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The BRAC Act, the State Militia Charade, and the Disregard of Original Intent

Nathan Zezula*

Introduction

This article will discuss a body of cases represented by *Rell v. Rumsfeld*¹ and its place as the latest development in the evolution of the colonial militia into the present day National Guard. The first part of the article will discuss the general legal trend away from state control of the militia and toward total federal control. The second part will discuss the Base Realignment and Closure Act (hereinafter the “BRAC Act”). The third part will discuss the case of *Rendell v. Rumsfeld*² as representative of the most complete discussion of the impact of the BRAC Act on the control of the National Guard by the judiciary. The fourth part will then look at the legal origins and development of the National Guard. Finally, in part five, the article will discuss the possible outcomes and resulting implications of *Rell* and the accompanying cases.

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1. *Rell v. Rumsfeld*, 389 F. Supp. 2d 395 (D. Conn 2005). This lawsuit, filed by the Governor Jodi Rell of Connecticut against Secretary of Defense Donald Rumsfeld, challenges the Secretary’s power to recommend to the President the removal of all National Guard aircraft from the 103rd fighter wing. Governor Rell claimed that the removal of the aircraft amounted to a reorganization of the unit, a power reserved for the state governor by 32 U.S.C. § 104(c). Rumsfeld argued that the BRAC Act, 10 U.S.C. § 2687, authorized him to make the recommendation. The trial court held for Governor Rell, and enjoined the Secretary. On appeal, the Second Circuit granted a stay on the grounds that the issue was not ripe. *Rell v. Rumsfeld*, 423 F.3d 164, 164 (2d Cir. 2005).

2. *Rendell v. Rumsfeld*, No. 05-CV-3563, 2005 WL 2050295, at *17 (E.D. Pa. Aug. 26, 2005). In this suit, Governor Edward Rendell of Pennsylvania challenged the Secretary of Defense’s recommendation to “deactivate” the 111th Fighter Wing. The court found that the Secretary of Defense failed to obtain Governor Rendell’s approval before deactivating a unit of the National Guard. As the Secretary failed to obtain this approval, the court found the recommendation “null and void.” *Id.* at *9.

I. The Steady March Toward Federalism

The state militia has been a part of the American identity since before the United States was a nation.³ The image of the Minuteman opposing the British regulars at Lexington and Concord is an integral part of our national identity. At the birth of the nation, the militia was our army and our defense, the means by which we secured our independence. Over the last two centuries, the militia has been budgeted, legislated, amended, and judicially interpreted into its twenty-first century manifestation as the National Guard.⁴

The change in the organization, equipment, and mission of the militia over the years was both foreseeable and necessary.⁵ Our national objectives as the sole global superpower require a different military and a different militia than the one that provided for frontier defense against the Indians and the British.⁶ This natural development has kept the militia concept of the citizen soldier relevant into the modern era.⁷

However, another area of change in the militia that is troubling to many is the dramatic shift in the control of the militia. In the eighteenth century, the militia was the jealously guarded province of the colonies, and later the states. The power of the states over the militia was set out in the Constitution under the Militia Clauses.⁸ These clauses reserve specific and limited powers for the federal government, mostly in time of war, and leave control over the militia to the states in peace-

3. See Alan Hirsch, *The Militia Clauses of the Constitution and the National Guard*, 56 U. CIN. L. REV. 919, 923 (1988); see also Patrick Todd Mullins, *The Militia Clauses, The National Guard, and Federalism: A Constitutional Tug Of War*, 57 GEO. WASH. L. REV. 328, 329 (1988) ("Prior to 1787, [the militia] was a product of English common law.").

4. "The National Guard is the modern Militia reserved to the States by article I, s. 8, cl.15, 16 of the Constitution." Maryland *ex rel. Levin v. United States*, 381 U.S. 41, 46 (1965) (vacated on other grounds). Throughout this article, the term "National Guard" will refer to both elements of the dual nature of the organization. Normally, the National Guard functions as the descendant of the state militia, as the State Guard. When placed on federal active duty, the same soldiers and units become the federal Reserve force, as the National Guard of the United States.

5. See Mullins, *supra* note 3, at 341.

6. *Id.* at 341.

7. *Id.*

8. U.S. CONST. art. I, § 8, cls. 15, 16.

time.⁹ In effect, the state governor was originally the commander in chief of an independent army, with only the obligation to answer the call of the President in time of war.

Currently, in the twenty-first century, the state governors' power over the state Guard troops, even in peacetime, is largely ceremonial.¹⁰ The list of remaining functions of state governors can now easily be exclusively listed. State governors retain the function to:

accept allotments of military personnel and equipment from the Department of Defense for the . . . National Guard; carry out training for the . . . National Guard; establish the location of any assigned, authorized, units of the . . . National Guard; organize or reorganize any unit of the . . . National Guard; Place the . . . National Guard on active duty during an emergency in [his state]; and appoint commissioned officers and warrant officers of the . . . National Guard.¹¹

As anemic as this list appears, the actual powers of state governors are limited still further. The first "power," that of accepting allotments of military personnel and equipment from the federal government, can hardly be called a power, burdened as it is with extensive federal requirements, such as the opening of all property books to federal oversight and of all ledgers to federal accounting.¹² The power to train the National Guard is so controlled by the federal government and so linked to federal funds that any real control over substantive training was legislated away from the states with the Dick Act of 1903.¹³ Similarly, the power to establish the kind and number of assigned, authorized units of the National Guard has been legislated away from the states:¹⁴ since 1916, the federal government has dictated the kind and number of units each state must maintain.¹⁵ The federal government prohibits states from maintain-

9. *Id.*

10. Mullins, *supra* note 3, at 332 (the National Guard is now "governed in part" by federal statute).

11. *Rendell v. Rumsfeld*, No. 05-CV-3563, 2005 WL 2050295, at *17 (E.D. Pa. Aug. 26, 2005).

12. Mullins, *supra* note 3, at 333-34. *See generally* Dick Act, ch. 196, § 14, 32 Stat. 775, 777 (1903) (repealed 1956).

13. Mullins, *supra* note 3, at 333-34.

14. *Rendell*, 2005 WL 2050295, at *17.

