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PROCEEDINGS BEFORE

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THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: RUDY PERPICH, GOVERNOR OF MINNESOTA,
ET AL., Petitioner v. DEPARTMENT
OF DEFENSE, ET AL.

CASE NO: 89-542

PLACE: Washington, D.C.

DATE: March 27, 1990

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----X
3 RUDY PERPICH, GOVERNOR OF :
4 MINNESOTA, ET AL., :
5 Petitioners :
6 v. : No. 89-542
7 DEPARTMENT OF DEFENSE, ET AL. :
8 -----X

9 Washington, D.C.

10 Tuesday, March 27, 1990

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 10:10 a.m.

14 APPEARANCES:

15 JOHN R. TUNHEIM, ESQ., Chief Deputy Attorney General of
16 Minnesota, St. Paul, Minnesota; on behalf of the
17 Petitioners.

18 KENNETH W. STARR, ESQ., Solicitor General, Department of
19 Justice, Washington, D.C.; on behalf of the
20 Respondent.

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1 Congress the power to provide for organizing, arming and
2 disciplining the militia and for governing such part of
3 them as may be employed in the service of the United
4 States, but reserving to the states respectively the
5 appointment of the officers and the authority of training
6 the militia according to the discipline prescribed by
7 Congress.

8 Now, the Montgomery Amendment effectively
9 nullifies clause 16 by removing states' powers to consent.
10 It permits unlimited Federal authority over training, and
11 leaves no control or authority to the states.

12 The Montgomery Amendment is unconstitutional
13 because it violates the plain language and meaning of
14 clause 16. It overturns long settled understandings of
15 the relationship among the clauses of Article I, Section
16 8, and it upsets a carefully established framework
17 eliminating a fundamental part of the checks and balances
18 as established by the framers.

19 QUESTION: And it is your position, I suppose,
20 that the part of Section 16 that it violates is that that
21 says it is reserving to the states the authority of
22 training the militia according to the discipline
23 prescribed by Congress?

24 MR. TUNHEIM: Yes, Mr. Chief Justice.

25 Even more extreme than the Montgomery Amendment

1 is -- National Guard of the United States in the reserve
2 component QUESTION: Mr. Tunheim?
3 MR. TUNHEIM: Yes.
4 is that? QUESTION: The Montgomery Amendment appears, at
5 least on its face, to apply only to the National Guard of
6 the United States, not the state militia component.
7 limitation MR. TUNHEIM: The National Guard of the United
8 States is essentially the same thing as the National Guard
9 of the states. Under the dual enlistment concept, yes --
10 federalize QUESTION: Well, of course, that's the question,
11 whether, whether they operate as one and the same or
12 differently somehow, at least on its face the amendment
13 appears to apply to the National Guard of the United
14 States. QUESTION: I take it -- I take it you're saying
15 that it's MR. TUNHEIM: Yes, Justice O'Connor, it does
16 apply to the National Guard of the United States, but the
17 are -- and the so-called unorganized militia? That is
18 also unorganized QUESTION: Now, would you tell me whether the
19 President, in this case, ordered the guard units to
20 Honduras for training, or did the President order the
21 National Reserve component to Honduras? Did he federalize
22 them and send them that way, or was this part of the two-
23 week training program of the state militia? organized
24 militia, MR. TUNHEIM: It's part of the two-week training
25 program, but they were federalized, Justice O'Connor, as

1 the National Guard of the United States in the reserve
2 component part of dual enlistment.

3 But our argument in the case, Justice O'Connor,
4 is that simply by creating the National Guard of the
5 United States you can't simply remove from the National
6 Guard the essential state organization, the constitutional
7 limitations that are in Article I, Section 8.

8 QUESTION: But at least the President attempted
9 to articulate the position that they were being
10 federalized and sent there in their capacity as the
11 National Guard of the United States?

12 MR. TUNHEIM: Yes, that's correct. What's more
13 extreme -- yes?

14 QUESTION: I take it -- I take it you're saying
15 that it's unconstitutional for Congress to divide by
16 statute, as it has done, the National Guard segment of the
17 militia and the so-called unorganized militia? That is
18 also unconstitutional in your view, I take it?

