



Perpich v. Department of Defense

A Primer on the Development of the National Guard

By Chad Conrady

Rudy Perpich was Minnesota's longest-serving governor, with non-consecutive terms totaling ten years from 1976 - 1978 and 1982 - 1990. Colorful, scrappy, and independent-minded, Perpich did not shy away from taking stands on controversial topics, including American military involvement in Central America, which he opposed.

During the mid-1980s, the Reagan administration's activities in Central America took center stage as a result of Congressional hearings on the Iran-Contra Affair, a gun-for-hostages scandal that revealed the administration had illegally provided funds and training to Contra militants in Honduras. The Contras were attempting to topple the leftist Sandinista National Liberation Front (FSLN) government of neighboring Nicaragua. Receiving less attention at this time was a dispute between the federal government and the governors of twelve states over who had authority to assign state National Guard troops to Honduras for training. In *Perpich v. U.S. Department of Defense*, Governor Perpich challenged the president's authority to deploy members of the Minnesota National Guard to Central America for three peace-time training exercises in January 1987. This article explores the historical and legal background of the case, the argument presented by Governor Perpich, and the Supreme Court's final decision.

Perpich's lawsuit had its roots in colonial America. Prior to ratification of the Constitution in 1789, the states primarily defended themselves through the use of local militia, a practice dating from early colonial days. These militia groups were largely unorganized, and depended on able bodied men between the ages of 18 to 50 to act as citizen-soldiers. The Articles of Confederation granted states the power to train, equip, and appoint most of the



Governor Perpich in 1985. (MHS photo)

officers in their militia, and limited Congress' power by allowing states to decide how many men they would provide if and when Congress asked for troops.

When the Constitutional Convention took place, the framers of the Constitution wanted to place limits on the development of a large standing army because they saw the soldiers of a professional army as more loyal to each other than to the citizens of the nation.¹ The Federalists reasoned that in order to avoid having a large standing army, the states' militia forces needed be a uniform and adequate force against foreign danger, which could only be achieved by imbuing the federal government with some authority over the militia, including the power to

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ALLIES



LTC Lawrence Kiefer, Post Commander, shakes hands with Gov. Perpich as Perpich departs from a plane that taxied up to post headquarters in 1977. Looking on are, left to right, MG James O'Brien, COL John Hohncke, MG James Sieben. (Minnesota Military Museum photo)

regulate and discipline, call forth, organize and arm the militia. The Anti-Federalists felt that this provided Congress with too much power. They feared that the federal government could use the militia to subvert state sovereignty.² A compromise was finally reached whereby the federal government could only use the militia in three specific instances: (1) to execute the laws of the Union; (2) suppress insurrections; and (3) repel invasions. In addition, James Madison specified that the authority of training the militia in a manner prescribed by Congress, and the appointment of officers, was specifically reserved for the states.³ From the perspective of the Constitutional Convention, it appears that the framers wanted the militia forces under the control of the states, but with provisions that the federal government could employ them if necessary, allowing the country to operate with only a small standing army and relying on the citizen-soldier to be the main military component of the United States. State control of the militia was seen as a check on the federal government to prevent an amassing of military power.

The first piece of legislation passed by Congress involving the militia was the Militia Act of 1792, which required every able bodied man between 18 to 45 to enroll in the militia and arm and equip himself at his own expense. Congress imposed no mandates for drills or musters, but annual returns (headcounts) were required, which meant that militias were to be mustered once a year. These occasions were described as social gatherings involving copious amounts of liquor, rather than actual military drill.⁴

In the War of 1812, the governors of Massachusetts, Rhode Island, and Connecticut refused to answer the president's call to muster their militias and repel the British invasion. It marked the first time governors refused to muster their militias, and it was sustained by the Supreme Court.⁵ During this same conflict, the militias of Ohio and New York refused orders to cross into Canada in pursuit of the British. During both the Mexican War and the Spanish-American War, the militia forces were unavailable because these engagements did not meet any of the three conditions set in the Constitution that would permit the federal government to call upon the

militia. However, the federal government did accept militia units as volunteers,⁶ which is why the First Minnesota was officially known as the First Minnesota Volunteer Infantry Regiment.