15. Mullins, *supra* note 3, at 334-35; *see also* National Defense Act of 1916, ch. 134, § 111, 39 Stat. 166, 197 (current version at 32 U.S.C. § 104(d)-(f) (2006)).

ing National Guard forces in addition to this proscribed list.¹⁶ Even the power to locate these prescribed units is subject to oversight from the federal government.¹⁷ The power to appoint and reappoint commissioned and warrant officers of the National Guard, a power explicitly granted to states by the Constitution, is subject to federal review.¹⁸ Of the remaining two powers listed in *Rendell*, the power of the state governor to call the National Guard to active duty during a state emergency is perhaps the last remaining substantive state power over the militia.¹⁹

II. The National Guard and the BRAC Act

The final power listed in *Rendell*, namely the power to organize and reorganize National Guard units, is the subject of this article and the target of recent intense judicial and legislative activity.²⁰ The recommendation for base closings, which the Defense Base Closure and Realignment Commission (hereinafter "BRAC Commission") forwarded to President George W. Bush on September 8, 2005, catalyzed this debate and became the case in controversy.²¹ The BRAC Commission was established by the BRAC Act and initially provided for three periods of realignment and base closure in 1991, 1993, and 1995.²² Congress then amended the Act to provide for a series of base clo-

16. Mullins, *supra* note 3, at 335-36. States are, however, allowed to maintain a token self-defense force with no ties or obligations to the federal government. See Act of August 11, 1955, ch. 802, 69 Stat. 686 (1955) (codified as amended at 32 U.S.C. § 109(c) (2006)).

17. An excellent example would be the power of the BRAC Commission to close federally funded National Guard bases. See generally Base Closures and Realignment Act, 10 U.S.C. § 2687 (2006) [hereinafter "BRAC Act"].

18. Power granted by U.S. CONST. art. I, § 8, cl. 16. The requirement of federal review was established by National Defense Act of 1916.

19. *Rendell*, 2005 WL 2050395, at *17. This is the power famously invoked (or not invoked) most recently by Governor Kathleen Babineaux-Blanco in response to Hurricane Katrina. See generally J.L. Miller, *Governors Want To Keep Guard Control*, THE NEWS JOURNAL (Wilmington, DE), Aug. 21, 2006, at 1A.

20. See generally *Romney v. Rumsfeld*, No. 0511821GAO, 2005 WL 2177118 (D. Mass. Sept. 8, 2005); *Rendell*, 2005 WL 2050295; *Missouri. ex rel. Nixon v. Rumsfeld*, No. 4:05-CV-01387JCH, 2005 WL 2172392 (E.D. Mo. Sept. 7, 2005); *Bredesen v. Rumsfeld*, No. 3:05-0640, 2005 WL 2175175 (M.D. Tenn. Sept. 7, 2005); *Blagojevich v. Rumsfeld*, 385 F. Supp. 2d 768 (C.D. Ill 2005); *Rell v. Rumsfeld*, 389 F. Supp. 2d 395 (D. Conn. 2005).

21. As required by BRAC Act § 2912, 10 U.S.C. § 2687 (2006).

22. *Rendell*, 2005 WL 2050295, at *6.

asures and realignment in 2005:²³ “The purpose of the BRAC Act is to “close or realign military installations that create an unnecessary drain on the economic resources of the Department of Defense.”²⁴ As part of this amendment to the BRAC Act, Secretary of Defense Donald Rumsfeld submitted a list of proposed changes and realignments to the BRAC Commission on May 13, 2005.²⁵ After making some revisions to the recommendations, the BRAC Commission forwarded the recommendations to President Bush on September 8, 2005. The President then had until September 23, 2005 to review the recommendations.²⁶ If the President had changes, a revision process would take place. This process would end on October 20, 2005 with the President approving the revisions or terminating the program without adopting the changes.²⁷ In the alternative, the President could either accept or not explicitly reject the changes by September 23, 2005, and the list would be transmitted to Congress.²⁸ If Congress did not then explicitly reject the list within forty-five days of receiving it, it would return to the Secretary of Defense for implementation.²⁹

The list that was sent to the BRAC Commission on May 13, 2005 contained several recommendations that not only closed state National Guard bases (as authorized by the BRAC Act), but also effected explicit and in-fact reorganization of National Guard units.³⁰ In several states, the recommendation involved

23. BRAC Act § 2912.

24. *Bredesen*, 2005 WL 2175175, at *1.

25. *Rell*, 389 F. Supp. 2d at 398; BRAC Act § 2912(e).

26. BRAC Act § 2914, 10 U.S.C. § 2687 (2006); *see also* Defense Base Closure and Realignment Timeline, <http://www.dod.mil/brac/docs/time05.pdf> (last visited Oct. 18, 2006).

27. *Id.* § 2914.

28. *Id.*

29. *Id.* § 2404.

30. Thirty-seven of forty-two Air Force proposals recommended by the Department of Defense involved the Air National Guard. These proposals would strip twenty-three Guard units of all of their aircraft. *See* DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION, FINAL REPORT TO THE PRESIDENT iii (2005), *available at* <http://www.brac.gov/finalreport.html#req> [hereinafter COMMISSION RECOMMENDATIONS]. In regards to the three sources of ongoing litigation, the report to the Commission only explicitly called for the deactivation of one National Guard unit (the 111th fighter wing in Pennsylvania, the subject of *Rendell*, 2005 WL 2050295). *Id.* The report called for the “realignment” of the Connecticut 103rd fighter wing which stripped all of the unit’s aircraft (the subject of *Rell v. Rumsfeld*, 389 F. Supp. 2d 395 (D. Conn 2005)). *Id.* at 122. The report also proposed to change the

reorganizing entire Air National Guard units and moving all the units' aircraft to another state.³¹ Many of the affected state governors saw this proposed action as an illegal infringement on their statutory right to approve all changes in organization of National Guard units located entirely within state borders.³² In an effort to secure injunctions before the BRAC Commission forwarded the list of recommendations to the President, six governors filed suit in federal district court.³³ Of the six suits filed, two were able to obtain an injunction in district court, but one of these was overturned the next day by the Second Circuit Court of Appeals.³⁴ Only Governor Rendell of Pennsylvania was able to secure and sustain an injunction.³⁵

flying mission for the Illinois 183rd fighter wing (the subject of *Blagojevich v. Rumsfeld*, 385 F. Supp. 2d 768 (C.D. Ill 2005)). *Id.* at 129.

31. See COMMISSION RECOMMENDATIONS, *supra* note 30 and accompanying text (even though the wording of the specific recommendations varied, the effect was the same: the reorganization of the affected units); see also *Romney v. Rumsfeld*, No. 0511821GAO, 2005 WL 2177118 (D. Mass. Sept. 8, 2005); *Rendell v. Rumsfeld*, No. 05-CV-3563, 2005 WL 2050295, at *17 (E.D. Pa. Aug. 26, 2005); *Missouri ex rel. Nixon v. Rumsfeld*, No. 4:05-CV-01387JCH, 2005 WL 2172392 (E.D. Mo. Sept. 7, 2005); *Bredesen v. Rumsfeld*, No. 3:05-0640, 2005 WL 2175175 (M.D. Tenn. Sept. 7, 2005); *Blagojevich*, 385 F. Supp. 2d 768; *Rell*, 389 F. Supp. 2d 395.