19 MR. TUNHEIM: No, it's not unconstitutional to
20 take the militia and organize it, which is what clause 16
21 gives Congress the power to do.

22 QUESTION: Well, but Section 311 of Title 10
23 says that the classes of the militia are the organized
24 militia, which consist of the National Guard, and the
25 unorganized militia, which is not the National Guard. So

1 you have to say that that also is unconstitutional, I take
2 it, to prevail?

3 MR. TUNHEIM: Justice Kennedy, I wouldn't agree
4 that we would have to say that. The unorganized militia
5 is really nothing. It is a body, a pool of individuals
6 who are able-bodied and able to perform military service
7 if either drafted into a federal army, or if called into
8 an organized militia. It's the organized militia that can
9 be called into the federal service, and that is the
10 National Guard.

11 QUESTION: The unorganized, you do not have in
12 Minnesota?

13 MR. TUNHEIM: Well, the unorganized militia by
14 statute exists everywhere, in states and under federal
15 law, but it really is -- is nothing. It's just a pool of
16 eligible individuals, and that's all it is. It doesn't,
17 it's not armed, it's not trained, and it's not part of the
18 fighting force at all.

19 QUESTION: There's nothing in the nature of
20 things that requires it to be that way, I suppose. I
21 mean, if the Governor wants to be able to prohibit his
22 military force from training abroad, or wants to be able
23 to direct it in all respects at all times, I suppose that
24 he could expend the money to make the unorganized militia
25 a full-fledged fighting force, buy them tanks and planes,

1 which now the Federal Government supplies.

2 MR. TUNHEIM: Well, Justice Scalia, currently
3 under federal law there's no authority for a state to keep
4 an organized militia, other than the National Guard, and
5 the National Guard must be federally recognized, so there
6 really is not an alternative for states. It's a choice
7 between accepting the federal funding and participating as
8 the National Guard or not having an organized militia.

9 QUESTION: Don't you think the -- it seems to me
10 a less extreme application of the militia clause of the
11 Constitution to say that it reserves to the states the
12 right to draft able-bodied people and call them the state
13 guard, if you will, than the contention that you're
14 construing -- the construction you're contending for it?

15 MR. TUNHEIM: The National Guard is the
16 organized militia. It is --

17 QUESTION: Well, but I mean supposing the
18 Governor wants to have a militia there in Minnesota to put
19 down disturbances 365 days a year. Is there any provision
20 of existing law that would prevent him, or the Minnesota
21 legislature, from passing an act creating a state guard,
22 drafting people into it and making them available?

23 MR. TUNHEIM: Federal law currently does not
24 permit states to maintain an organized militia, other than
25 the federally recognized National Guard. That's the

1 requirement of federal law at this time.

2 QUESTION: What do you mean by organized
3 militia? I mean, you're talking about it as though you
4 can't have tanks if you're an organized -- if you're an
5 unorganized -- is the term defined, "unorganized militia"?

6 MR. TUNHEIM: Unorganized -- the unorganized
7 militia is defined under federal law, and I think the laws
8 of most states. It's simply defined as every able-bodied
9 person between the ages of 18 and 45. It's a pool of
10 individuals that's available for military service at some
11 point in time, but they are not trained. They are not
12 part of an organized militia in any sense.

13 QUESTION: Is there some provision in the law
14 that would prevent the State of Minnesota from setting out
15 to train those people?

16 MR. TUNHEIM: There's a provision of federal law
17 that says that states may not maintain an organized
18 militia, other than the National Guard. It's -- the
19 National Guard is the organized militia.

20 QUESTION: But what if the states were to draw
21 on this unorganized militia? Would that violate the
22 federal law, do you think?

23 MR. TUNHEIM: I think it would, because that
24 would be organizing the unorganized militia, and federal
25 law says that you cannot keep an organized militia, other

1 than the National Guard.