The limitations on use of the militia, absence of standardization, and the relatively poor performance of some volunteer regiments in the Spanish-American War, resulted in Congress passing the Dick Act in 1903. This landmark legislation, named for Charles Dick, a congressman (later senator) from Ohio who also served as president of the National Guard Association of the United States, laid the ground work for developing the organized militia into a modern fighting force. The Dick Act required the militias to conform to Army organization, be trained by Regular Army instructors, and be equipped in standardized fashion using federal funds. The militia was also required to participate in field encampments, hold at least 24 armory drills each year, and militia officers needed to receive training at an Army service school.⁷ The states were given five years to comply with these new requirements, but by the time the deadline arrived, only a few states had met the requirements, causing Congress to grant a two-year

extension.⁸ Some believed that the Dick Act would weaken states' control over the militia, but the law allowed states to maintain control while the country was at peace, and also made the force more proficient through the monetary aid and prescribed training of the federal government.⁹

The next major change to the militia came with passage of the National Defense Act of 1916 (NDA), which officially renamed the organized militia as the National Guard, even though the name "National Guard" had been commonly used in the U.S. since the 1870s. NDA declared the Guard to be an integral part of the United States Army when called into federal service and required members to take an oath to both the state and federal governments.¹⁰ The 1916 act also curtailed the states' control of officer appointments by prescribing qualifications and requiring officers to be recognized by federal authorities.¹¹ Failure to comply with any of these provisions risked the withdrawal of federal funds.

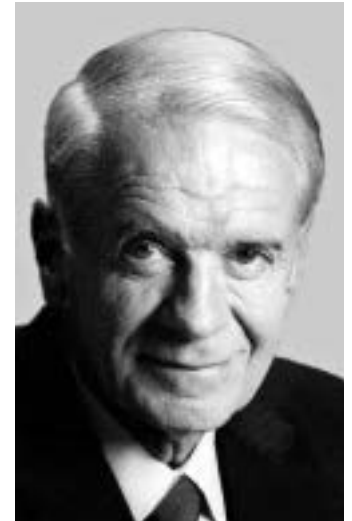
Amendments made to the NDA in 1933 created a dual enlistment system in which the National Guard of the United States (NGUS) was a reserve component of the Army, organized and administered under the Army Clause of the Constitution, while each state or territorial National Guard operated under the Militia Clause. Thus, each National Guard soldier simultaneously served in two overlapping organizations: one federal and one state. These acts of Congress were challenged in a series of court cases that debated which clause would be considered more influential for overseeing the powers of the Army and militia. In the end, the court sustained the dual enlistment system by stating that the power granted in the Army Clause is not limited to the conditions set in the Militia Clause. These cases also set the precedent for placing the Army Clause ahead of the Militia Clause.

U.S. military involvement in Central America in the mid-1980s was already a contentious issue nationally when Reagan chose not to federalize the National Guard, for which he would have needed Congressional approval, and instead began sending Guard units to Honduras on "training missions." Two governors refused to consent to federal training missions abroad for their Guard units.

In response, U.S. Representative G. V. "Sonny" Montgomery (R) of Mississippi sponsored a bill in 1986 that became an amendment to the 1987 Defense Authorization Act. Called the "Montgomery Amendment," it removed a governor's power to turn down federal requests to send National Guard units on training missions overseas, unless the Guard was clearly needed at home for local emergencies. Rudy Perpich pushed back. Declaring the Montgomery Amendment to be unconstitutional, he filed suit against the Department of Defense on January 28, 1987,

and sent a letter to the 49 other governors asking them to join him as a "friend of the court," which several did.

Members of the Minnesota Army National Guard had participated in three active duty training missions in Honduras in January 1987. Governor Perpich, as Commander-in-Chief of the Guard, objected to these missions. Perpich argued that the Montgomery Amendment prevented him from withholding his consent to carry out such training, and that the Amendment violated the Militia Clauses of Article 1, subsection 8 of the Constitution, which provides Congress with the power to call forth the militia only to execute federal law, suppress insurrections, and repel invasions.