32. See *supra* notes 29-30 and accompanying text; 32 U.S.C. § 104(c) (2006).

33. See *Romney*, 2005 WL 2177118; *Rendell*, 2005 WL 2050295; *Nixon*, 2005 WL 2172392; *Bredesen*, 2005 WL 2175175; *Blagojevich*, 385 F. Supp. 2d 768; *Rell*, 389 F. Supp. 2d 395. The governors relied on the Supreme Court case of *Dalton v. Specter*, 511 U.S. 462 (1994), for the proposition that once the list was forwarded to the President on September 8, 2005, they would be barred from review under the Administrative Procedure Act ("APA"), 5 U.S.C. § 704 (1966), as the President was not an agency subject to the Act. Even outside the APA, the President's decision making was not subject to judicial review. See *Rendell*, 2005 WL 2050295, at *11. In this series of cases, all but *Rendell* ultimately held that the recommendation to the President was not a "final act" as required by the APA. In other words, no real harm had yet been done and the issue was not ripe. The courts did reserve to the states the right to bring an action once the harm (removal of the planes) became imminent. See, e.g., *Rell v. Rumsfeld*, 423 F.3d 164, 165-66 (2d Cir. 2005).

34. *Rell*, 389 F. Supp. 2d 395, stay granted by 423 F.3d 164 (2d Cir. 2005).

35. *Rendell*, 2005 WL 2050295, at *21. The BRAC commission removed language calling for the dissolution of the 111th fighter wing, but proceeded to add language which would retire or reassign all of the unit's aircraft. In an August 29th press conference, Governor Rendell called the development "disappointing." Press Release, 2005 BRAC Threatens Air National Guard, <http://www.pngas.net/braclinks.htm> (last visited Oct. 18, 2006).

On September 8, 2005, the BRAC Committee passed the closure and reorganization list on to President Bush.³⁶ On September 15, 2005, President Bush then submitted the recommendations without change to Congress.³⁷ Congress then had forty-five days in which to reject the recommendations, but failed to act by the November 8, 2005 deadline.³⁸ Consequently, the recommendations then became effective. As of November 2005, only three of the seven governors who originally filed suit had plans of continuing to pursue legal action.³⁹ The federal government filed an appeal in late October 2005 to contest the stay granted in federal district court to Governor Rendell of Pennsylvania.⁴⁰ Now that the BRAC recommendations are effective, Governor Jodi Rell of Connecticut and Governor Rod Blagojevich of Illinois are preparing to re-file the suits which the respective district courts originally dismissed as unripe.⁴¹

III. *Rendell v. Rumsfeld*

The suits filed by Governors Rell, Blagojevich, and Rendell all make essentially the same claims.⁴² Through the BRAC process, the federal government is attempting to disband or reorganize National Guard units that are entirely within a single state.⁴³ The BRAC Act authorizes the federal government to close National Guard bases.⁴⁴ The BRAC Act does not, however,

36. Base Realignment and Closure 2005 - U.S. Department of Defense, http://www.defenselink.mil/news/Sep2005/20050909_2657.html (last visited Jan. 23, 2007).

37. *Id.*

38. *Id.*

39. Mark K. Mathews, *Govs Press Base Closing Lawsuits*, STATELINE.ORG, Nov. 2, 2005, <http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=64428>.

40. *Id.* (appeal has not yet been published). There is no indication that Governor Rendell plans to contest the removal of the aircraft of the 111th fighter wing. Unlike Connecticut, Pennsylvania has two other fighter wings with aircraft. See Press Release, 2005 BRAC Threatens Air National Guard, <http://www.pngas.net/braclinks.htm> (last visited Oct. 18, 2006).

41. *Id.*; *Rell v. Rumsfeld*, 389 F. Supp. 2d 395 (D. Conn. 2005); *Blagojevich v. Rumsfeld*, 385 F. Supp. 2d 768 (C.D. Ill. 2005).

42. *Rell*, 389 F. Supp. 2d 395; *Blagojevich*, 385 F. Supp. 2d 768; *Rendell v. Rumsfeld*, No. 05-CV-3563, 2005 WL 2050295 (E.D. Pa. Aug. 26, 2005).

43. *Rell*, 389 F. Supp. 2d 395; *Blagojevich*, 385 F. Supp. 2d 768; *Rendell*, 2005 WL 2050295.

44. BRAC Act, 10 U.S.C. § 2687 (2006).

explicitly give the federal government the authority to reorganize or change the makeup of the National Guard units. In fact, 32 U.S.C. § 104(c) requires the approval of the state governor for any change to National Guard unit organization (called the “proviso”). The district court in *Rendell* is the only court to date to have extensively dealt with this apparent conflict of statutes. Secretary Rumsfeld initially contended that the proviso in Section 104(c) did not apply to all changes in the branches, organization, or allotment of National Guard units, but only to the subject matter of the proceeding sentence in the section (i.e., the President’s “designation of units combined to form higher tactical units.”)⁴⁵ The district court, using rules of statutory construction and legislative history, determined that the proviso in Section 104(c) does apply broadly to any change in organization and therefore is applicable to changes made by the federal government in the context of the BRAC Act.⁴⁶ The court found as a matter of law that the Secretary’s recommendation that the 111th Fighter Wing be deactivated without Governor Rendell’s recommendation was in violation of 32 U.S.C. § 104(c).⁴⁷ In the alternative, Secretary Rumsfeld argued that the collateral reorganization or closing of National Guard units as a result of base closure was implicitly authorized by the BRAC Act.⁴⁸ He reasoned that in as much as there may be a conflict between the BRAC Act and 32 U.S.C. § 104(c), the BRAC Act implicitly repealed Section 104(c) and compromised the governor’s legal right to approve the reorganization or elimination of a National Guard unit.⁴⁹

To resolve this issue, the court embarked on an examination of conflict of laws. The court began from the proposition that “repeals by implication are not favored,”⁵⁰ then sought to determine whether there was in fact an irreconcilable conflict between the two statutes that would require the court to entertain the possibility of repeal.⁵¹ In determining if the two stat-

45. *Rendell*, 2005 WL 2050295, at *15.

46. *Id.* at *17.

47. *Id.*

48. *Id.* at *18.

49. *Id.* at *17.