2 QUESTION: Define the term "organized." I mean,
3 I think we're playing with words here. It seems to me all
4 the federal statute says is that a state can have two
5 kinds of militia, one which we'll call the "organized
6 militia," can be called up and it's the United States
7 National Guard, and the other, if the state wants to have
8 another one, the states can do with what they want. But
9 is there any federal definition of "organized"?

10 MR. TUNHEIM: There -- there is a federal
11 definition in federal law. The organized militia means
12 the National Guard. It is defined as the National Guard.

13 QUESTION: Well, if that's all it means, then
14 you can create one that isn't the National Guard, and that
15 will be the unorganized militia.

16 MR. TUNHEIM: But there's another provision of
17 federal law that says you cannot keep an organized militia
18 other than the National Guard, Justice Scalia, or
19 something called state defense forces, which are not
20 militia, they're not defined as militia, they can't be
21 called forth into the federal service, they can't be paid,
22 and they simply are not an organized militia under the --

23 QUESTION: But they can't be paid by the federal
24 government?

25 MR. TUNHEIM: That's correct.

1 QUESTION: Well, but what's wrong with the State
2 of Minnesota paying them if they want to have them serve
3 the purposes of the State of Minnesota?

4 MR. TUNHEIM: Because the militia under the
5 Constitution can be called forth into the federal service.
6 That's an essential element of the definition of "militia"
7 in the Constitution as understood by the framers. And the
8 defense forces by federal law cannot be called forth into
9 the federal service. They can be used only within the
10 borders of the states, and as a practical matter
11 they -- they simply don't exist. They were created
12 to -- to -- to help within states during World War II when
13 National Guard members were in the federal service for the
14 duration of the war.

15 QUESTION: But -- but they don't exist, I -- I
16 suggest to you because the states haven't chosen to call
17 them into existence.

18 QUESTION: What -- Mr. Tunheim, what do you make
19 of footnote 5 in the Solicitor General's plea where he
20 says 24 states have statutes providing for a state defense
21 force or a state guard that is separate from the National
22 Guard, listing Minnesota law appears to recognize a state
23 guard in addition to the National Guard, citing the
24 statute?

25 I think these later questions have all been

1 directed toward this kind of thing, and you keep turning
2 around to speaking of militia.

3 What do you make of footnote 5?

4 MR. TUNHEIM: Well, certainly there exists
5 statutory authority in each of these states for creation
6 of something called a defense force, but it's carefully
7 not described as an organized militia in any sense --

8 QUESTION: This is what I meant by my part of
9 the question that Minnesota hasn't chosen to -- to go
10 along this line yet.

11 MR. TUNHEIM: The -- the provisions in Minnesota
12 law allow for creation of this home defense force, and
13 it -- it was used during World War II. It's not currently
14 used at all, even though the provisions remain on the
15 books.

16 But again, the defense forces are carefully
17 referred to as not militia because that -- that
18 constitutes a different definition within the
19 Constitution. It calls into play the requirements of the
20 Constitution, and -- and it really -- they have carefully
21 not identified the defense forces as organized militia
22 because of that.

23 QUESTION: Oh, I don't think they are or are not
24 a militia simply because Minnesota chooses to call them or
25 not to call them a militia. I mean, a militia is a

1 militia. Surely by simply not giving them a name
2 Minnesota doesn't deprive them of that character.

3 MR. TUNHEIM: Justice Scalia, it is federal law
4 that doesn't define these home defense forces as organized
5 militia. Federal law identifies "organized", right.

6 QUESTION: But they can be militia but not
7 organized militia. And certainly, organized really
8 doesn't mean that they have no organization because, as
9 you say, even Minnesota in World War II had a home guard
10 which was, I assume, organized. They had officers and
11 subordinates and so forth?

12 MR. TUNHEIM: It was, but it wasn't militia in
13 the sense --

14 QUESTION: So it was organized in some sense.

15 MR. TUNHEIM: It -- it was organized by the
16 state, but it wasn't militia in the sense given to it by
17 the Constitution which allows the militia of the states to
18 be called into the federal service, and this is where the
19 National Guard has come from. The National Guard was
20 organized out of the state militia, and our argument is
21 that you simply cannot take the Constitutional limitations
22 that come along with the National Guard and take them away
23 simply by calling them a different name. That's the
24 essence of --

25 QUESTION: Are you questioning the

1 constitutionality of the dual enlistment system?

