STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

January 19, 2024

Opinion No. 24-001 (revised)

Constitutionality of Proposed Legislation Limiting the Release of Tennessee National Guard into Active-Duty Combat

Question

Is House Bill 1609 of the 113th Tennessee General Assembly, 2nd Session (2024) constitutional?

Opinion

House Bill 1609 is constitutionally suspect under the Supremacy Clause of the United States Constitution.

ANALYSIS

House Bill 1609 provides that

> [t]he Tennessee national guard or a member of the national guard must not be released from military service of this state into "active duty combat"[1] unless the United States congress has passed an "official declaration of war"[2] or has taken an official action pursuant to the United States Constitution, Article I, § 8, Clause 15, to explicitly call forth the Tennessee national guard or a member of the national guard for the enumerated purposes of executing the laws of the union, repelling an invasion, or suppressing an insurrection.

But House Bill 1609 expressly "does not limit or prohibit the governor from consenting to the deployment of a Tennessee national guard member under [Title 32 of the United States Code]" for "defense support of civil authority missions within the United States and United States territories."

For the reasons set forth below, House Bill 1609 is vulnerable to a legal challenge under the Supremacy Clause of the U.S. Constitution.

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[1] House Bill 1609 defines "active duty combat" as "performing the following services in the active federal military service of the United States: (A) Participation in armed conflict; (B) Performance of a hazardous service relating to an armed conflict in a foreign state; or (C) Performance of a duty through an instrumentality of war."

[2] House Bill 1609 defines an "official declaration of war" as "an official declaration of war made by the Unites States congress pursuant to the United States Constitution, Article I, § 8, Clause 11."

The Supremacy Clause gives Congress the power to preempt state law. It provides that the U.S. "Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land." U.S. Const., art. VI, cl. 2. Since the U.S. Constitution and the laws made by Congress are "supreme" throughout the country, state law may be preempted by federal law when a conflict exists between federal and state law. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001); *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 98 (1992); *LeTellier v. LeTellier*, 40 S.W.3d 490, 497 (Tenn. 2001). Such conflict preemption arises when compliance with both federal law and state law is impossible or when state law presents an obstacle to the accomplishment of the full purposes and objectives of Congress. *Fidelity Fed. Sav. and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982); *Swift v. Campbell*, 159 S.W.3d 565, 577 (Tenn. Ct. App. 2004) (citing *Gade*, 505 U.S. at 98).

The Constitution vests Congress with extensive power over the armed forces of this county. *See* U.S. Const., art. I, § 8, cls. 1, 11-16. Congress has the power to "provide for the common defense," *id*. cl. 1, "declare war," *id*. cl. 11, "raise and support armies," *id*. cl. 12, "make rules for the government and regulation of the land and naval forces," *id*. cl. 14, and "make all laws which shall be necessary and proper for carrying into execution the foregoing powers," *id*. cl. 18.

> Congress also has the power
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> [t]o provide for calling forth militia to execute the laws of the Union, suppress insurrections and repel invasions; [and]
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> [t]o 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.

Id. cls. 15-16 (often referred to as the "Militia Clauses").

The "modern militia reserved to the States by Art. I, § 8 cl[s]. 15, 16 of the Constitution" is "[t]he National Guard." *Maryland ex rel. Levin v. United States*, 381 U.S. 41, 46 (1965), *vacated on other grounds*, 382 U.S. 159 (1965).[3] As the Supreme Court has explained, a series of Acts produced our current National Guard system which consists of "two overlapping but distinct organizations . . . —the National Guard of the various states and the National Guard of the United States." *Perpich v. Department of Defense*, 496 U.S. 334, 345 (1990) (internal quotation marks omitted). All persons who enlist in a state National Guard unit simultaneously enlist in the National Guard of the United States. *Id*. Under this system, state guardsmen are both members of (1) the "organized militia" for federal-law purposes and (2) a reserve component of the armed forces of the United States. *Id*. at 337 n. 1, 345-46, 347 n. 19; 10 U.S.C. § 246. When a member of the Guard is ordered to active duty in the federal service, he or she is thereby relieved of his or her status in the state Guard for the entire period of federal service. *Perpich*, 496 U.S. at 346.

[3] The Supreme Court's decision in *Maryland ex rel. Levin v. United States* confirms that the National Guard qualifies as the militia for purposes of *federal law* under the Militia Clauses in the U.S. Constitution. Neither *Maryland* nor this opinion expresses a view on whether the National Guard serves as "the Militia" under Article III, § 5 of the Tennessee Constitution.