50. *Id.*

51. *Id.* at *18. “It is not enough to show that the two statutes produce differing results when applied to the same factual situation, for that no more than states

utes were capable of co-existing, the court found that the BRAC Act explicitly governed the closing of bases and the assignment of civilian employees, but was conspicuously silent when it came to the organization of National Guard units.⁵² The court reasoned that in light of this omission, it is unlikely that Congress intended to usurp the authority of the state governors on this issue.⁵³ In contrast, Section 104(a) explicitly conferred the power to approve organizational changes to the state governor.⁵⁴

Under this reasoning there is no direct conflict of law and the two statutes can co-exist. As such, there are no grounds to find that the BRAC Act implicitly repealed the proviso in Section 104(c).⁵⁵ The court found that there were no genuine issues of material fact that the Secretary's recommendation violated Section 104(c) and the plaintiffs were entitled to summary judgment as a matter of law.⁵⁶ The federal government currently has a suit pending in the Third Circuit Court of Appeals regarding this decision.⁵⁷

IV. The Legal Background and Underpinnings of the National Guard

In his *Rendell* opinion, Judge Padova found the roots of the above-discussed conflict in the "very 'princip[les] of Federalism.'"⁵⁸ Not only is the National Guard (in one form or another) older than the nation itself, the Founding Fathers designed it to operate on the same principles of federalism that form the structure of the country. The National Guard serves a dual function: it is both the militia, as laid out in the Constitution under the command of the state governor, and also, when activated, a reserve component of the federal Army under the direc-

the problem. Rather, when two courts are capable of co-existence, it is the duty of the courts . . . to regard each as effective." *Id.*

52. *Id.* at *19.

53. *Id.*

54. *Id.* at *17 ("Governor Rendell, as State commander in chief, does not share his authority over the state National Guard with any federal entity").

55. *Id.* at *19.

56. *Id.* at *20.

57. See *supra* note 40 and accompanying text.

58. *Rendell*, 2005 WL 2050295, at *2.

tion of the President as Commander in Chief.⁵⁹ When joining the National Guard, soldiers and officers swear (or affirm) to obey the orders of both the state governor and the President of the United States.⁶⁰ This federal nature is at the center of the over two hundred year long struggle for the power over the National Guard. In order to understand the importance of *Rendell* and accompanying cases, it is important to understand the legal origins and influences of the modern National Guard.

Today's National Guard traces its roots back to the early colonial militias.⁶¹ These various militias formed the Continental Army, which was largely responsible for winning American independence from Great Britain.⁶² When the country first attempted a national constitution in the guise of the Articles of Confederation, the Framers left the control and the identity of the militias solidly with the newly formed states.⁶³ However, the Framers of the Constitution, in an attempt to forge a country with a stronger federal government, gave considerable attention to the fate of the state militias.⁶⁴ John Jay, one of the chief Federalist proponents, was adamant in his belief that the core of a strong country is a unified national militia.⁶⁵ Jay also questioned the efficiency of the fragmented colonial militia system and its ability to deal with an organized attack.⁶⁶ Even

59. See generally *id.* Throughout this article "Army" is used to refer to the armed forces as a whole. In the same manner, "National Guard" is used to refer to the body that comprises the army, air, and naval components of the National Guard. All of these components share common historical and legal roots.

60. National Defense Act of 1916, ch. 134, § 70, 39 Stat. 166.

61. See generally MICHAEL D. DOUBLER, *I AM THE GUARD* 17 (2001), available at <http://www.arng.army.mil/Publications/guardhistorybook.pdf>.

62. *Id.* All colonies had a compulsory militia except for Pennsylvania, which was settled largely by Quakers. *Id.*

63. ARTICLES OF CONFEDERATION, art. IX, para. 5 (1777).

64. Hirsch, *supra* note 3, at 924.

65. See THE FEDERALIST NO. 4, at 15 (John Jay) (George W. Carey & James McClellan eds., 2001):

[A strong national government] can place the militia under one plan of discipline . . . consolidate them into one corps, and thereby render them more efficient than if divided into thirteen . . . independent companies.

What would the militia of Britain be, if the English militia obeyed the government of England, if the Scotch militia obeyed the government of Scotland, and if the Welsh militia obeyed the government of Wales?

Id.

66. See *id.* at 16 ("If one [State militia] were attacked, would the others fly to its succor, and spend their blood and money in its defence?").

though the militias did cause the withdrawal of the British forces from the colonies, many were critical of the militias' performance.⁶⁷ Alexander Hamilton, another Federalist, went one step further and advanced the idea of a standing army.⁶⁸ However, the Framers as a whole were particularly uncomfortable with the possible abuses of a standing peacetime army.⁶⁹ Even James Madison, who proposed a strong, federally controlled militia, stopped short of advocating a standing army.⁷⁰ Ultimately, the debate at the Constitutional Convention concerning the militia became one of degree: how *much* power should be given to the federal government over the militia?⁷¹

The Constitutional Convention eventually agreed to give the federal government a list of enumerated powers, which are known as the Militia Clauses.⁷² Article I, Section 8, Clause 15 gives Congress the power to "provide for the calling forth of the militia to execute the laws of the Union, suppress insurrections and repel invasions;"⁷³ and Article I, Section 8, Clause 16 gives the Congress the power to

provide for the 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 Officers, and the Authority of training the militia according to the discipline prescribed by congress⁷⁴

When the Constitution was put before the state conventions for ratification, concern arose in regards to Clause 15 in particular.⁷⁵ The states were concerned with the specter of a

67. DOUBLER, *supra* note 61, at 63 ("To rely principally on the militia for national defense was to lean on a broken reed.").

68. See THE FEDERALIST NO. 25, at 122-26 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) ("The steady operations of war against a regular and discipline army can only be successfully conducted by a force of the same kind War, like most other things, is a science to be acquired and perfected by diligence, by perseverance, by time, and by practice." *Id.* at 125).

69. Hirsch, *supra* note 3, at 924.

70. JONATHAN ELLIOT, 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 378 (2d. ed. 1974).

71. Hirsch, *supra* note 3, at 924.

72. U.S. CONST. art. I, § 8, cl. 15, 16.

73. *Id.* cl. 15.

74. *Id.* at 16.

75. Hirsch, *supra* note 3, at 929 (discussing the debates during the Virginia ratifying convention, 1788).

federally controlled force oppressing or actually invading the sovereign states.⁷⁶ Eventually, most of the critics reasoned that because the federal government was limited to three enumerated purposes when calling forth the militia, the federal power was sufficiently limited.⁷⁷ Most also preferred a militia system with some federal power to a powerful standing federal army.⁷⁸ The Founding Fathers considered it unlikely that state militias, even under the control of the federal government, could ever be used against the states.⁷⁹ Indeed, the militia was seen as the counterbalance to the standing federal army, which was cautiously authorized by the new Constitution.⁸⁰

Much of the development of the militia and the regular Army in the ensuing decades and centuries was statutory. The Act of 1789 is seen as the official birth of the two-tiered military system.⁸¹ This Act provided for a standing federal army distinct from the state militia system. It also authorized the President to draft the militia into service, although this provision ultimately proved unnecessary.⁸²

The Federal Militia Act of 1792 established a federal accounting system that created a “documented and manageable pool” from which the federal government could call up troops in time of war.⁸³ The Act also established a uniform military age between eighteen and forty-five years of age.⁸⁴ During the nineteenth century, the structure of the militia was left largely untouched. In 1903, however, largely in response to the United States’ increased presence in the international community, Congress passed the Dick Act and repealed the Militia Act of

76. *Id.*

77. *Id.* at 930.

