immunities Clause (harmonizing the Privileges and Immunities Clause with N.D. Const. art. XI, §§ 15, 17, and 18 further supports the conclusion that the provisions do not operate as exclusions). Persons allowed by state and federal law other than those described in section 16 may join the Guard as volunteers under Article XI, §§ 17 and 18 of the North Dakota Constitution.

Therefore, it is my opinion that Sections 16, 17, and 18 of Article XI of the North Dakota Constitution allows the North Dakota Army and Air National Guard to accept volunteers to

⁶ I conclude that, when read in conjunction with other constitutional provisions, the age, gender, and residency terms of N.D. Const. art. XI, Sec. 16, do not restrict voluntary membership in the North Dakota National Guard. In reaching this conclusion I am mindful of the Tenth Circuit Court of Appeal's decision in Nelson v. Geringer, 295 F. 3d 1082 (10th Cir. 2002) in which the litigants successfully argued that residency restrictions imposed on certain members of the Wyoming National Guard violated the United State Constitution. I find the rationale of that court persuasive and strongly encourage you to seek a concurrent resolution of the North Dakota Legislature to remove or amend the age, gender, and residency terms of N.D. Const. art. XI, Sec. 16.

⁷ Since Rostker was decided, opportunities for women in combat roles in the United States Military have been expanded. In particular, over ninety-nine percent of Air Force positions and sixty-seven percent of Army positions are now open to women. Martha Chamallas, The New Gender Panic: Reflections on Sex Scandals and the Military, 83 Minnesota L. Rev. 305, 331 (1998).

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the fullest extent permitted by federal law, which includes women, nonresidents, and certain persons not between the ages of 18 and 45 years.⁸

Sincerely,

Wayne Stenehjem
Attorney General

eee/vkk

This opinion is issued pursuant to N.D.C.C. §54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts. See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).

⁸ The supremacy clause of the United States Constitution applies even to provisions contained in a state constitution. Reynolds v. Sims, 377 U.S. 533, 584 (1964). Federal agencies acting within the scope of their congressionally delegated authority may preempt state law under the supremacy clause. City of New York v. F.C.C., 486 U.S. 57, 63 (1988). See also U.S. v. Gillock, 445 U.S. 360, 370-72 (1980) (state constitutional provision creating an evidentiary privilege does not apply where this privilege conflicts with federal rules). The supremacy clause also applies to military matters, City of Los Angeles v. U.S., 355 F.Supp. 461 (D.C. Cal., 1972), especially to matters concerning recruitment and enlistment of military personnel, U.S. v. City of Philadelphia, 798 F.2d 81 (3d Cir. 1986). Therefore, if a court were to conclude that Article XI, § 16 was a restriction prohibiting individuals from volunteering to serve in the Guard, its operation would be superseded by federal laws concerning membership in the armed forces.

**TITLE 37
MILITARY
CHAPTER 37-01
GENERAL PROVISIONS**

37-01-01. Definitions. In this title, unless the context otherwise requires:

1. "Active militia" means the organized and uniformed military forces of this state known as the "North Dakota national guard" and the reserve militia when called to active service.
2. "Active service" means state active duty in case of public disaster, riot, tumult, breach of the peace, resistance of process, or the threat thereof, whenever called in aid of civil authorities, or under martial law, or at encampments, whether ordered by state or federal authorities, and includes the performance of any other duty requiring the entire time of the organization or person, except when called or drafted into the federal service by the president of the United States. The term includes service in case of, or to prevent, insurrection, riot, or invasion under the order of the commander in chief communicated through proper military channels.
3. "Military forces of this state" means those individuals in the active militia.
4. "Militia" means a group of individuals defined in the Constitution of North Dakota.
5. "National guard" means that part of the military forces of this state which is organized, equipped, and federally recognized under the provisions of the National Defense Act, as amended, of the United States as the "national guard, air national guard, of the United States and the state of North Dakota". The term includes also the term "national guard of the state of North Dakota".
6. "On duty" includes periods of drill and of such other training and service as may be required under state or federal law, regulation, or order.
7. "Reserve militia" consists of all those individuals who are subject to service in the active militia and who are not serving in the national guard of this state.
8. "State active duty" means active service on behalf of the state under authority of the governor at the expense of the state.
9. "State defense force" means the group of individuals in the reserve militia in state active duty under chapter 37-12.1.

37-01-02. Armed military force from another state entering this state for military duty prohibited - Exceptions. No armed military force from another state, territory, or district may enter this state for the purpose of doing military duty herein without the permission of the governor, unless such force is a part of the United States army or is acting under the authority of the United States of America.

37-01-03. Articles of uniform code of military justice applicable in state - Regulations governing - Punishment for offenses while on duty. The articles of uniform code of military justice governing the armed forces of the United States as codified in the Manual for Courts-Martial, United States, 1984 (1998 edition), now in effect, are a part of this title so far as the same are applicable and not modified by any provision of this title. A person who commits an offense while on duty may be tried by a court-martial lawfully appointed even after such duty has terminated, and if found guilty, the accused must be punished according to the articles of uniform code of military justice and the rules and regulations governing the armed forces of the United States and within the limits prescribed in this title and by federal law for the courts-martial

in the national guard. In any case in which the person alleged to have committed the offense could be charged either under the code of military justice or the civil law of this state, the officer whose duty it is to approve such charge, in the officer's discretion, may order the person charged or subject to being charged to be turned over to the civil authorities for trial. Whenever reference is made to the articles of uniform code of military justice, to the military service, or to the armed forces of the United States, such reference shall be deemed to include the military service of this state. The intent of this title and of all laws of this state affecting the military forces is to conform to all acts and regulations of the United States affecting the same subjects, and all laws of this state shall be construed to effect this purpose.

37-01-04. Governor's authority to order out national guard - Reserve militia ordered out. In case of insurrection, invasion, tumult, riot, breach of the peace, or imminent danger thereof, to provide a presence at state ceremonial events, or to provide assistance to political entities in search and rescue efforts or to respond to a potential natural or environmental hazard or nuisance, the governor may order into the active service of this state any part of the national guard that the governor may deem proper. When the national guard of this state, or a part thereof, is called forth under the Constitution of the United States and the laws of the United States, the governor shall order out for service the remaining troops or such part thereof as may be necessary. If the number of available troops is insufficient, the governor shall order out such part of the reserve militia as the governor may deem necessary.

37-01-04.1. National guard emergency - Costs - Application to emergency commission. Whenever the governor orders the national guard or any portion thereof into the active service of the state in accordance with sections 37-01-04 and 37-01-06, the adjutant general shall determine and record the costs of the national guard in performing such service. Immediately following the termination of such active service, or prior thereto if it is deemed necessary by the adjutant general, the adjutant general shall make application to the state emergency commission for a grant of funds from the contingency fund or other available funds in the state treasury in an amount equal to the costs of the national guard in performing such service. Notwithstanding other provisions of chapter 54-16, it must be conclusively presumed upon the receipt of such application by the emergency commission from the adjutant general that an emergency exists, and such commission shall forthwith grant and direct the transfer to the credit of the national guard from the contingency fund or such other funds as may be available of an amount equal to that certified in such application by the adjutant general.

37-01-05. Absence of national guard from state - Designation not to be given to new organization. The state designation of an organization of the national guard which is absent from this state in the service of the United States may not be given to any new organization.

37-01-06. Seizure of property by governor to avert strike or lockout and to avert disaster or calamity. The governor, as commander in chief of the military forces of this state, may take any measure necessary to prevent or avert any impending disaster or calamity which threatens to destroy life or property in this state, or which may entail loss of life or property, or result in great suffering or hardship among the people of this state. In the event of any strike or lockout, or threatened strike or lockout, of the employees of any coal mine or public utility which threatens to endanger the life and property of the people of this state, the governor may commandeer and take for use during any such emergency any such coal mine or public utility together with the machinery, equipment, and appurtenances of any such mine or utility which may be necessary to save life and property. The governor may employ all help necessary for the operation of any such coal mine or public utility and may make and enter into all contracts required for the operation thereof. The governor may purchase any and all material necessary for operating any such coal mine or public utility and may sell and distribute the products or services thereof.

37-01-07. Facilities and services at disposal of governor upon taking over coal mine or public utility. When the governor is required to take over and use any coal mine or public utility as provided in section 37-01-06, the governor may:

Section 16. The militia of this state shall consist of all able-bodied male persons residing in the state, between the ages of eighteen and forty-five years, except such as may be exempted by the laws of the United States or of this state. Persons whose religious tenets or conscientious scruples forbid them to bear arms shall not be compelled to do so in times of peace, but shall pay an equivalent for a personal service.