Upon being relieved from active federal service, the individual reverts to National Guard status. *Id*. at 348.

Significant here, the Supreme Court has held that the Militia Clauses do not constrain the powers of Congress "to provide for the common Defence," to "raise and support Armies," to "make Rules for the Government and Regulation of the land and naval Forces," or to enact such laws as "shall be necessary and proper" for executing those powers. *Perpich*, 496 U.S. at 349 (quoting *Selective Draft Law Cases*, 245 U.S. 366, 375, 377, 381-84 (1918)); *see Cox v. Wood*, 247 U.S. 3, 6 (1918) (power to raise armies is "not qualified or restricted by the provisions of the militia clause"). The power to call forth the militia for the three enumerated purposes of "execut[ing] the laws of the Union, suppress[ing] insurrections, and repel[ling] invasions" in Clause 15 merely "supplement[s]" the broader power to raise armies and provide for the common defense; it does not limit those powers. *Perpich*, 496 U.S. at 350.[4] And Clause 16 "enhances" federal power by authorizing Congress to provide for "organizing, arming and disciplining the Militia" and "governing such part of the militia as may be employed in the service of the United States." *Id*. While "the Authority of training the Militia" is reserved to the States respectively, the States are, in turn, required to exercise that training authority "according to the discipline prescribed by Congress." *Id*.

In sum, the Supreme Court's interpretation of the Militia Clauses "recognizes the supremacy of federal power in the area of military affairs." *Id*. at 351. Accordingly, state law is preempted when it conflicts with federal legislation enacted by Congress in conformance with its power over the country's armed forces. *See Houston v. Moore*, 18 U.S. 1, 8-9 (1820) (recognizing the right of control of the militia by the respective States and their right to legislate regarding the militia as concurrent with Congress, within constitutional limitations, with the right of the State yielding to the superior right of Congress acting within said limitations).

House Bill 1609 conflicts with—and is therefore preempted by—federal legislation that authorizes active reserve duty for the National Guard without the consent of the governor of the State concerned "[i]n time of war or of national emergency declared by Congress, *or when otherwise authorized by law*." 10 U.S.C. § 12301(a) (emphasis added).[5]

House Bill 1609 allows the Tennessee National Guard to be released from military service of this State into "active duty combat" in only two instances: (1) when Congress has "passed an official declaration of war" pursuant to Article I, Section 8, Clause 11 of the U.S. Constitution or (2) when Congress has taken an official action pursuant to Article I, Section 8, Clause 15 of the

[4] Citing *Selective Draft Law Cases*, 245 U.S. at 382-89, and *Cox*, 247 U.S. at 6, the Court observed that members of the Guard who fought in France during World War I were not engaged in any of the three specified purposes in Clause 15; nevertheless, membership in the militia did not exempt them from a valid order to perform federal service, whether that service took the form of combat duty or training for such duty. *Perpich*, 496 U.S. at 349-50 & n. 20.

[5] While subsections (b) and (d) of 10 U.S.C. § 12301 do require the consent of the governor in the circumstances addressed in those subsections, the governor's ability to withhold consent is significantly constrained because subsection (f) states: "The consent of a Governor described in subsections (b) and (d) may not be withheld (in whole or in part) with regard to active duty outside the United States, its territories, and its possessions, because of any objection to the location, purpose, type, or schedule of such active duty."

U.S. Constitution to explicitly call forth the Tennessee national guard or a member of the national guard for one of the three enumerated purposes in that clause.

But under federal law, Congress has the power to call up the National Guard in more than just these two instances. As explained above, Congress's power to call forth the National Guard for any of three purposes in Article I, Section 8, Clause 15 is merely a "supplement[ary]" power. *Perpich*, 496 U.S. at 350. Clause 15 does not constrain the "broader [congressional] power to raise armies and provide for the common defense." *Id*. Thus, House Bill 1609 would effectively prohibit the release of the Tennessee National Guard into "active duty combat" when Congress summoned the Guard for one of these broader purposes unless Congress "passed an official declaration of war" pursuant to Article I, Section 8, Clause 11.