78. See THE FEDERALIST NO. 29, at 140-45 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) (arguing that the militia would eliminate the need for a standing army, or at least provide a security against a standing army run amuck); see also Hirsch, *supra* note 3, at 924.

79. Hirsch, *supra* note 3, at 924.

80. U.S. CONST. art. I, § 8, cl. 12.

81. See Act of Sept. 29, 1789, ch. 25, 1 Stat. 95 (repealed 1790).

82. Hirsch, *supra* note 3, at 943-44 (large numbers of militia volunteered in the war of 1812 and the Mexican-American war, even though these engagements arguably fell outside of the federal government’s three enumerated purposes for calling up the militia).

83. See Militia Act of 1792, ch. 33, 1 Stat. 271.

84. Militia Act of 1792 § 1..

1792.⁸⁵ With the passage of the Dick Act, Congress exercised its power under the Militia Clauses to organize the militia.⁸⁶ The state organized militia was now officially called the National Guard,⁸⁷ and the reserve militia, consisting of all males aged eighteen to forty-five, was now a separate entity.⁸⁸ The Dick Act also authorized the federal government to provide funding for training and equipment.⁸⁹ It also provided for the training of the militia by regular, federal army soldiers.⁹⁰ Along with the support, however, came the predictable oversight. Militia troops were now required to train fifteen days per calendar year.⁹¹ The Act also opened militia property books to federal auditors and inspectors to insure that the states properly applied the funding.⁹²

The Militia Act of 1908 represented the first attempt by Congress to use the militia overseas.⁹³ Prior to this Act, the militia was seen as a strictly defensive force, to be used in defense of the country and its citizens.⁹⁴ For a short time, until the Militia Act was declared unconstitutional, Congress was able to federalize the National Guard for service anywhere in the world.⁹⁵ However, the Judge Advocate General of the U.S. Army, and later the Attorney General, found no basis in the enumerated powers of Clause 15 for sending the National Guard outside the national borders for conditions short of actual warfare.⁹⁶

As World War One raged in Europe, Congress looked for a way around the legal rulings that repealed the Militia Act of 1908.⁹⁷ Their answer was the National Defense Act of 1916 (NDA).⁹⁸ The NDA allowed the President to draft state Guard

85. The Dick Act, ch. 196, 32 Stat. 775 (1903). Section 25 of the Dick Act repealed the Militia Act of 1792.

86. *See id.*

87. The Dick Act § 1.

88. DOUBLER, *supra* note 61, at 128.

89. The Dick Act § 3.

90. *Id.* § 20.

91. Mullins, *supra* note 3, at 334.

92. The Dick Act § 14; Mullins, *supra* note 3, at 334.

93. The Militia Act of 1908, Ch. 204, 35 Stat. 399.

94. Hirsch, *supra* note 3, at 931-34.

95. Mullins, *supra* note 3, at 334.

96. DOUBLER, *supra* note 61, at 137.

97. Mullins, *supra* note 3, at 334.

98. National Defense Act of 1916, ch. 134, 39 Stat. 166.

troops into the federal Reserve.⁹⁹ Using this power, the President could draft entire state Guard units into the regular Army.¹⁰⁰ This allowed Government to use the Clause 12 powers instead of its powers under the Militia Clauses.¹⁰¹ As federalized troops, they could then be sent anywhere in the world.¹⁰² Congress also used the NDA to further blur the organizational line between the state Guard troops and the regular Army. The Army was restructured to include both the standing federal Army and the National Guard while in federal service.¹⁰³ It also defined the militia, as separate from the National Guard, to include all men aged eighteen to forty-five.¹⁰⁴ Every member of the state Guard had to swear allegiance to the President, as well as to the state governor.¹⁰⁵ Congress also approved new funding for the state troops, as well as new restrictions on state control.¹⁰⁶ Most notably, the federal government gained the right to approve the commission of any state Guard officer whose unit accepted federal funds.¹⁰⁷ The right to appoint their own officers was a right reserved for the states explicitly in the Constitution.¹⁰⁸ The Framers reasoned that a state militia with state-selected officers would never become a puppet of the federal government and turn on the states.¹⁰⁹ While the states technically still retained the ability to select state officers, this function was stripped of all substantial power.¹¹⁰ As a result of the Act, the federal government now also dictated the type and

99. *Id.* § 111.

100. Mullins, *supra* note 3, at 335.

101. The federal government no longer had to “call out the militia” as they could raise an army under Clause 12 language, which empowers Congress to draft an army. This power is not encumbered by the three conditions stated in Clause 15 when calling out the militia. *See* U.S. CONST. art. I, § 8, cl. 12, 15; Hirsch, *supra* note 3, at 958.

102. Mullins, *supra* note 3, at 334.

103. National Defense Act §§ 57, 58; *see also* Mullins, *supra* note 3, at 335.

104. National Defense Act § 57.

105. *Id.* § 70.

106. Mullins, *supra* note 3, at 335.

107. National Defense Act § 75 (“The provisions of this act shall not apply to any person hereinafter appointed an officer of the National Guard unless he first shall have successfully passed such tests as to his physical, moral, and professional fitness as the President shall proscribe.”)

108. U.S. CONST. art. I, § 8, cl. 16.

109. Hirsch, *supra* note 3, at 928.

110. National Defense Act of 1916, § 75.

number of units a state was required to maintain.¹¹¹ The Act also prohibited states from maintaining units in addition to those authorized by the national government.¹¹² In 1918, the NDA survived a constitutional challenge on the grounds that it gave the federal government powers beyond the scope of, Article I, section 8, clause 15.¹¹³

In the case of *Arver v. United States*, the Supreme Court held that the power of the federal government to call up the militia was separate from the power to raise an army in time of war.¹¹⁴ It also held that using a selective draft to raise an army from the militia in time of war was implicitly permitted by the federal government's power to prosecute war.¹¹⁵

The Army Reorganization Act gave the federal government almost total oversight over the operation of the National Guard.¹¹⁶ This Act also established the Federal Bureau of the Militia and gave it the power to control the geographic location of the Guard.¹¹⁷ The President could now activate the Guard under federal control in the event of an emergency.¹¹⁸

The Act of 1933 created the National Guard of the United States, which was composed of state Guards in the service of the United States.¹¹⁹ In effect, this was the beginning of the federal militia. During peacetime, the federal militia didn't really exist, but became a functional force in wartime.¹²⁰ Every state Guardsman was now also a federal Reservist, and took an oath as a member of both organizations.¹²¹

The Armed Forces Reserve Act of 1952 codified the modern National Guard and Reserve system.¹²² This Act provided for

111. National Defense Act § 60; *see also* Mullins, *supra* note 3, at 335.

112. National Defense Act § 60; *see also* Mullins, *supra* note 3, at 336.

113. *Arver v. United States*, 245 U.S. 366 (1918) (powers not within the three enumerated powers of "repelling invasions, executing the laws of the union, and suppressing insurrections." *See* U.S. CONST. art. I, § 8, cl. 15).