Source: Const. 1889, Art. XIII, § 188.

53 Am. Jur. 2d, Military, and Civil Defense, §§ 30, 33-45.

Cross-References.

Military matters, see title 37.

57 C.J.S. Armed Services, §§ 288-298.

Collateral References.

Militia ⇄ 1-3, 5-10.

Section 17. The militia shall be enrolled, organized, uniformed, armed and disciplined in such a manner as shall be provided by law, not incompatible with the constitution or laws of the United States.

Source: Const. 1889, Art. XIII, § 189.

Section 18. The legislative assembly shall provide by law for the establishment of volunteer organizations of the several arms of the service, which shall be classed as active militia; and no other organized body of armed men shall be permitted to perform military duty in this state except the army of the United States, without the proclamation of the governor of the state.

Source: Const. 1889, Art. XIII, § 190.

"militia when in active service". State ex rel. Poole v. Peake, 22 N.D. 457, 135 N.W. 197, 40 L.R.A. (n.s.) 354 (1912).

Active Militia.

The term "active militia" does not mean

Section 19. All militia officers shall be appointed or elected in such a manner as the legislative assembly shall provide.

Source: Const. 1889, Art. XIII, § 191.

Section 20. The commissioned officers of the militia shall be commissioned by the governor, and no commissioned officer shall be removed from office except by sentence of court-martial, pursuant to law.

Source: Const. 1889, Art. XIII, § 192.

lature makes provisions therefor. State ex rel. Poole v. Peake, 22 N.D. 457, 135 N.W. 197, 40 L.R.A. (n.s.) 354 (1912).

Trial by Courts-Martial.

This section contemplates trials by courts-martial, but not until such time as the legis-

Section 21. The militia forces shall in all cases, except treason, felony or breach of the peace, be privileged from arrest during their attendance at musters, parades and elections of officers, and in going to and returning from the same.

Testimony for SCR 4012
Major Jackie Huber
February 24, 2005

Mr. Chairman, members of the committee for the record I am Jackie Huber. I am a 16 year veteran of the North Dakota National Guard and I am a 2-time combat veteran. I served in Operational Desert Shield/Storm with the 191st Military Police Company and the 142d Combat Engineer Battalion in Operation Iraqi Freedom.

Thank you for allowing us the opportunity to be the voice for the many service women of the North Dakota National Guard's past, present, and future. The North Dakota National Guard has developed a global reputation as a leader that sets the standards of excellence for others to follow. This reputation is a direct result of the sacrifices, selfless service, and professionalism of both the men and women of the North Dakota National Guard. The history of women in the armed forces began over 220 years with the American Revolution and continues today. A World War II Army Nurse is quoted as saying, "Let the generations know that women in uniform also guarantee their freedoms." The service women of the North Dakota National Guard have made many personal sacrifices for our state and nation's defense.

It is time for our state to recognize the women of the North Dakota National Guard for their services and contribution of protecting our freedom in our State Constitution. In the words of Desert Storm veteran, (then) Major Rhonda Cornum, "the qualities that are most important in all military jobs, things like integrity, moral courage, and determination, have nothing to do with gender."

Thank you Mr. Chairman and committee members. I will answer any of your questions.

North Dakota Veteran's Coordinating Council

My name is John L. Jacobsen. I am the chairman of the Legislative Committee of the North Dakota Veterans Coordinating Council. I am a member of both the VFW and the American Legion. I am also a member of the VFW National Legislative Committee. We work directly with our Members of Congress on legislation at the national level.

The NDVCC membership is comprised of 15 members representing the five (5) veterans' organizations in the state. (3 from each organization) They are:

- American Legion
- AMVETS
- Disabled American Veterans (DAV)
- Veterans of Foreign Wars (VFW)
- Vietnam Veterans of America (VVA)

These organizations represent approximately 61,000 veterans currently living in North Dakota.

I am a member of the Legislative Committee of the NDVCC. I am not a member of the NDVCC but report directly to them. In order for the Legislative Committee to support any bill brought up before our Legislature, concurrence must be unanimous, that is all 5 organizations must agree that we should support the bill. An organization with 2 no votes can eliminate our support of the bill.

I have been instructed to ask you to support SCR 4012
Thank you.

TESTIMONY OF
MAJOR GENERAL MICHAEL HAUGEN, THE ADJUTANT GENERAL
NORTH DAKOTA NATIONAL GUARD
BEFORE THE
HOUSE CONSTITUTIONAL REVISIONS COMMITTEE
MARCH 23, 2005
SENATE CONCURRENT RESOLUTION 4012

Mr. Chairman, Members of the Committee:

This Resolution proposes to amend our Constitution to reflect current requirements for membership in the National Guard, bring our state Constitution into accord with the Federal Constitution and eliminate obsolete gender and age restrictions to the inactive militia.

In 1889, North Dakota became the thirty-ninth state in the union. At that time we also adopted our constitution to include Article XI, section 16 which defines the militia of this state. The militia at that time was defined as all resident able-bodied males between the ages of 18 and 45. Based on societal norms at that time such a definition made sense; women were not part of the military and the average life expectancy for a male in 1889 was 45 years old. Thankfully we are past such an era and not only do women now serve in the military but they serve with distinction. We also recognize that age, in and of itself, is not an impediment but we look to the abilities of the individual.

Because Section 16 of Article XI places gender and age limits on membership in the military forces of this state it is arguably unconstitutional under the Federal Constitution. Under Federal rules we must allow qualified applicants, regardless of age, gender or residence, to join the North Dakota National Guard. The reality is that we do not follow our State Constitution, since a large percentage of our force is female, over the age of 45, or a resident of another state. The fact of the matter is that we would not have an adequate, trained force to respond to State and Federal emergencies without these soldiers and airmen.

In 2004 we requested an Attorney General's Opinion on whether Article XI, Section 16 was unconstitutional. While determining that the section does not prohibit women and those over 45 from volunteering for the North Dakota National Guard the Attorney General stated in a footnote:

"... I am mindful of the Tenth Circuit Court of Appeal's decision in [Geringer] in which the litigants successfully argued that residency restrictions imposed on certain members of the Wyoming National Guard violated the United State Constitution. **I find the rationale of that court persuasive and strongly encourage you to seek a concurrent resolution of the North Dakota Legislature to remove or amend the age, gender, and residency terms of N.D. Const. art. XI, Sec. 16.** "

(Letter Opinion 2004-L-61, footnote 6)

While there are solid legal reasons for amending the constitution, what we are doing in the proposed resolution is simply recognizing that women and members over 45 are a valuable part of our military and also can, and will, assist in a time of crisis that would warrant activation of the inactive militia. The resolution clarifies that we have an active militia; the National Guard of this state composed of those who volunteer and an inactive militia; composed of all residents over the age of 18 of able-body. The inactive militia can be called upon during a period of emergency. While most would believe it is unlikely that the Governor will ever have to activate the inactive militia of this state, since September 11, 2001 we all recognize we must prepare for scenarios previously unimaginable. To limit the inactive militia in today's world to males between 18 and 45 makes no sense. If we have a crisis of such magnitude that the Governor must call out the inactive militia every able-bodied citizen can, and should, provide assistance without regard to gender or age.

As an example of how limiting the inactive militia makes no sense, if Governor Hoeven were to activate the militia of North Dakota to respond to a crisis he would call me, The Adjutant General, and direct that I take the necessary steps to call up those individuals necessary to respond the crisis. The first thing that I would do is call LTC Giselle Wilz, Director of Military Support to Civil Authorities, who would in turn take steps to activate those citizens necessary to respond to the particular crisis. As our

Constitution currently reads, LTC Wilz would not even qualify to be a member of the North Dakota National Guard or the inactive militia!

There has been confusion expressed that this resolution will mean a draft for women or that it will place women in a combat environment. Simply put, this resolution has nothing to do with a "draft" and will not place women in combat roles. If anything this resolution will make it less likely for anyone to be involuntarily activated for a combat role as it makes clear that the National Guard consists of "volunteers who are accepted". The inactive militia on the other hand has a primary purpose of responding to a state disaster of such magnitude that normal resources, to include the National Guard, are insufficient.

In 1889 limiting militia membership to male residents between 18 and 45 likely made sense; however the Guard's role in national defense, as well as the role women play in the Guard, have both expanded, making our current Constitution obsolete. We do not know what the future holds, but we need to change with the times and be ready to respond to situations with the necessary individuals, utilizing their strengths without regard to gender or age. On behalf of all soldiers and airman of the North Dakota National Guard we respectfully request a Do Pass on SCR 4012.