Rep. Sonny Montgomery

Perpich v. Department of Defense worked its way through the courts. The District Court rejected Perpich's challenge, a ruling affirmed by the U.S. Eighth Circuit Court of Appeals. From there the case went before the Supreme Court where, in March 1990, John R. Tunheim, Chief Deputy Attorney General of Minnesota, aided by Hubert H. Humphrey III, Attorney General, and Peter M. Ackerman, Special Assistant Attorney General, argued the case on behalf of Governor Perpich and the State of Minnesota.

The Supreme Court ruled unanimously in June 1990 that the gubernatorial consent requirement was not constitutionally required and that its partial repeal by the Montgomery Amendment was constitutionally valid. The court observed that the dual enlistment system means that when members of the National Guard are ordered into federal service as the NGUS, they lose their status as members of the state militia during the period of federal service. The court also pointed out that the authority to train the militia is limited according to the Militia Clause by the discipline prescribed by Congress, so "if the discipline required for an effective service in the armed forces of a global power requires training in distant lands, or distant skies, Congress has the authority to provide it."¹² Lastly, the court found that the governor retains the power to veto state guards' participation in a federal training mission if it would hinder the state guard's capacity to respond to local emergencies. In short, members of the National Guard could be ordered to federal active

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CURATOR'S NOTES

By Doug Bekke



I am pleased to see the attention being given to the 100th anniversary of World War I. Exhibits are being planned, developed and constructed, seminars are being held, articles are appearing in many publications, and commemoration speeches are being given.

For years, my fear was that the main coverage of the war would be a short mention between major stories on the latest winner of American Idol

and an in-depth update on some media celebrity. WWI marked the end of the 19th century and the start of the 20th. It caused, influenced, and affected most of the major events, situations, and personalities of the 20th century. In many parts of the world the after-effects of WWI continue to profoundly influence current events.

For me, WWI was not an abstract event in the distant past remembered through old sepia-toned photographs of stiff looking people in strange clothing. In my youth I knew many people who had first-hand experiences with the war, as soldiers or as civilians at home. In my mind, I still hear their voices. I remember their stories, and I see their faces. They were relatives, friends, neighbors, teachers, mentors. I remember their accounts of WWI, 40-70 years before, as being just as vivid and real to them to as my accounts today of my own service and memories. For all of us, the events of our lives are not history, but part of us, and they remain as real as the computer screen I am now looking at.

The Minnesota Military Museum's WWI exhibit will open in the summer of 2016 and will seek to capture a sense of WWI in Minnesota on the home front—for civilians and troops in training—and "over there" in the trenches.

Please note, too, the newsletter article on the planned Vietnam exhibit. This exhibit will not happen if it is not supported by Vietnam veterans.

Perpich v. Department of Defense

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duty for purposes of training outside the United States, whether the governor approved it or not.

In conclusion, the framers of the Constitution wanted the militia to work as a check on the military powers of the federal government by the states, and the Montgomery Amendment reduced the influence states have to effectively challenge the federal government's use of its organized militia. However, the militia as envisioned by the framers of the Constitution proved to be an undisciplined force with limited effectiveness. Through federal government oversight, starting with the Dick Act in 1903, and court cases affirming the constitutionality of these acts of Congress, the militia/National Guard not only became a more effective force in and of itself, but solidly integral to the nation's strength and security.

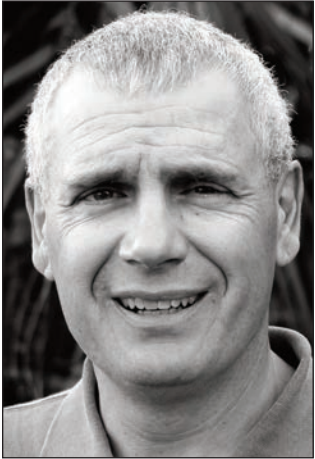
Chad Conrady is the museum's archivist.