114. *Id.* at 384.

115. *Id.* at 378.

116. Army Reorganization Act, ch. 227, 41 Stat. 759 (1920) (repealed 1950).

117. Mullins, *supra* note 3, at 337.

118. *Id.*

119. Act of June 15, 1933, ch. 87, 48 Stat. 153; *see also* Mullins, *supra* note 3, at 337.

120. Mullins, *supra* note 3, at 337.

121. DOUBLER, *supra* note 61, at 170.

122. Armed Forces Reserve Act of 1952, ch. 608, 66 Stat. 481 (largely repealed).

the Guard to be called out for federal service for fifteen days each year subject, of course, to permission from the state governor.¹²³ The Act also struck what seemed like a viable compromise with regards to the federal power to call out the militia. Under the language of the Act, the President could only call out the state Guard for the three enumerated purposes under Clause 15.¹²⁴ For any reason outside the scope of Clause 15, the President had to secure the permission of the state governor.¹²⁵ This compromise would have given the federal government the actual power it needed to maintain a cohesive military structure going into the Cold War period while respecting the sensibilities of the individual states.¹²⁶

The next two decades saw increased emphasis on the Reserve and National Guard components of the military. The doctrine that emerged in the 1970's was the "Total Force" concept.¹²⁷ This concept relied on a smaller, all-volunteer regular army augmented by the United States Army Reserve and the National Guard.¹²⁸ Now any conceivable major military engagement would rely heavily on the Army Reserve and National Guard units' ability to quickly mobilize and deploy.¹²⁹ This increased national role for the state Guard was necessarily met with a decrease in its state role. The principal role of the Guard had become one of a reserve force for the President. No longer was the Guard a state militia force with a secondary mission of federalizing in time of war.¹³⁰

The next major development in the legal structure and control of the National Guard occurred in the early 1980's. During

123. Armed Forces Reserve Act § 233(c).

124. See Mullins, *supra* note 3, at 338; see also U.S. CONST. art. I, § 8, cl. 15.

125. See Mullins, *supra* note 3, at 338.

126. *Id.*

127. DOUBLER, *supra* note 61, at 240.

128. *Id.* Much of this change in emphasis was caused by the post-Vietnam political climate that favored both a smaller military and a smaller military budget.

129. *Id.* at 242. Starting in 1970, most active duty combat divisions were made up of two active duty brigades and one "roundout" brigade, which was a National Guard brigade that would join the division in time of war. *Id.* at 240-41.

130. Of course, this period also saw unprecedented use of National Guard troops by state governors to respond to riots and other incidences of domestic violence. Examples include the 1965 Watts Riots in Los Angeles 1965, the 1967 Riots in Detroit, and the incident at Kent State University in 1970. See DOUBLER, *supra* note 61, at 226-29.

this period, the federal government began using the prescribed fifteen-day federal active-duty training period to send National Guard troops to Central America. During these training missions, National Guard troops were used to build bridges and roads, but they also took part in military maneuvers with Central American armed forces.¹³¹ Several state governors saw these “training missions” as an attempt to bully and influence local politics.¹³² In response, they threatened to exercise the power reserved to them by the Armed Forces Reserve Act of 1952 and withhold their consent to allow their state Guard troops to train on federal active duty outside the national borders.¹³³ Hoping to avoid this confrontation, Congressman Sonny Montgomery introduced an amendment as part of the 1986 Defense Authorization Act.¹³⁴ Known as the Montgomery Amendment, this proviso effectively rescinded the right of state governors to withhold their consent “because of any objection to the location, purpose, right, or schedule of such active duty.”¹³⁵ After the amendment passed, Minnesota Governor Rudy Perpich filed suit in federal court to declare the amendment unconstitutional.¹³⁶ The Supreme Court held that the gubernatorial consent requirement of the Armed Forces Reserve Act of 1952 was not constitutionally required.¹³⁷ The Court reasoned that because members of the National Guard were really members of both the state and federal National Guards, they were no longer a part of the state militia while on their federal active duty training.¹³⁸ As such, the federal government was within its power to train these federal troops both within the United States and without.¹³⁹ The Court did reserve for the governors

131. *Id.* at 255; see also Mullins, *supra* note 3, at 339.

132. DOUBLER, *supra* note 61, at 255.

133. *Id.*

134. Mullins, *supra* note 3, at 340.

135. *Perpich v. U.S. Dep't of Def.*, 880 F.2d 11, 33 (8th Cir. 1989).

136. *Id.*

137. Keith Highet, George Kahale, III & David J. Scheffer, *National Guard Training Missions Outside United States—Federal Control Over National Guard—“Militia” Clauses of U.S. Constitution—“Montgomery Amendment,”* 84 AM. J. INT'L L. 914, 918 (1990); see also Armed Forces Reserve Act of 1952, ch. 608, 66 Stat. 481 (largely repealed).

138. *Perpich v. U.S. Dep't of Def.*, 496 U.S. 334, 348 (1989).

139. Highet et al., *supra* note 137, at 918; see also *Perpich v. U.S. Dep't of Def.*, 880 F.2d 11, 17 (8th Cir. 1989).

the truncated right to veto the federal use of state Guard troops if the training mission interfered with the governor's ability to respond to local emergencies.¹⁴⁰

In a concession to the states, federal law has authorized states to maintain their own defense forces separate from the National Guard.¹⁴¹ This defense force cannot be drafted into federal service, and its members are not dually enrolled in any federal body.¹⁴² This provision is in recognition of the radical shift in organization and mission which has transformed the militia from the backwoods Minutemen of the colonial period to the federal Reserve force that the National Guard is today.