I would be pleased to respond to any questions, Mr. Chairman.

TESTIMONY OF
LIEUTENANT COLONEL GISELLE WILZ, DIRECTOR OF MILITARY SUPPORT
NORTH DAKOTA NATIONAL GUARD
BEFORE THE
HOUSE CONSTITUTIONAL REVISIONS COMMITTEE

MARCH 23, 2005

SENATE CONCURRENT RESOLUTION 4012

Mr. Chairman, Members of the Committee:

I am a 21 year veteran of the North Dakota National Guard, having served in Operation Desert Storm, and having also participated in several state emergencies. As a female soldier I have not been alone in my endeavors. Women have been a part of your North Dakota National Guard since 1967, and were recognized as a part of the armed forces in February 1901 when the Army Nurse Corps was established. I say recognized, because women have been serving this country since the Revolutionary War, and have been a part of every conflict. Women have also paid the ultimate sacrifice throughout our history. Over 30 servicewomen have lost their lives serving this great country in Iraq alone.

Women currently comprise over 10% of the National Guard nationwide, well over 35,000 soldiers and airmen. In North Dakota women represent 16.5 % of our Army Guard and nearly 19% of our Air Guard. Numerous Air Guard members deployed to the theater of operations since 2001 have been women. Of the 1300+ Army Guard soldiers that have deployed to Iraq in support of Operation Iraqi Freedom, over 10% have been women. 139 female combat soldiers have served as vital members of the 142nd Engineer Battalion, the 957th Multi- rôle Bridge Company, and most recently the 141st Combat Engineer Battalion. They served not in stereotypical roles but as engineers, bridge crew members, mechanics, transporters, logisticians. They are also leaders; serving throughout

the ranks as commanders, platoon leaders, and senior non-commissioned officers (NCOs).

It is now time to remove the antiquated gender and age language in our State Constitution and recognize that service to our great State and Nation, whether defined within the Constitution or not, has never been and never will be, gender or age defined. If the Governor would have to call up the inactive militia to come to the aid of our citizens in a time of overwhelming natural disaster, state crisis, or God forbid a terrorist act against our communities and our state, the citizens of this state will come forward to serve in whatever capacity necessary based on their skills and abilities; not their gender or age. We won't do it because it is written into the Constitution, we will do it for the same reason we have always done it, because of our commitment as citizens of North Dakota and the United States.

I stand before you as a field-grade officer of the North Dakota National Guard requesting your support for this resolution. The fact that I am also a woman should not be relevant and with your support of SCR 4012, gender and age will thankfully not be a factor in the near future. Thank you Mr. Chairman and members of the committee, I would be happy to answer any questions.

Citizens as Soldiers
A History of the North Dakota National Guard



Jerry Cooper
with Glenn Smith

North Dakota State Library
Bismarck, ND 58505

Foreward

The National Guard was very much a part of small town life in the thirties. To be sure, there were units in the cities, but they were apt to be less prominent in the community. Most historians who mention the Guard in that decade place it in the context of labor-management conflicts and, more often than not, view it with hostility. As one who grew up in a Kentucky town with a population of ten thousand during the Depression, I remember the Guard as an integral part of our community. Among the officers were a couple of lawyers and a postal clerk, one of the sergeants was a barber, and my brother and his best friend were privates. Perhaps a hundred men were in the three units—a tiny medical detachment, a quartermaster company, and a cavalry troop. Understandably, my town was known as a Guard town. The cavalry starred in the local parades. How we children and evidently a good many adults enjoyed seeing those men in uniform on their handsome horses prancing down the street. The Guard was a natural part of life there and in hundreds of other towns and cities throughout the nation. It was also a basic component of our national tradition.

The militia concept, which originated in England in the twelfth century, was ideally suited to conditions in the American colonies. On the frontier, where men and their families lived on a potential battlefield, the theories of universal military obligation and local responsibility for defense were not abstractions but obvious facts of life. As the frontier advanced and as the colonies evolved into a nation, problems arose in maintaining the militia, not only because in more settled areas hostile threats were no longer evident but also because some political leaders tried to make the militia more of a federal than state force. In the nineteenth century, the militia provided a structure to raise troops in times of emergency. As a means of sustaining trained, effective military units, it was a failure. But then, had it really been otherwise before the War of Independence? Those Founding Fathers who wanted a more effective citizen-soldier organization hoped to change (reform, in their view) the system. What emerged and became particularly popular in the 1850s were volunteer companies. Initially, neither the federal nor state governments paid much attention to these units. There was little reason for them to do so, as these were essentially social clubs. The men had shoulder arms, swords, and colorful uniforms and might be able to perform exhibition drills for entertainment, but for them the camaraderie, dances, and other such activities were as important, if not more so, than any military function.

The Civil War brought a temporary end to such amusements, but within a few years after that war volunteer companies began to spring up again. A greater impetus to the National Guard, as it was beginning to be called in the 1870s, came from the turbulence of that decade, however, when laborers clashed with the establishment. Governors of the eastern states where the disorders

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Glenn Smith
North Dakota

initially occurred wanted military forces at their disposal, and the militia system was the logical as well as legal means of obtaining them. The federal government also began to take increased interest in citizen soldiery. This set the scene for the major issue in National Guard affairs in the twentieth century: the struggle for power between the state and federal governments. The latter wanted an effectual reserve for the Army, while the states did not want to give up their control to the extent that was necessary to realize that goal. Over the years the pressures of modern war and the great expansion of federal spending in support of the National Guard brought about the standardization of weapons, equipment, and personnel requirements, so that by the 1960s the Guard became the kind of organization that the federal government desired. Gone were the social clubs. Training had now become the Guard's top priority. In fact, by 1980 many Guardsmen were virtually full-time professional soldiers.

In the mid-1880s, when North Dakota was still a territory, a few citizens began to form militia companies which continued to struggle for existence even after statehood. As was generally characteristic of such organizations of that era, they were clubs whose members wore uniforms and drilled on occasion. Indeed, the secretary of the company at Valley City referred to it as 'the lodge.' Given North Dakota's small and scattered population and limited state funds, the beginnings of the North Dakota militia were feeble. Fortunately, however, the rural nature of the state enabled it to avoid industrial violence so that the emerging National Guard units did not have to bear the burden of quelling labor unrest.

North Dakotans had their initiation in combat in the Philippines, where the First North Dakota Infantry Regiment performed well in the first months of the Insurrection in 1899. As it happened, this was also the only war in which North Dakotans fought in a state-designated unit made up entirely of men from their home state. The First North Dakota went out again in the Mexican Border call-up in 1916, but it became the 164th Infantry in World War I and received an influx of out-of-state recruits. Those officers and men who saw combat went into action as replacements (most of them helped make the 1st Division famous) since the Army broke their regiment up to reinforce veteran divisions.

During the twenties and thirties, the National Guard revived and even prospered in comparison with the peacetime interval between 1899 and 1917. Increased federal subsidies, particularly for pay, meant a greater regularization of drill periods and summer camps. A Guardsman risked going to jail for an unexcused absence. Besides, during the depression he needed the money too much to miss a drill night.

Three units with North Dakota roots, the 164th Infantry Regiment and the 188th and 957th Field Artillery battalions, fought with distinction in World War II, but again, large numbers of outsiders filled the ranks and many of the officer slots as well. During the cold war, veterans and their younger colleagues kept the National Guard colors flying, even through the drastic reorganization of the 1960s. Meanwhile, the Air Guard unit began to add its laurels to the Guard's history.

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Origins of the North Dakota National Guard

The North Dakota National Guard originated in the Dakota Territorial Militia of the 1860s, which in turn was a descendant of the colonial militia. In the colonial era, a universal military obligation fell on all eligible males, usually free white men between the ages of eighteen and forty-five. The militia trained irregularly and served as a training system from which colonial leaders raised more permanent units to take the field for a lengthy campaign. British authorities, then American commanders in the Revolution, attempted to raise volunteer units from the militia first and only reluctantly resorted to a draft when volunteering failed. After 1783, and until the end of the nineteenth century, state governments provided most of the troops used to fight the nation's wars. The states relied on their otherwise inactive militia systems to recruit volunteers, and calls on the states for wartime troops helped keep alive the spirit and practice of citizen-soldiers first established in the colonial era.