This proposed state prohibition is constitutionally problematic. It would conflict with federal law and would thus be subject to conflict preemption under the Supremacy Clause. To begin with, the meaning of "war" in Article I, Section 8, Clause 11 is unsettled. While scholars have debated its meaning and offered varying definitions,[6] the term has not been defined by the Supreme Court. Thus, there is no assurance that the three services described in the definition of "active duty combat" in House Bill 1609[7] would always rise to the level of "war." *See Proposed Deployment of United States Armed Forces into Bosnia*, 19 Op. Off. Legal Counsel 327, 333 (1995) (opining that deployment of approximately 20,000 ground troops to enforce a peace agreement in Bosnia and Herzegovina was not a "war," even though the deployment involved some "risk that the United States [would] incur and (and inflict) casualties"); *Deployment of United States Armed Forces into Haiti*, 18 Op. Off. Legal Counsel 173, 174 n. 1, 178-79 & n. 10 (1994) (opining that planned deployment of up to 20,000 United States troops to Haiti to oust military leaders and reinstall Haiti's legitimate government was not a "war"). In these instances, i.e., when the services described in the definition of "active duty combat" would not be viewed as rising to the level of "war," withholding the release of the Tennessee National Guard because Congress has not "passed an official declaration of war" would not be permissible.

And even when the services described in the definition of "active duty combat" in House Bill 1609 constitute engagements in "war" or are otherwise determined to constitute ones involving military force, requiring Congress to "pass[] an official declaration of war" before the Tennessee National Guard could be released would contravene federal law. "From the Administration of President John Adams to the present," Congress has recognized the president's role as Commander-in-Chief of the military[8] and passed legislation authorizing the use of military force by the president without a formal declaration of war. Bryce G. Poole, *The Constitutionality of Targeted Killing*, 34 Regent U. L. Rev. 69, 79 (2021-2022) (collecting examples).

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[6] *See, e.g.*, Michael D. Ramsey, *Textualism and War Powers*, 69 U. Chi. L. Rev. 1543, 1610-11 (Fall 2002); Zheyao Li, *War Powers for the Fourth Generation: Constitutional Interpretation in the Age of Asymmetric Warfare*, 7 Geo. J. L. & Pub. Pol'y 373, 381-84 (Winter 2009); Jake Novack, *Exploring Executive War Power: The Rise and Reign of the Presidentialist Interpretation*, 53 Cal. W. L. Rev. 247, 262-64 (Spring 2017).

[7] *See* note 1, *supra*.

[8] *See* U.S. Const., art. II, § 2, cl. 1.

Currently, the "War Powers Resolution," 50 U.S.C. §§ 1541-1550, authorizes the president to use military force *prior* to a formal a declaration of war by Congress—or *without* a formal declaration of war by Congress when the president obtains congressional authorization for use of military force. Specifically, the War Powers Resolution requires the president to inform Congress within 48 hours of committing armed forces to military action, *see* 50 U.S.C. § 1543(a), and prohibits armed forces from remaining in action more than 60 days, subject to a 30-day withdrawal period, unless Congress has "declared war or has enacted a specific authorization for use of military force," *id*. § 1544(b).

The War Powers Resolution was employed, for instance, when President George W. Bush sought and received two congressional resolutions authorizing the use of force following the events of September 11, 2001. Senate Joint Resolution 23 empowered the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001," *see* Pub. L. No. 107-40, 115 Stat. 224, 50 U.S.C. § 1541 note, and House Joint Resolution 114 empowered the President "to use the Armed Forces of the United States as he determines to be necessary and appropriate" to "defend the national security of the United States against the continuing threat posed by Iraq" and "enforce all relevant United Nations Security Council resolutions regarding Iraq," *see* Pub. L. No. 107-243, 116 Stat. 1498, 50 U.S.C. § 1541 note. In short, President Bush was authorized by law to use military force without a declaration of war by Congress.

In sum, while the constitutionality of the War Powers Resolution has been questioned, it remains controlling federal law.[9] Accordingly, House Bill 1609's requirement that Congress must "pass[] an official declaration of war" before the Tennessee National Guard can be released from military service of this State into "active duty combat" conflicts with federal law. Under the War Powers Resolution, Congress may authorize the president to use military force without a declaration of war, and even when Congress may decide to make a declaration of war, the War Powers Resolution allows the president to use military force before any such declaration is made.

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[9] *See* William J. Rich, 3 Modern Constitutional Law §38:33 (3rd ed. 2023); Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 Va. L. Rev. 101 (Feb. 1984); Gregory V. Momjian, *Justiciability as a Canon of Avoidance and a Normative Good in War Powers Litigation*, 38 J.L. & Pol. 1 (Winter 2023).

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