Footnotes:

- 1 Alexander Hamilton, James Madison, and John Jay, *The Federalist*, ed. Benjamin Fletcher Wright (Cambridge: Harvard University Press, 1961), 181-182.
- 2 Monte M.F. Cooper, "Perpich v. U.S. Department of Defense: Federalism Values and the Militia Clause," *University of Colorado Law Review*, 62 (1991): 667.
- 3 *Ibid*, 663.
- 4 Frederick Bernays Wiener, "The Militia Clause of the Constitution," *Harvard Law Review*, 54, no. 2 (December 1940): 187.
- 5 Norman Beckman, "Limiting State Involvement in Foreign Policy: The Governors and the National Guard in 'Perpich v. Defense,'" *Publius*, 21, no. 3 112.
- 6 Wiener, 192.
- 7 Andrew M. Curtis, "Casenote: *Perpich v. U.S. Department of Defense*," *La Raza Law Journal*, 2, no. 1 (1988): 90.
- 8 *House Committee on Militia. Report on Extending Time for Organized Militia to Conform to section Three of Act of January 21, 1903. 60th Cong., 1908. Report No. 26.*
- 9 James Parker, "The Militia Act of 1903," *The North American Review*, 177, no. 561 (August 1903): 285 – 286.
- 10 Joseph Sullivan, "Who Controls the National Guard," *University of Detroit Law Review*, 67, no. 3 (1990): 449.
- 11 Wiener, 200 – 201.
- 12 *Perpich v. Department of Defense*, 496 U.S. 334 (1990), <https://bulk.resource.org/courts.gov/c/US/496/496.US.334.89-542.html> (accessed on April 4, 2014).

DIRECTOR'S UPDATE

By Jeff Thielen



I recently spent some time calling long-time members and supporters of the Military Historical Society of Minnesota to ask them if the organization was meeting their needs and expectations. If you were not among those called, I would like to ask you that question now. I ask because people join organizations for a variety of reasons.

If you joined with expectations that have not been met, you might find another

organization to support instead. It is a proven adage that it is much easier and cheaper to keep members than to find new ones, so if there is something you would like to

see us doing that we are not currently doing, please let us know.

As a member and donor, you have made an investment in our work and believe it to be worthwhile. One of my goals is to be responsive to your concerns and interests and to insure your continued support for our mission "to educate the public on the service of Minnesota's veterans, to preserve a record of their service through exhibits and programs of the Minnesota Military Museum, and to preserve artifacts and records related to their service for future generations."

We currently have 144 Life Members, 97 Individual & family members, and 29 corporate members. Every one of them is important, every member a valued resource. We want more members, and we want to keep members we already have interested. We encourage members to become involved as volunteers, but if you are unable to volunteer, please know that your continued support is strongly appreciated. And tell us how we might do better. Thank You!

Heads up! New Vietnam exhibit in planning stages

A new special exhibit focusing on the Vietnam War is scheduled to open in the summer of 2015, marking 50 years since the summer of 1965 when the conflict began burning into public consciousness. The story of the war will be told through the words and photographs of Minnesotans who served. The exhibit will begin with a brief overview of the background and history. Going around the room will be a timeline of significant events in the war. The main body of the exhibit will re-tell stories about veterans who were there, covering our earliest involvement until US withdrawal.

Doug Bekke, curator, described some stories he already knows: "The earliest involves a Minnesota member of an OSS Operational Team," said Bekke. "He was the radioman who parachuted into Hanoi in the closing days of WWII. One of the last is an Army nurse in Saigon in 1973. Another is from the son of a Vietnamese officer who, as a 9 year old, was evacuated by helicopter from our embassy in 1975. He went through the refugee system and is now a Minnesota teacher."

Not everything in Vietnam involved combat. Doug also seeks the stories of mechanics, cooks, clerks, and support troops from all branches. "And I want vignettes," he said. "One infantryman sent me a great story about his encounter with red ants. I have several of my own stories

about working with the Cambodian army. Somebody else told me about the 're-up bird and the f—k you lizard.' No exhibit could tell the entire Vietnam story, and I'm not going to try, but do hope that we can paint a representative picture."

How you can help

If you are a Vietnam vet, or know someone who is or was, get in touch with us. We need your name, hometown (where did or do you live as a Minnesotan), branch of service, unit, dates of service, and how we can contact you. Provide some stories representing your service with dates and location.