In the most recent attempt by the federal government to extend its authority over the National Guard, the House of Representatives' version of the 2007 Defense Authorization Bill passed with a provision that would allow the President to federalize the National Guard to respond to national disasters.¹⁴³ While the Senate version of the bill does not include the provision, the House-Senate Conference Committee has yet to approve a final version.¹⁴⁴ In an unprecedented show of bipartisan support, all fifty-one state governors signed a letter dated August 1, 2006 and addressed to the Senate and House Committees opposing the measure.¹⁴⁵ Arkansas Governor Mike Huckabee called the measure part of a larger federal effort designed to make states "satellites of the national government," and also claimed that the measure "violate[d] more than 200 years of American history."¹⁴⁶ The Adjunct General of the Delaware Guard, General Frank Vavala, called the measure

140. Highet et al., *supra* note 137, at 918; *see also Perpich*, 880 F.2d at 17. During the relief effort in response to Hurricane Katrina, there was some grumbling among gulf state administrations that too many of their National Guard troops were in Iraq and Afghanistan to effectively deal with the situation. *See* Liz Sidotti, *Guard Stretched Between Katrina, Wars*, ASSOCIATED PRESS, Sept. 10, 2005, available at <http://www.mfso.org/article.php?id=362>.

141. Act of Aug. 11, 1955, ch. 802, 69 Stat. 686 (codified as amended at 32 U.S.C. § 109(c) (2006)).

142. Act of Aug. 11, 1955 (amending Section 61 of the National Defense Act of 1916, ch. 134, 39 Stat. 166, by addition of subsection "(b)").

143. Kelly Beaucar Vlahos, *Congress Debates Giving White House Broader Authority Over National Guard*, FOX NEWS.COM, Sept. 14, 2006, <http://www.foxnews.com/> (search for "congress debates white house national guard").

144. *Id.*

145. *Id.*

146. *Id.*

“counter to the [U.S.] Constitution and the [C]onstitutional [M]ilitia [C]lause, which of course gives the governor the authority over the National Guard.”¹⁴⁷

It seems clear that the measure is an attempt by the White House to increase its control over available disaster relief resources in the wake of a poor federal showing during the Hurricane Katrina disaster. However, Delaware Governor Ruth Ann Minner, was quick to point out that state-directed relief efforts were among the most responsive in the aftermath of the hurricane.¹⁴⁸ Because the National Guard was under her control, she was able to dispatch troops to Mississippi within about twenty hours;¹⁴⁹ after the Governor of Mississippi made the request, the Governor of Delaware was able to respond quickly, without any federal interference.¹⁵⁰ General Vavala added, “[w]e were able to support our colleagues in Mississippi and Louisiana and did a magnificent job in doing so. I think our [F]ounding [F]athers had it right: If it ain’t broken, don’t fix it.”¹⁵¹ Governor Minner saw the federal inroads on state power as not only unconstitutional, but unnecessary, stating, “I cannot imagine any governor turning down the [P]resident where there is a real need.”¹⁵²

Although most think it unlikely that the provision will find its way into the final version of the bill, the incident is indicative of where the legal momentum lies in the power struggle over the National Guard. This measure passed the House of Representatives 396 to 31 before the issue attracted any real attention or debate.¹⁵³

V. Possible Outcomes and Resulting Implications for *Rendell*

Today, state governors have very little real power over their National Guard troops.¹⁵⁴ The state governor no longer

147. J.L. Miller, *Governors Want To Keep Guard Control*, THE NEWS JOURNAL (Wilmington, DE), Aug. 21, 2006, at 1A.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *See supra* notes 11-18 and accompanying text.

has control over the commissioning of officers.¹⁵⁵ State governors cannot dictate what kind of troops and units will make up their National Guard troops, nor where in the state they will be billeted.¹⁵⁶ Governors have no control over the budget and the equipment of their National Guard troops,¹⁵⁷ nor any say over when the federal government will call their National Guard troops or units to active duty for training missions, for emergency, or in time of war.¹⁵⁸ In fact, the only remaining powers governors do have is their ability to refuse to send troops on training missions if faced with a state emergency and the right under 32 U.S.C. § 104(c) to have approval authority for a change in organization of a National Guard unit.¹⁵⁹

The legal system has been consistently chipping away the state control of the militia, seemingly in the face of both the express language of the Constitution and the intent of the Founding Fathers.¹⁶⁰ A prime example is the National Defense Act's stripping of the governors' right to appoint National Guard (militia) officers.¹⁶¹ No provision could be more explicitly stated in the Constitution: the right to appoint officers in the state militia is specifically reserved to the states.¹⁶² If past history is any indicator, these remnants of state power regarding the National Guard will not last long.

The question that will shortly be before the Second and Eighth Circuit Courts of Appeal is a symbolic fight for the respective governors, and probably little else. If the Circuits find the logic of District Judge John Padova in *Rendell* unconvincing and hold that the authority to re-organize National Guard

155. See *supra* note 18 and accompanying text.

156. See *supra* note 15.

157. See *supra* notes 12, 15, 17, and accompanying text.

158. See Mullins, *supra* note 3, at 335-38.

159. See *Rendell v. Rumsfeld*, No. 05-CV-3563, 2005 WL 2050295, at *17 (E.D. Pa. Aug. 26, 2005); see also 32 U.S.C. 104(c) (2006).

160. See *Perpich v. U.S. Dep't of Def.*, 880 F.2d 11, 18 (8th Cir. 1989) (Heaney, J., dissenting):

With a few strokes of the word processor, the majority has written the Militia Clause out of the United States Constitution. In so doing, it contradicts the clear intent of the founding fathers, who believed that state control over elements of the military was essential to a free and peaceful republic.

Id.

161. National Defense Act of 1916 § 75, ch. 134, 39 Stat. 166.

162. U.S. CONST. art. I, § 8, cl. 16.

Units lies with the federal government, there will be no great shift of power in the federalist balance.¹⁶³ If the courts find for the states and hold 32 U.S.C. § 104(c) applicable and superior to the authority granted to the BRAC Commission by the BRAC Act, the victory may be a hollow one. In fact, the governors bringing suit over the actions of the 2005 BRAC Commission may find they have a lot in common with Governor Perpich. Perpich tried to exercise his statutory rights as the commander in chief of the state National Guard troops only to find the power stripped away by the Montgomery Amendment.¹⁶⁴ The right of state governors to approve changes to the organization of National Guard units is statutory. While the authority does have roots in the Constitution, the Militia Clauses are broad enough to leave room for interpretation.¹⁶⁵ Congress can easily repeal 32 U.S.C. § 104(c) if the courts interpret the statute in a manner unfavorable to its interest.¹⁶⁶ After all, the Constitution specifically states that the appointing of militia officers is expressly reserved for the states, and yet this is power has been effectively legislated away by Congress.¹⁶⁷ While such a repeal will eventually have to withstand a constitutional challenge, the legal momentum in this eventuality would seem to be against the state governors.