From its inception, the militia was a decentralized force with a strong local orientation. It served state and local governments in suppressing civil disorder, enforcing the law, and coping with disasters. When the volunteer uniformed companies came to full flower in the 1850s, the militia served the fraternal and political interests of its members as well. Informality governed these units far more than official regulations. Militiamen usually elected their own officers, and even when called to serve the federal government, they displayed a casual contempt for military discipline that endlessly disturbed and angered Regular Army officers. The National Guard would inherit much of this local focus and informality.

Historian Russell Weigley has stressed that America's military history is the history of two armies, the Regular Army and the citizen-soldier army raised for war. Until World War I, the vast majority of the citizen-soldiers came to national military service through the state militia systems as volunteers. From World War I through the Korean War, despite conscription, thousands of state citizen-soldiers entered military service through the National Guard, which developed after the Civil War as a direct descendant of the uniformed militia. A great deal of history has been written on one segment of the military's dual tradition, the Regular Army, but far less on the citizen-soldier army. The Guard's history is inextricably bound up with that of the Army's, but it is more than that. A full history of the state citizen-soldier must include his part in the nation's wars, but it also requires a close examination of his experience in and service to his state, and, perhaps most importantly, a full portrait of who he was and why he served.

Citizens as Soldiers

When Congress created Dakota Territory in March 1861, the universal militia had long since lost its vitality, even on the frontier. The Army preceded settlement in Dakota, establishing garrisons at Forts Pierre and Randall on the Missouri River in the south and at Fort Abercrombie on the Red River in the north during the 1850s. These small garrisons regulated Indian-white relations and sought to keep in check hostile Indian action. The Army's presence reduced the need for a militia, and the vast expanse of the Territory, with a population in 1860 of just under five thousand, spread out from Pembina on the Canadian border to Sioux Falls, Vermillion, and Yankton in the south, hindered effective militia organization.

Regular troops were removed from the Missouri River posts early in the Civil War. Territorial Governor William Jayne issued a proclamation in December 1861 calling for two companies of volunteer cavalry to bolster the depleted garrison at Fort Randall. After a month of recruiting at Yankton, Vermillion, and Bon Homme, Jayne managed to raise one company, which he enrolled into territorial service in late January 1862. This was the first unit of the Dakota Militia. On 29 April 1862, the federal government accepted the outfit as Company A, First Dakota Cavalry, for three years' service in the United States Volunteers. Jayne failed to recruit the second company.

Further stimulus for organizing the Dakota Militia came in late summer, 1862, when Sioux Indians in southwestern Minnesota rose up in anger. The massacre at New Ulm, Minnesota, in mid-August alarmed the scattered Dakota settlers. Company A and a recently arrived battalion of Iowa volunteer cavalry at Fort Randall offered the only protection. Although the Indians in Dakota gave no sign of joining the Minnesota Sioux in the uprising, panic spread in the Territory anyway. Farmers left their homesteads for the small villages in the southeast section and many departed the Territory. Governor Jayne ordered the enrollment of the entire militia, all able-bodied men between the ages of eighteen and fifty, on 30 August 1862, acting as much to calm the people and stop the exodus as to deal with actual Indian violence.

In the oldest of militia traditions, Jayne called for every eligible male to enroll in his local company "for home defense," each to supply his own arms and equipment. Enrollees were then to elect their officers. Although Jayne also sent a request for federal arms, asking for three hundred muskets and ample ammunition, the weapons did not arrive until November, after the worst of the Indian threats had passed. In the meantime, in September he appointed an adjutant general for the territorial militia, Charles P. Booge, a Yankton merchant.

Dakotans built temporary fortifications in the southeast villages and organized six militia companies in the fall of 1862. In early October, the governor issued a second call for volunteers, asking for eight companies, half infantry and half cavalry, willing to enlist for nine months' service as United States Volunteers. He intended to use these outfits in offensive action against the Indians to forestall an uprising. The war scare, for such it was in Dakota, evaporated rapidly, and volunteers for the eight companies failed to appear. At the end of 1862, Jayne had only enough men to organize a second troop of cavalry which became Company B, Dakota Cavalry, United States Volunteers, when it entered federal service on 1 March 1863. By that time, the hastily

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Origins of the North Dakota National Guard

organized militia companies of September 1862 were inactive. Although General Booge reported 266 officers and men enrolled in the militia in his December 1863 report, the force had not served a day in the field for the entire year.

Because the Army returned to the Territory with the intent of breaking Indian power, the Dakota Militia faded away as rapidly as it had come into being. Minnesota militia units, under Colonel Henry H. Sibley, had pursued and severely punished the Indians responsible for the New Ulm massacre. The surviving Indians fled Sibley's forces into Dakota, going northwest, however, and not threatening the southern settlements. In the summer of 1863, the Army launched a two-pronged attack on the Dakota tribes. While Sibley, now a brigadier general in United States service, led a force west from Minnesota, another contingent under Brigadier General Alfred H. Sully came up the Missouri River. Sully devised and led two punishing campaigns against the Indians during the summers of 1863 and 1864. The only territorial forces to serve in these campaigns were Companies A and B, Dakota Cavalry, United States Volunteers, a nominal battalion commanded by Captain Nelson Miner of Yankton.

Dakota Territory did not directly provide troops for the Civil War; although the two cavalry companies, totaling 182 officers and men, served as three-year volunteers throughout the war, they never left the Territory. Their lot consisted of a great deal of routine but arduous patrol duty, serving only as a battalion during Sully's 1864 campaign. The Dakota Militia never took the field nor fired a shot at a hostile Indian. Its ineffectiveness during the Indian war was due largely to a lack of resources. The male population of military age within Dakota did not suffice to field a sizable force and the Territory lacked funds to equip even the small home-defense force mobilized in 1862.

It appeared soon after the war that vigorous leadership from Governor A. J. Faulk would give the Territory an active, well-equipped militia. When he asked the Secretary of War in March 1867 for sufficient arms, ammunition, uniforms, and accouterments to outfit one thousand men, most of them as cavalry, the War Department granted the request, sending arms and other necessities with a total value of \$38,000 under an 1808 law that provided for the partial outfitting of the militia by the United States. The shipment far exceeded the Territory's annual allotment, thus leaving it with a deficit of \$27,541 that would not allow it to draw equipment for years to come.

The governor proposed to establish companies "for home protection against a threatened invasion of the hostile Indians." He filled the vacant territorial staff offices, naming J. L. Kelly as adjutant general. By the end of July 1867, 538 officers and men were organized in eight companies located in the southeastern part of the Territory, all but one fully armed and equipped. Despite this promising beginning, Kelly's 1867 report hinted at a lack of substance behind the new militia. Kelly made no mention of a legislative appropriation to sustain the force once the federal government equipped it. He asked the governor to request a small sum from the legislature to be used to rent a building for storing surplus military gear. Kelly revealed that little of the twenty-nine tons of arms, uniforms and accouterments sent to Dakota in 1862 could be found, most being "lost or destroyed for want of some suitable place to store them."

Citizens as Soldiers

The companies of 1867 disappeared, along with their equipment. For the next fifteen years the Territory made no effort to keep up a militia. The adjutant general of the United States Army, in his annual "Abstract of the Militia" for 1877, for example, reported no organized militia for Dakota but mentioned a territorial debt of \$20,957.25 remaining on the arms grant of 1867. In his accounting to the Secretary of the Interior in 1868, Governor William Howard pointed out that "Dakota has no public buildings, no military organizations, and no arms." A year later Howard commented that he would like to see at least three companies of organized militia in the Territory to offer protection for the settled areas of the Red River valley, the southeast section, and the Black Hills. Governor Nehemiah Ordway mentioned the lack of a militia system in his 1880 report, disclosing that the territorial legislature of 1877 had passed a comprehensive militia code but, for want of arms, "the law has remained a dead letter." The governor speculated that the arms Faulk had collected had ended up with "irresponsible persons who lost them, or possibly worse, sold them to the Indians." Until Dakota cleared its debt with the War Department, it could not organize a militia, for it had insufficient revenues to purchase material to equip even a small force.

Dakota's militia system lay dormant in the 1870s for other reasons as well. The Territory's farming population remained too small and dispersed to support volunteer companies. As Governor Howard's 1878 report indicated, until the Territory acquired a capitol building, insane asylum, and penitentiary, it was not likely to expend its limited funds on the militia. In 1867, Governor Faulk justified his request for arms under the necessity to defend hearth and home against the Indians, a need that disappeared rapidly as the Regular Army returned in force to Dakota in the late 1860s, establishing a line of posts up the Missouri River into Montana. The Army eliminated the Indian threat for good when it broke the power of the Sioux in the campaigns following the disaster at Little Big Horn in 1876.