Some veterans have written self-published books or accounts of particular experiences. Send us a copy for our library and archive. We badly need good quality photographs. If you have never told or recorded your experiences, this is an opportunity to start the process to preserve a chapter of your life, good or bad, for the military history of Minnesota and perhaps more importantly for your family.

Contact: Doug Bekke (Curator), 612-729-7651, dp-bekke@yahoo.com, or write him c/o the museum.

OUT OF THE ARCHIVES

By Chad Conrady



This summer has so far been very productive in getting the museum's archival materials organized and accessible for use by the public. Records from the Adjutant General's Office (AGO) are still front and center for me. Since the last Allies update in March, I have focused my energy on the muster roll and the payroll records because these are the most informational rich resources. These records would benefit family genealogists re-

searching family members that served in the Minnesota National Guard, for instance through these records a researcher could see the 1916 Mexican Border War muster roll which showed E. A. Walsh as a mess sergeant, then use the pay roll records from the 1920s through the 1940s to track his progression from a colonel to when he became the adjutant general. It would also be able to track the progression of important figures in Minnesota National Guard's history, such as William Kreger and Philip C. Bettenburg.

Of these records the muster rolls are completely organized and re-housed in acid free boxes and folders. The overarching organization of the muster rolls is chronological, based on the National Guard's military engagements at the time, starting first with the American Civil War (limited to 7th Minnesota Infantry), then the Spanish-Ameri-

can War, the 1916 Mexican Border War, World War One, and World War Two. Within these time periods, regiments are organized based on the regiments' numbers and type, so in the World War One group the First Minnesota Infantry (soon re-named 135th Infantry) has its own sub-grouping with individual folders containing specific unit records, such as Company A. I am continuing this type of organization for the payroll records that I am currently processing. My plan is to complete the payroll records by the end of summer, and so far have payroll records from 1929 – 1941 completely organized and re-housed. I have started work on the payroll records dated from 1947 – 1950. Once these records are completely processed it should open up more space in the archives storage area because we are getting rid of bulky filing cabinets as their contents get transferred into archival folders and boxes.

In other recent news, the museum has acquired records from the 194th Tank Regiment (about 10 bankers boxes), which will be helpful for researchers since outside the muster and payroll records, archival information on this regiment is limited. I also had some volunteers in last week to rehouse the PS Magazine Collection that Dr. Jon van der Hagen was kind enough to organize for me during the winter. PS is the Army's graphic monthly preventive maintenance journal.

An update on the Minnesota Reflections: the museum received the digital copies of the World War One muster rolls back from the Minnesota Historical Society and I have enlisted my wife to create the required metadata for the records, a necessary step to complete the project so the muster rolls can be uploaded into Minnesota reflections. If all goes well she will complete the metadata creation by early fall.

Vietnam Traveling Exhibit

For one day only on Monday, August 4, a mobile museum and memorial housed in a 48 foot trailer will be on the museum grounds. The exhibit is sponsored by the Mobile Riverine Force Association, which is dedicated to the soldiers of the 9th Infantry Division and sailors of Navy Task Force 117, as well as Navy and Coast Guard units in the Mekong Delta and other areas of Vietnam from 1966-70. The exhibit will be open 10:00 AM to 7:00 PM.

In addition, local author Wendell Affield will be on hand to sign copies of his book *Muddy Jungle Rivers*. Affield was a Navy coxswain on an ATC (Armor Troop Carrier) river boat in 1968-69 in Vietnam. He served near the North Vietnam border on the Cua Viet River and in the Mekong Delta south of Saigon. His book provides the insightful journey of a young Minnesotan who is sent to Vietnam and arrives at the height of the Tet Offensive.

In Memorium: Sid Schmuckler

A few months ago, a true friend of the museum passed away at age 96. Sid Schmuckler of Lilydale was a WWII naval officer and early member of the Military Historical Society of Minnesota. He and the Jewish War Veterans of the United States, Department of Minnesota, in which he was also a member, gave significant financial support to the museum over the years. Sid also "worked" the halls of the Capitol on our behalf well into his 80s, keeping tabs on our legislative requests, attending hearings, and button-holing key legislators. He was the kind of man every organization would want in its corner. We will miss him.