The most likely outcome of the *Rell* and *Rendell* decisions is a short term compromise that keeps the issue from the Circuit courts all together. In one scenario, the federal government might offer the Air National Guards of Pennsylvania and Connecticut an alternative flying mission, more in line with the federal comprehensive defense plan. In such a compromise, the governors would retain a flying mission for their state Air National Guards, and in return would approve the new restructuring and drop the suits. While a compromise would solve the immediate problem, it would leave the underlying question for another case and another court.

163. See *supra* notes 11-18.

164. See *Perpich*, 880 F.2d at 11.

165. U.S. CONST. art. I, § 8, cl. 15.

166. See *Rendell v. Rumsfeld*, No. 05-CV-3563, 2005 UL 2050295, at *17-19 (E.D. Pa. Aug. 26, 2005).

167. See *supra* note 106 and accompanying text.

As the eventual disposition of the issue seems a forgone conclusion, the question remains as to whether development of the law and the shifting of power from the states to the federal government is a healthy adaptation to the changing times, or a harmful contradiction of the Founders' intent. The BRAC Commission would argue that giving state governors the power to derail a money-saving and efficiency-promoting exercise like the BRAC process is not in the country's best interest. It is the job of governors to protect the interests of their constituents, not necessarily the interests of the country as a whole. The National Guard, its equipment, and its bases are a vital component of national security and should therefore be controlled by the federal government.¹⁶⁸

However, the intent of the Framers with respect to the state militias is remarkably clear. The National Guard of the twenty-first century is perhaps the embodiment of everything the Framers were attempting to avoid with the Militia Clauses.¹⁶⁹ The Framers styled the militia as the grass-roots foil for the standing federal Army.¹⁷⁰ Its very function was to protect the states from an overreaching federal government. The National Guard of the twenty-first century has been substantially appropriated by the federal Army, and now serves as its Reserve force.¹⁷¹ With the possible exception of the Article I references to slavery, there is not a more striking instance of a direct, modern-day violation of both the letter and the spirit of the Constitution.

Of course, legislation can be in contradiction with the Framers' intent and still be in the best interests of the country. The modern National Guard may seem better used as a reserve force and a state-controlled, federally-coordinated, emergency response force than as a bulwark against the federal government. In recent years the National Guard has seen extensive service in both of these capacities. In the aftermath of September 11th, 2001, National Guard troops from the 115th, the 290th, and the 200th regiments secured the grounds of the Pen-

168. DOUBLER, *supra* note 61, at 240.

169. *See supra* notes 63-64 and 67-70.

170. *See supra* note 68 and accompanying text.

171. DOUBLER, *supra* note 61, at 240.

tagon.¹⁷² Over 3000 were on duty within three days, and over 5000 within ten days, as part of operation Noble Eagle.¹⁷³ During the course of this operation, National Guard troops were also responsible for the security of nuclear power plants, domestic water supply, bridges, tunnels, and other sensitive infrastructure.¹⁷⁴ Air National Guard fighter aircraft maintained a constant presence in the skies over both Washington, D.C. and New York City.¹⁷⁵ In total, 206,587 National Guard soldiers and airmen saw active duty from September 11, 2001, to September 1, 2005, in support of operation Noble Eagle.¹⁷⁶

The largest domestic deployment of National Guard troops in the country's history occurred in the aftermath of Hurricane Katrina.¹⁷⁷ Within twenty-four hours of Katrina's upgrade to Category Three status, the governor of Louisiana had 2000 National Guard troops on active duty; this number rose to 4000 within forty-eight hours.¹⁷⁸ As the eye of the storm moved inland, National Guard helicopters and rescue crews were the first responders on site.¹⁷⁹ In total, the National Guard activated 50,087 troops and 146 helicopters in response to the hurricane, some 20,000 more than the next largest deployment (in response to the 1906 San Francisco earthquake).¹⁸⁰ Other recent domestic deployments of the National Guard include: 4000 troops during the 2002 Winter Olympics in Salt Lake City, Utah; 4870 troops during the June 2004 G-8 summit in Savannah, Georgia; 1614 troops during the 2004 Democratic National Convention in Boston, Massachusetts; and 1297 troops during the 2004 Republican National Convention in New York City.¹⁸¹ It is the standardizing influence of the federal government that makes these feats of coordination possible.

172. NATIONAL GUARD HOMELAND DEFENSE WHITE PAPER: SEPTEMBER 11, 2001, HURRICANE KATRINA, AND BEYOND 2-3 (2005), *available at* http://www.arng.army.mil/Publications/HLD%20White%20Paper_11OCT05_Final_Version.pdf.

173. *Id.*

174. *Id.* at 3.

175. *Id.*

176. *Id.*

177. *Id.* at 4.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 6.

The National Guard's already prominent role as the reserve component of the standing, regular Army is likely to expand. Americans have been unwilling to pay the high price of a large standing army when the maintenance of a reserve force is considerably less expensive.¹⁸² While a reserve force is not as effective as a regular force in the early stages of a war, American society has in the past committed itself to the war effort with such fervor that the gap has been quickly overcome.¹⁸³ When a reserve force is not enough, American society has filled the gap with volunteers or conscription.¹⁸⁴ By 2010, the Army National Guard will comprise 54% of the country's combat forces.¹⁸⁵ Again, it is only the close control of the federal government that allows the country to rely so heavily upon the National Guard.

The question remains whether there is any place for the old idea of a militia that serves as a counterbalance for a standing federal army in the twenty-first century. The idea of protecting one's state from the encroachments of the federal government certainly seems to be at odds with the realities of the modern era. The country bears little resemblance to the confederation of sovereign states that comprised the United States in the eighteenth century. Even the name "United States" is now a singular term when it used to be a plural describing many individual sovereign bodies. And yet we are not one homogeneous nation. The presidential election of 2004 made it clear that there are very real differences between the citizens of the various states. A comparison of the political blue state/red state map of the 2004 election and the slave state/free state map of 1860 shows opinion still breaks sharply along state lines. Liberal Democrats live predominately in urban, coastal areas, while conservative Republicans are increasingly concentrated in rural southern or mid-western states.¹⁸⁶ As long as there is such an ideological divide, there is a place, at least in principle, for a state militia governed by the states. Even though a repeat of Fort Sumter is improbable, an eventual confrontation of some

182. DOUBLER, *supra* note 61, at 343.

183. *See id.*

184. *Id.*

185. ARMY NATIONAL GUARD VISION 2010, at 1 (2005), available at <http://www.arbg.army.mil/publications/2010Introduction.pdf>.

186. Steve Schifferes, *Election Reveals Divided Nation*, BBC NEWS, Nov. 3, 2004, available at <http://news.bbc.co.uk/1/hi/world/americas/3973197.stm>.

kind between federal and state governments seems probable. As the federal government finds it harder and harder to sit the fence on issues like abortion and stem cell research, the disfavored may find a use for the idea of state sovereignty, and the institutions that go along with it.