Five years after Governor Ordway's 1880 report lamented the lack of an organized militia in the Territory, the Dakota National Guard totaled one thousand officers and men organized in a brigade of two infantry regiments and an artillery battery. The Dakota National Guard held its first encampment that year, a four-day stint at Fargo where a Regular Army officer inspected the brigade. Beginning with the muster-in of four companies in 1884, the Dakota National Guard blossomed in two years into a force of nineteen companies with a full panoply of brigade and regimental officers. Guard companies were located throughout the Territory, from Fargo in the north to Vermillion in the south.

This substantial growth in the Dakota National Guard reflected the rapid growth of the Territory itself, 1878 to 1890 being the years of "The Great Dakota Boom." Railroad construction in both the northern and southern sections of Dakota brought with it a flood of immigration, causing the number of residents to grow from fewer than 15,000 in 1870 to 135,000 in 1880 and 415,610 in 1885, 152,000 of them in northern Dakota. A growing population and a maturing agricultural economy increased territorial revenues, allowing the development of governmental institutions, including prisons, insane asylums, universities, and the establishment of a permanent seat of

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government at Bismarck. As the farming frontier moved westward, towns and villages in the eastern part of Dakota expanded in size and number. Banks, newspapers, grain elevators, implement dealers, and other commercial enterprises grew with the population. The development of towns was crucial to the progress of the Dakota National Guard, for towns provided a stable population from which to recruit Guardsmen.

Dakota's success in establishing a territorial National Guard paralleled the rejuvenation of state militias throughout the United States. Heralded by some as "the New National Guard," the organized militia of the states increasingly adopted the name National Guard to distinguish itself from the pre-Civil War volunteer militia. The new Guard differed from the old militia in several ways, the most significant change being the willingness of many states to spend money on their military systems, chiefly to control labor disorders. As industrialization expanded rapidly after 1865, labor and management came into increasing conflict. Angry workers struck with greater frequency, and, all too often, labor disputes degenerated into violence. A major railroad strike in 1877, affecting an area from Pennsylvania to Missouri, overwhelmed state and local law enforcement agencies, compelling President Rutherford B. Hayes to direct the United States Army to give aid in the strike-torn area. Many National Guard units around the country performed ineffectively during the 1877 riots, and many states, most notably Pennsylvania, reorganized their militia systems and increased their military budgets. Labor disorders appeared regularly for the remainder of the nineteenth century, leading to further state military support.

Expanded fiscal support permitted reorganization of the inefficient, prewar militia systems. Reform-minded adjutants general asserted greater control over the once semi-independent, locally oriented companies of the pre-1861 militia. The regiment came to replace the company as the focal point of tactical and administrative organization. Increasingly, Guardsmen looked to the federal government and the Regular Army for assistance and advice. The newly formed National Guard Association (1879) successfully lobbied to increase the annual federal arms distribution to the states from \$200,000 to \$400,000 in 1887. Regular Army officers, upon state request, visited summer camps to inspect and instruct state soldiers. The annual summer regimental training camp, another post-1865 innovation, became the high-water mark of National Guard reform by the end of the century.

Despite these developments, the National Guard did not become an effective military force. The states spent money for a domestic peace-keeping force, while the War Department sought a potential reserve to bolster the Army in wartime. Guardsmen's loyalty and training were often pulled in competing directions. Increased state and federal funds fell far short of meeting the basic needs of the Guard for modern arms, equipment, training facilities, and armories. Each state equipped its force as it saw fit and as it could afford, and in those without a large urban, industrial population, particularly in the economically weak South and in the new states of the West, the National Guard fared poorly. Guardsmen often had to spend their personal money and organize fund-raising activities to provide essential items.

6. NATIONAL GUARD AND RESERVES [§§ 25-41]

a. IN GENERAL [§§ 25-40]

§ 25. Generally

The Federal Constitution's Militia Clauses provide that Congress shall have the power to provide for calling forth the militia to execute the laws of the union, suppress insurrections, and repel invasions;⁵⁷ and that Congress shall have power 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.⁵⁸

In light of the Federal Constitution's more general plan of providing for the common defense, the powers allowed to the states by existing statutes are significant. Several constitutional provisions commit matters of foreign policy and military affairs to the exclusive control of the national government. Thus, the constitutional allocation of powers in this realm could give rise to a presumption that federal control over the Armed Forces would be exclusive; if it were not for the Militia Clauses, it would be possible to argue on like grounds that the constitutional allocation of powers precluded the formation of organized state militia. The Militia Clauses, however, subordinate any such structural inferences to an express permission while also subjecting state militia to express federal limitations.⁵⁹

The persons comprising the active militia come from the body of the militia, and, when not engaged at stated periods in drilling and other exercises, they return to their usual vocations, as is customary with militia, and are subject to call when the public exigencies demand it.⁶⁰ The traditional understanding is that the militia is a part-time, nonprofessional fighting force.⁶¹ The National Defense Act of 1916, pursuant to the power vested in Congress by the Militia Clauses, materially altered the status of the state militias by constituting them as the National Guard.⁶² A person may not become a member of a state defense force other than the National Guard, if he or she is a member of a reserve component of the Armed Forces,⁶³ and members of the National Guard ordered to active duty are relieved from duty in the Guard.⁶⁴ Members, organizations, and units of the Army National Guard of the United States or the Air National

57. US Const Art I § 8 cl 15.

58. US Const Art I § 8 cl 16.

Law Reviews: Hirsch, *The Militia Clauses of the Constitution and the National Guard*. 56 U Cin LR 919 (1988).

59. *Perpich v Department of Defense*, 496 US 334, 110 L Ed 2d 312, 110 S Ct 2418.

Law Reviews: Sullivan, *Who controls the National Guard? Congress and governors stake their constitutional claims*. 67 U Det LR 443 (Spring 1990).

Annotations: Supreme Court's construction and application of Federal Constitution's militia clauses (Art I, § 8, cl 15 and 16), allocating

power over militia between Congress and states. 110 L Ed 2d 738.

60. *Dunne v People*, 94 Ill 120; *State ex rel Madigan v Wagener*, 74 Minn 518, 77 NW 424.

61. *Perpich v Department of Defense*, 496 US 334, 110 L Ed 2d 312, 110 S Ct 2418.

62. *Maryland ex rel. Levin v United States*, 381 US 41, 14 L Ed 2d 205, 85 S Ct 1293, vacated 382 US 159, 15 L Ed 2d 227, 86 S Ct 305 and (superseded by statute on other grounds as stated in *Yeary v United States* (5th Cir) 921 F Supp 549).

63. 32 USCS § 109(e).

64. 32 USCS § 325(a).

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65. 32 USCS § 325(b).

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Guard of the United States ordered to active duty must be returned to their National Guard status upon relief from that duty.⁶⁵

§ 26. Militia and National Guard defined

The militia of the United States consists of all able-bodied males at least 17 years of age and, with certain exceptions, under 45 years of age, who are or who have made a declaration of intention to become citizens of the United States, and of female citizens of the United States who are members of the National Guard.⁶⁶

Distinction: The militia which the states are allowed and expected to maintain and train must be distinguished from the troops which they are forbidden to keep without the consent of Congress, in that the latter would constitute a standing Army, while the militia are civilians primarily, and soldiers only on occasion.⁶⁷

The militia is classified into the organized militia consisting of a National Guard and Naval Militia, and the unorganized militia consisting of those who are not members of the National Guard or Naval Militia.⁶⁸

The National Guard consists of the Army National Guard and the Air National Guard.⁶⁹ The Army National Guard is a land force; is trained and has its officers appointed under the Sixteenth Clause, Section 8, Article I of the Constitution; is organized, armed, and equipped wholly or partly at federal expense; and is federally recognized.⁷⁰ The Air National Guard is an air force; is trained and has its officers appointed under the Sixteenth Clause, Section 8, Article I of the Constitution; is organized, armed, and equipped wholly or partly at federal expense; and is federally recognized.⁷¹ The Air National Guard is the reserve component of the Air Force all of whose members are members of the Air National Guard.⁷²

§ 27. Federal and congressional powers

The Constitution of the United States gives to Congress power to provide for calling out the militia to execute the laws of the Union, suppress insurrection, and repel invasions, and 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,⁷³ reserving to the states respectively the appointment of officers⁷⁴ and the authority of training the militia according to the

65. 32 USCS § 325(b).

66. 10 USCS § 311(a).

Exemptions from the militia are listed in 10 USCS § 312.