DONOR HONOR ROLL, April-June 2014

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ARTIFACT DONATIONS

The museum gratefully acknowledges donations of artifacts from the following:

Richard Abel ▪ Jim Barnard ▪ Marcella Cheeseman ▪ Ernest Denzer ▪ Tom Erdahl ▪ Jerome Fehn ▪ Alvin Guck ▪ Maureen Hanson ▪ D. Marvin Hill ▪ Maxine Hoefs ▪ Anton Johnson ▪ Kathy Johnson ▪ Caroll Kram ▪ James McDuff ▪ Allan R. Meixner ▪ Daniel Ojeda, Jr. ▪ Esther Olson ▪ Nick Ostapenko ▪ Clifford and Dianne Peet ▪ Mary Pietz ▪ Science Museum of Minnesota ▪ Pat Spinosa ▪ Harold Trembley ▪ VFW Post 936, Alexandria ▪ Adeline Voth ▪ Richard Witte III

CONTRIBUTIONS

Renewing Members: Ronald Andreen ▪ Louis Bode ▪ Margaret Fletcher ▪ Joe Forberg ▪ Ross Fortier ▪ Earl Jensen ▪ Doug Johnson ▪ Al Kabus ▪ Robert Keppel ▪ Walter Kosel ▪ Bernard Koskovich ▪ Al Kreutz ▪ Howard Larsen ▪ Steve Rannenberg ▪ John Sisterman ▪ Nancy Walsh

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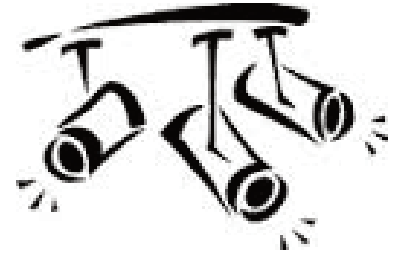
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Ronald Stuard ▪ Steve Stuart ▪ Swanville Lions Club ▪ Jim and Sandy Tuleictl ▪ Geoff Walden ▪ Grant Webber ▪ Rhoda Winsky ▪

SPOTLIGHTED RECENT DONATIONS



Nick Stenglein, a Minneapolis high school student made sure that the uniforms and papers of LTC Lucian G. Vorpahl, who oversaw many of the Army's WWII Pacific Theater construction projects, were saved and donated.

Mrs. Marcella Cheeseman donated her husband BG William Cheeseman's General Officer's pistol and uniforms.

MG Allan Meixner donated his General Officer's pistol and flags.

Mrs. Marge O'Brien, widow of the late MG James O'Brien, donated her husband's papers and photographs from his lengthy service in the 34th and 47th Divisions.

The Kvistberg family donated many, many books and artifacts from the estate of their father, Dr. Gerald Kvistberg of Sartell.

Mrs. Pat Spinosa donated her father's WWII USMC artifacts.

Just this week, in anticipation of the museum's Vietnam exhibit, Mr. Jay Doyle donated papers and photographs from his brother, WO Larry Doyle, an army helicopter gun ship pilot killed in Vietnam in late 1968.

Devon Hall donated his grandfather's MNNG rifle trophy, many shooting medals (1907-1909), and very special 1903 Springfield target rifle dated 1906, serial numbered 1820.

ALLIES

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All memberships are acknowledged in the museum newsletter and in our website's Donor Roll Call. Contributions of \$500 or more in a single year and all Life memberships are also recognized permanently on a plaque in the museum lobby.

How would you like to receive your newsletter? Postal mail Email

Would you like to receive information about volunteering? Yes No

PROCEDURE

Pay by mail: Print this form and mail with your check (payable to the Military Historical Society of Minnesota) to: Minnesota Military Museum, Camp Ripley, 15000 Highway 115, Little Falls, MN 56345. If you prefer, you can mail or fax (320-632-7797) this form without payment and follow up by calling the museum at 320-616-6050 with your credit card information.

Pay online: We also have a simple, secure way for you to become a member or renew your membership online. Go to our website at mnmilitarymuseum.com. Click on Support Us>Become a Member and follow the prompts.

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