In general terms, a militia group is a body of citizens enrolled for military discipline, which ordinarily comprises all males physically capable of acting in concert for the common defense. *United States v Miller*, 307 US 174, 85 L Ed 1206, 59 S Ct 816, 39-1 USTC ¶ 9515, 22 AFTR 351.

The term "militia" has also been defined as a body of armed citizens trained to military duty, who may be called out in certain cases but may not be kept on service like standing armies in time of peace; and that is the case as to the

active militia of a state. *Dunne v People*, 94 Ill 120.

67. *United States v Miller*, 307 US 174, 85 L Ed 1206, 59 S Ct 816, 39-1 USTC ¶ 9515, 22 AFTR 351.

68. 10 USCS § 311(b).

69. 10 USCS § 101(c)(1).

70. 10 USCS § 101(c)(2).

71. 10 USCS § 101(c)(3).

72. 10 USCS § 101(c)(4).

73. § 19.

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discipline prescribed by Congress.⁷⁵ In addition, Congress has the power to prescribe the amount of pay of the militia,⁷⁶ and to make applicable various other rules pertaining to the regular Army.⁷⁷ Although these provisions do not give to Congress powers over the militia of the states beyond the specific objects enumerated,⁷⁸ the power of Congress to organize, arm, and discipline the militia, being unlimited except in the two particulars of officering or training them, may be exercised to any extent that Congress deems necessary.⁷⁹ Members of the organized militia, being under obligation, by virtue of state and national laws and their oaths as members of the militia, to respond to an emergency call of the President, are, when mobilized, subject to regulations established by Congress under the express provisions of the Federal Constitution in respect to organization, discipline, and reorganization.⁸⁰ After a detachment of the militia has been called forth and has entered into the service of the United States, the authority of the Federal Government over such detachment is exclusive.⁸¹

Whenever Congress determines that more units and organizations are needed for the national security than are in the regular components of the ground and air forces, the Army National Guard of the United States and the Air National Guard of the United States, or such parts of them as are needed, together with units of other reserve components necessary for a balanced force, must be ordered to active duty and retained as long as so needed.⁸²

§ 28. Power of the President

The power to detach and draft the militia and bring them to the support and defense of the United States has been considered incident to the President's power of calling forth the militia.⁸³

By statute, whenever the United States or any of the territories, commonwealths, or possessions is invaded or is in danger of invasion by a foreign nation, whenever there is a rebellion or danger of a rebellion against the authority of the Government of the United States, or whenever the President is unable, with the regular forces, to execute the laws of the United States the President may call into federal service members and units of the National Guard of any state in such numbers as he or she considers necessary to repel the invasion, suppress the rebellion, or execute those laws.⁸⁴ Whenever there is

75. § 164.

76. As to the pay of members of the armed forces, see division II-D of this article.

77. *Houston v Moore*, 18 US 1, 5 Wheat 1, 5 L Ed 19.

78. *Dunne v People*, 94 Ill 120.

79. *Houston v Moore*, 18 US 1, 5 Wheat 1, 5 L Ed 19 (holding that Congress has power to fix the time at which the state militia called out by the President change their character from state to national militia).

Annotations: Supreme Court's construction and application of Federal Constitution's militia clauses (Art I, § 8, cl 15 and 16), allocating power over militia between Congress and states, 110 L Ed 2d 738.

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80. *Sweetser v Emerson* (CA1 Mass) 236 F 161, cert dismd 243 US 660, 61 L Ed 950, 37 S Ct 476.

81. *Houston v Moore*, 18 US 1, 5 Wheat 1, 5 L Ed 19; *In re Wulzen* (SD Ohio) 235 F 362, 14 OhioLr 491.

82. 10 USCS § 10103.

83. *Houston v Moore*, 18 US 1, 5 Wheat 1, 5 L Ed 19.

84. 10 USCS § 12406, providing further that orders for these purposes are to be issued through the governors of the states or, in the case of the District of Columbia, through the commanding general of the National Guard of the District of Columbia.

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85. 10 USCS

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an insurrection in any state against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into federal service such of the militia of the other states in the number requested by that state and use such of the Armed Forces as he or she considers necessary to suppress the insurrection.⁸⁵ In addition, whenever the President considers that unlawful obstructions, combinations, or assemblages or rebellion against the authority of the United States make it impracticable to enforce the laws of the United States in any state or territory by the ordinary course of judicial proceedings, he or she may call into federal service such of the militia of any states, and use such of the Armed Forces as is considered necessary to enforce those laws or to suppress the rebellion.⁸⁶

The President must prescribe regulations and issue orders necessary to organize, discipline, and govern the National Guard,⁸⁷ and if an emergency is declared by Congress, the President is authorized to extend enlistments in the National Guard.⁸⁸ When called into federal service, the militia is subject to the orders of the President.⁸⁹

Caution: It has been held that the authority to decide when the exigency contemplated in the Constitution of the United States and the acts of Congress, in which the President has authority to call for the militia, exists exclusively vested in him or her and his or her decision is conclusive upon all other persons.⁹⁰ Congress, however, does have specific statutory authority to determine that additional forces are necessary, leading to components of the National Guard and reserves being ordered to active duty and retained as long as so needed.⁹¹

The President may exercise this power independently of any state legislation, although where there is such legislation he or she should avail himself or herself of it.⁹² The exercise of such power in the case of insurrection and disorder between conflicting claimants in a state which requires the calling out of the militia necessarily involves the determination as to which of the two claimants is the lawful one.⁹³ A requisition is treated as an order where made by the President upon the governor in calling out the militia.⁹⁴ The organized militia or National Guard of a state, however, is not subject to the President's orders until called into the actual service of the United States.⁹⁵

§ 29. Power of the states

The United States Constitution expressly reserves to the states the authority

85. 10 USCS § 331.

91. § 161.

86. 10 USCS § 332.

92. *Druecker v Salomon*, 21 Wis 621; *In re Wehlitz*, 16 Wis 443.

87. 32 USCS § 110.

93. *Luther v Borden*, 48 US 1, 7 How 1, 12 L Ed 581.

88. § 69.

89. *Ex parte Dailey*, 93 Tex Crim 68, 246 SW 91, 26 ALR 138.

94. *Martin v Mott*, 25 US 19, 12 Wheat 19, 6 L Ed 537; *Houston v Moore*, 18 US 1, 5 Wheat 1, 5 L Ed 19.

90. *Jones v Perkins*, 245 US 390, 62 L Ed 358, 38 S Ct 166; *Selective Draft Law Cases*, 245 US 366, 62 L Ed 349, 38 S Ct 159; *Franke v Murray* (CA8 Mo) 248 F 865; *Druecker v Salomon*, 21 Wis 621.

95. *Lind v Nebraska Nat'l Guard*, 144 Neb 122, 12 NW2d 652, 150 ALR 1449; *Ex parte Dailey*, 93 Tex Crim 68, 246 SW 91, 26 ALR 138.

of training the militia according to the discipline prescribed by Congress.⁹⁶ The construction is uniformly given to the Constitution that in the absence of or subordinate to the regulations of Congress, a state may organize⁹⁷ and control⁹⁸ its own militia. Every state has authority to train its able-bodied male citizens of suitable age appropriately to develop fitness, should any such duty be laid upon them, to serve in the United States Army or in the state militia, or as members of local constabulary forces, or as officers needed effectively to police the state, and, for such purpose, may, when the National Government makes it possible, avail itself of the services of officers and equipment belonging to the military establishment of the United States; and so long as its action is within retained powers and not inconsistent with any exertion of the authority of the National Government and transgresses no right safeguarded to the citizen by the Federal Constitution, the state is the sole judge of the means to be employed and the amount of training to be exacted for the effective accomplishment of these ends.⁹⁹ The congressional and executive authority granted by the Constitution¹ to prescribe and regulate the training and weaponry of the National Guard precludes any form of judicial regulation of the same matters.²

The constitutions of the several states universally provide for the organization and maintenance of a well-regulated militia, and grant to the legislatures the necessary authority to carry that provision into effect.³ A state may use its military power to put down an armed insurrection within the state which is too strong to be controlled by the civil authority. The state itself must determine what degree of force the crisis demands,⁴ and may avail itself, upon request to the proper authorities, of the services of officers and equipment belonging to

96. US Const Art I § 8.

97. *Dunne v People*, 94 Ill 120.

The National Guard is primarily a state organization, subject to the orders and directions of the regular Army when called upon by the President. *Croaff v Harris*, 30 Ariz 357, 247 P 126.

Except when employed in the service of the United States, the whole government of the militia is within the province of the state, and where a question relates solely to the organization of the corps composing the military forces of the state, only military authorities may act. *People ex rel. Gillett v De Lamater*, 247 App Div 246, 287 NYS 979.

Since the militia owes its duty as much to one county of the state as to another, its duty is not confined to the county in which it exists. *Hubbard v Fitzsimmons*, 57 Ohio St 436, 49 NE 477.

98. *Houston v Moore*, 18 US 1, 5 Wheat 1, 5 L Ed 19 (holding that the militia belong to the state in which they are enrolled, and are subject, both in their civil and military capacities, to the jurisdiction and laws of such state, except so far as those laws are controlled by acts of Congress constitutionally made).

99. *Hamilton v Regents of University of California*, 293 US 245, 79 L Ed 343, 55 S Ct

197, reh den 293 US 633, 79 L Ed 717, 55 S Ct 345.

The state has power to regulate the conduct of the citizens and to restrain the exertion of baleful influences against the promptings of patriotic duty to the detriment of the wealth of the nation and state. To do so is not to usurp a national power, it is only to render a service to the people. *Gilbert v Minnesota*, 254 US 325, 65 L Ed 287, 41 S Ct 125.

1. US Const Art I § 8 cl 16.

2. *Gilligan v Morgan*, 413 US 1, 37 L Ed 2d 407, 93 S Ct 2440, 66 Ohio Ops 2d 19.

3. *State ex rel. Lanng v Long*, 136 La 1, 66 So 377.

Where the state armory board was authorized by statute to adopt such plans for the construction of an armory building as would in its judgment meet the needs of the organized militia of the state in the locality in which such building was to be constructed, the judgment of the state armory board was final upon the subject, absent fraud or abuse of discretion, and could not be reviewed by the courts. *State ex rel. Clemmer & Johnson Co. v Turner*, 93 Ohio St 379, 113 NE 327.

4. *Luther v Borden*, 48 US 1, 7 How 1, 12 L Ed 581.

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5. *Hamilton v Regent fornia*, 293 US 245, 79 reh den 293 US 633, 79 United States ex rel. Gil 81, 74 F2d 485.

6. *Joos v Illinois Nat'l* NE 505.

7. *Houston v Moore*, Ed 19; In re Wulzen (S Ohio 491.

the military establishment of the United States.⁸ Similarly the establishment of a rifle range for the practice of target shooting is a lawful exercise of the powers of the officers of the state militia as representatives of the state.⁹ The state governments, however; never have had, and never could have, jurisdiction over the national militia, since the United States Constitution confers no such power;⁷ and no state or territory may maintain any troops other than those of its National Guard and other defense forces.¹⁰ Such other defense forces are for use only within the jurisdiction concerned, as its chief executive considers necessary, and may not be called, ordered, or drafted into the federal Armed Forces.⁹

§ 30. —Power of state legislatures

The power of state governments to legislate concerning the militia existed and was exercised before the adoption of the Constitution of the United States, and as its exercise was not prohibited by the instrument, it remains with the states, subject only to the paramount authority of acts of Congress enacted in pursuance of the Constitution of the United States.¹⁰ The power given to Congress to provide for organizing, arming, and disciplining the militia is defined to be merely an affirmative power, and not incompatible with the existence of a like power in the states; hence, the conclusion is that the power of concurrent legislation over the militia exists in the several states with the National Government.¹¹ Once Congress has acted within the limits of the power granted in the Constitution, its laws for organizing, arming, and disciplining the militia are supreme, and all interfering regulations adopted by the states are thenceforth suspended, and for the same reasons all repugnant legislation is unconstitutional. That principle applies, however, only where Congress has assumed control of the militia under granted powers.¹² The reservation in the Federal Constitution of the power of the states, respectively, of the appointment of the officers,¹³ and the authority to train the militia according to the discipline prescribed by Congress¹⁴ does not put any restriction upon the states in respect to the concurrent legislation concerning the militia. That reservation constitutes an exception merely from the power given to Congress to provide for organizing, arming, and disciplining the militia, and is a limitation upon the authority which would otherwise have devolved upon it as to the appointment of officers. The exception from a given power cannot upon any fair reasoning be considered as an enumeration of all the powers which belong to the states

in federal service, to repress insurrection or repel invasion within its own territory and directed against its own existence or authority. *Houston v Moore*, 18 US 1, 5 Wheat 1, 5 L Ed 19 (per Story, J).

5. *Hamilton v Regents of University of California*, 293 US 245, 79 L Ed 343, 55 S Ct 197, reh den 293 US 633, 79 L Ed 717, 55 S Ct 345; *United States ex rel. Gillett v Dern*, 64 App DC 81, 74 F2d 485.

6. *Joos v Illinois Nat'l Guard*, 257 Ill 138, 100 NE 505.

7. *Houston v Moore*, 18 US 1, 5 Wheat 1, 5 L Ed 19; *In re Wulzen (SD Ohio)* 235 F 362, 14 OhioLr 491.

8. 32 USCS § 109(a).

9. 32 USCS § 109(c).

10. *Houston v Moore*, 18 US 1, 5 Wheat 1, 5 L Ed 19; *Dunne v People*, 94 Ill 120.

11. *Houston v Moore*, 18 US 1, 5 Wheat 1, 5 L Ed 19; *Dunne v People*, 94 Ill 120; *State ex rel. M'Cready v Hunt*, 20 SCL 1; *Texas Nat'l Guard Armory Board v McCraw*, 132 Tex 613, 126 SW2d 627.

12. *Houston v Moore*, 18 US 1, 5 Wheat 1, 5 L Ed 19; *Dunne v People*, 94 Ill 120.

13. § 43.

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over the militia.¹⁵ In the exercise of its reserved powers, a state may enact and enforce legislation designed to prevent any hindrance or interference with the raising of armies and military forces by the nation.¹⁶

§ 31. Power and duties of governor

When the militia of a state are not in federal service, they are subject to the order of the governor of the state,¹⁷ who, as commander in chief of the militia, is made the supreme head of the military forces of the states¹⁸ and, in times of necessity or emergency, is usually, by statute or constitutional provision, vested with the power to call the military forces of the state to service.¹⁹ When the constitution of a state provides that it is the duty of the governor, whenever he or she may deem it necessary for the welfare or safety of the state or when any actual or threatened invasion, insurrection, domestic violence, or other danger to the public interest makes it necessary to employ military force in aid of the civil power of the government for the enforcement of law, to order into active service so much of the state guard or military force of the state as he or she may deem necessary, he or she is the sole judge of the necessity for military interference, and his or her declaration of a state of war, insurgency, or insurrection is ordinarily held to be conclusive upon the courts.²⁰ The presumption, however, is that he or she will not exercise this power unless it becomes necessary,²¹ and as long as the courts are open and are able to function, a governor has no authority to call out the military forces of the state for the purpose of compelling observance of a conservation order.²² In the case of riots and insurrection within the state, he or she alone has power to declare a state of insurrection and call out the militia to suppress it where the constitution so provides; the local authorities have no power to question the necessity of the exercise by the governor of his or her constitutional power to call out the militia to suppress an insurrection.²³ In ordering out the militia under such a power, the governor may act on his or her own initiative and independently of the civil authorities in the community in which the military force is needed. The governor is not required to wait until requested by those authorities to order out the militia, and he or she may place the militia at the disposal of the civil authorities, or he or she may, through military channels, control and direct,

15. *Dunne v People*, 94 Ill 120.

16. *State v Holm*, 139 Minn 267, 166 NW 181.

17. *Ex parte Dailey*, 93 Tex Crim 68, 246 SW 91, 26 ALR 158.

18. *People ex rel. Gillett v De Lamater*, 247 App Div 246, 287 NYS 979.

Unless adopted and promulgated by the governor, the United States Army Regulations are not binding on the militia. *Manley v State*, 62 Tex Crim 392, 137 SW 1137.

19. *Lord & Burnham Co. v New York*, 251 NY 198, 167 NE 220, reh den 252 NY 517, 170 NE 126 (holding that upon request of a municipal government in the state, the governor may order the military forces of the state to aid the civil authorities in the maintenance of law and order).

20. *Sterling v Constantin*, 287 US 378, 77 L Ed 375, 53 S Ct 190 (not followed on other

grounds by *Ohio Inns, Inc. v Nye* (CA6 Ohio) 542 F2d 673, 79 CCH LC ¶ 53875, 22 FR Serv 2d 749); *In re Moyer*, 35 Colo 159, 85 P 190; *In re Boyle*, 6 Idaho 609, 57 P 706; *Lewis v Lewelling*, 53 Kan 201, 36 P 351; *Franks v Smith*, 142 Ky 232, 134 SW 494; *Ex parte McDonald*, 49 Mont 454, 143 P 947; *Ex parte Dailey*, 93 Tex Crim 68, 246 SW 91, 26 ALR 158; *Chapin v Ferry*, 3 Wash 386, 28 P 754; *Ex parte Lavinder*, 88 W Va 713, 108 SE 428, 24 ALR 1178.

21. *State ex rel. Charlton v French*, 44 NM 169, 99 P2d 715.

22. *Sterling v Constantin*, 287 US 378, 77 L Ed 375, 53 S Ct 190 (not followed on other grounds by *Ohio Inns, Inc. v Nye* (CA6 Ohio) 542 F2d 673, 79 CCH LC ¶ 53875, 22 FR Serv 2d 749).

23. *Ex parte McDonald*, 49 Mont 454, 143 P 947.

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§ 33. —Approval

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24. *In re Boyle*, 6 Idah. v Smith, 142 Ky 232, State, 188 Miss 367, McPhail, 182 Miss 360.

25. *Lewis v Lewelling* Although the Presic units of the National Gu each state and territor force, the units of whic form complete higher t in the branch, organiza unit located entirely witi without the approval of § 104(c).

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26. *State ex rel. Jones* 189 P 430.

of the members of the organized militia does not prevent the governor from disbanding them. The state is not bound by the terms of an enlistment and may put an end to the term before it has regularly expired.⁵⁶

An organization of the National Guard whose members have received compensation from the United States as members of the National Guard may not be disbanded without the President's consent.⁵⁷

In disbanding a part of the organized militia and placing the officers on the supernumerary or retired list, there is no violation of a constitutional provision which forbids the removal from office of any commissioned officer of the militia except through the sentence of a court-martial. To retire an officer is not to remove him or her from office,⁵⁸ nor does that result follow from the act of relieving him or her from duty⁵⁹ and transferring him or her to a detached officers' list.⁶⁰

b. OTHER ORGANIZATIONS, FORCES, AND PERSONS [§ 41]

§ 41. Generally

Unless restrained by their own constitutions, the state governments have the power to regulate or prohibit associations and meetings of the people, except in the case of peaceable assemblies to perform the duties or exercise the privileges of citizens of the United States; and they also have the power to control and regulate the organization, drilling, and parading of military bodies and associations, except when such bodies or associations are authorized by the militia laws of the United States. The exercise of this power by the states is necessary to the public peace, safety, and good order. To deny the power would be to deny the right of the state to disperse assemblages organized for sedition and treason, and the right to suppress armed mobs bent on riot and looting.⁶¹ A statute prohibiting any body of persons, other than the regular organized militia and the regular troops of the United States, to associate themselves together as a military company or organization, or to drill or parade with arms without a proper license, is not violative of the federal constitutional provision 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,

56. *Lewis v Lewelling*, 53 Kan 201, 36 P 351.

The action of the governor in discharging members of the state Air National Guard by shortening their term of enlistment was purely discretionary with the governor. *Boling v Rockefeller*, 52 Misc 2d 745, 277 NYS2d 168.

As to enlistment, generally, see §§ 56 et seq.

57. 32 USCS § 104(f)(1).

58. *State ex rel. Grove v Mott*, 46 NJL 328.

59. *Baker v Harris*, 178 Ark 1001, 13 SW2d 33; *People ex rel. Gillett v De Lamater*, 247 App Div 246, 287 NYS 979.

60. *Baker v Harris*, 178 Ark 1001, 13 SW2d 33.

61. *Chicago v Chicago League Ball Club*, 196 Ill 54, 63 NE 695; *Dunne v People*, 94 Ill 120; *Commonwealth v Murphy*, 166 Mass 171, 44 NE 138.

Life, liberty, or property is not taken without due process of law by state legislation prohibiting bodies of men other than the organized militia of the state and the troops of the United States from associating as a military company and drilling with arms in cities or towns. *Presser v Illinois*, 116 US 252, 29 L Ed 615, 6 S Ct 580.

since in the first place such a statute does not infringe the right of the people to keep and bear arms, and in the second place that particular provision is a limitation on the powers of Congress and the National Government only, and not on the powers of the several states.⁶² Nor is such a statute in contravention of the provision of a state constitution that the people have a right to keep and bear arms for the common defense, since this right does not include the right to associate together as a military organization or to drill and parade with arms in cities and towns, unless authorized so to do by law. This is a matter affecting the public security, quiet, and good order, and it is within the police powers of the legislature to regulate the bearing of arms so as to forbid such unauthorized drills and parades.⁶³ Such a statute is not an infringement of the provision of the Federal Constitution which declares that no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, since it is only the privileges and immunities of citizens of the United States that such provision was intended to protect, and the right voluntarily to associate together as a military company or organization or to drill or parade with arms without and independent of an act of Congress or law of the state authorizing the same, is not an attribute of national citizenship.⁶⁴ Military organization and military drill and parade under arms are subjects, especially under the control of the government of every country. They cannot be claimed as a right independent of law. Under our political system they are subject to the regulation and control of the state and federal governments, acting with due regard to their respective prerogatives and powers.⁶⁵ Such an act is not class legislation,⁶⁶ nor does it constitute a bill of attainder.⁶⁷ Statutes in some states expressly provide for the holding of certain military parades, and make it a penal offense wilfully to disturb or interrupt them; but to render one amenable to the penalty so provided for, the parade must be authorized by law and must be held at a time prescribed by the statute.⁶⁸

D. OFFICERS AND ENLISTED PERSONNEL [§§ 42-53]

Research References

US Const Art II § 2

10 USCS §§ 101, 271 et seq., 282 et seq., 521 et seq., 531 et seq., 552, 571 et seq.,

62. *Presser v Illinois*, 116 US 252, 29 L Ed 615, 6 S Ct 580.

A membership corporation cannot be formed for the purpose of providing a home guard. In re Proposed Incorporation of L. B. Defense Guards, Inc., 100 Misc 584, 166 NYS 459.

63. *Presser v Illinois*, 116 US 252, 29 L Ed 615, 6 S Ct 580; *Commonwealth v Murphy*, 166 Mass 171, 44 NE 138.

64. *Presser v Illinois*, 116 US 252, 29 L Ed 615, 6 S Ct 580.

65. *Presser v Illinois*, 116 US 252, 29 L Ed 615, 6 S Ct 580 (holding that there is no repugnancy to the congressional legislation for the organization of the militia in state legislation prohibiting bodies of persons, other than the organized militia of the state and the troops

of the United States, from associating as a military company and drilling with arms in cities or towns).

The unlawful formation of armed units is contrary to both state and federal constitutions and statutes, even though the units are formed for the allowed purpose of being used against subversive elements and to suppress an imminent insurrection. Application of Cassidy, 268 App Div 282, 51 NYS2d 202, adhered to 270 App Div 1046, 63 NYS2d 840, affd 296 NY 926, 73 NE2d 41.

66. *Commonwealth v Murphy*, 166 Mass 171, 44 NE 138.

67. *Presser v Illinois*, 116 US 252, 29 L Ed 615, 6 S Ct 580.

68. *White v State*, 99 Ga 16, 26 SE 742.

601 et seq., 627 et seq., 12320; 14 50 USCS Appx § 4 ALR Digest: Armed I ALR Index: Armed F

§ 42. Generally

"Officer" is defined. Officers of the military and the persons eligible for the National Guard are listed. Officers needed to be eligible.

§ 43. Appointments

The commissioning of an officer in the Army is the province of the President. The applicant therefor must be a citizen of the United States. The President thinks may exert over tenure or commission by any process to commission.

Statutory provision for the grade above warrant grade. Requirement that an applicant be able to complete 20 years of service before birthday is not a violation of the classification and comparative youth test.

To be eligible for appointment must be a citizen of the United States. Each person who volunteers to subscribe to a prescribed term of service.

Each person applying for drug, chemical, and biological warfare training may not be given a commission until a person determined to be suitable.

69. 10 USCS § 101(b)(1); "Commissioned officer" defined. USCS § 101(b)(2).

"Warrant officer" is defined. 10 USCS § 101(b)(3).

14 USCS §§ 211 et seq. Commissioned and warrant officers.

70. *Texas Nat'l Guard Act*, 132 Tex 613, 126 SW2d 138; *Dailey*, 93 Tex Crim 68, 24 138.

71. 32 USCS § 305.