2 MR. TUNHEIM: We are not, Justice Kennedy. The
3 dual enlistment system, properly interpreted, is -- is
4 a -- is useful and, I think, constitutional.

5 What we are challenging is the use of dual
6 enlistment to avoid the militia clause limitations.
7 The -- when dual enlistments were created --

8 QUESTION: Well, it's rather odd to say that
9 Congress has the authority, as you just conceded, to have
10 dual enlistment and then not permit the federal government
11 to make that choice an effective one and to use all of its
12 powers to make sure that the dual enlistment system works.

13 MR. TUNHEIM: Well, I think the answer to that
14 lies in the purpose of the dual enlistment system, Justice
15 Kennedy. It was created in 1933 for -- for one particular
16 reason, and that was so that the -- that National Guard
17 units as trained units could be federalized quickly in
18 case of an emergency or wartime situation.

19 The problem in World War I was that -- that the
20 National Guard units were disbanded. The individuals were
21 drafted as individuals, and then once they were in the
22 federal army the federal government tried then to recreate
23 these -- these organized units.

24 That was the purpose of dual enlistment, to
25 provide for a quick mobilization of organized units. It

1 had nothing to do with training; and also, it was
2 expressly limited to use during a national emergency or
3 wartime. Congress, in 1933 when dual enlistment was
4 created, in no way intended to divest from states the
5 training authority over the National Guard, and Congress
6 didn't understand in 1933 that it was divesting such
7 training authority. There wasn't federal training of the
8 National Guard that went on at that time.

9 QUESTION: Well, Mr. Tunheim, in this particular
10 case were the troops federalized and ordered to Honduras
11 for training?

12 MR. TUNHEIM: Yes. They were -- they were
13 federalized for purposes of Section 672, which is the
14 training procedures, the training section for two-week
15 purposes.

16 QUESTION: Is it possible that the term
17 "discipline" in the militia training clause includes the
18 concept of location of the training?

19 MR. TUNHEIM: Justice O'Connor, I think the term
20 "discipline" clearly means the standards to be applied to
21 training. The framers, in fact, feared this very problem
22 of confusing the authority of discipline and the authority
23 of training. One of the delegates proposed that -- that
24 the training reservation to the states simply be
25 eliminated because, of course, the states would have that

1 authority because it wasn't being expressly given to the
2 new federal government, and the delegate was talked out of
3 it because of the fear that discipline might someday be
4 read and interpreted broadly enough to include training.

5 The framers were very concerned about
6 maintaining an effective state control over the militia
7 except during times of emergency, and the reservation of
8 training clause really has to be viewed in that light
9 along with the appointment of officers clause.

10 QUESTION: Does the militia clause speak
11 of -- of emergency? I mean, Section 16 which you say has
12 been violated, the authority of training militia going to
13 discipline, does it -- is it qualified in any way by the
14 existence of an emergency?

15 MR. TUNHEIM: Not in clause 16, Mr. Chief
16 Justice. clause 15 sets forth three purposes for which
17 the militia can be called into the federal service. Those
18 are, in essence, emergency situations, and the State's
19 argument is also that Congress has the power under the
20 army clause during an emergency to call the -- to
21 federalize the militia, to call the National Guard into
22 the federal service based on this Court's decision in the
23 Selective Draft Law cases.

24 Now let me just explain in a nutshell the
25 State's position. As I said, when -- when the nation

1 faces a national emergency, it is our view that Congress
2 has complete power to federalize the National Guard under
3 the army clause, or Congress can utilize the three
4 purposes in clause 15 for calling the National Guard into
5 the federal service.

6 In either case, state authority is completely
7 removed; but, absent those circumstances, states retain
8 basic control over the National Guard, particularly with
9 respect to training which is expressly reserved to states.
10 This position harmonizes the army clause with the militia
11 clauses instead of reading out of existence the militia
12 clauses, which is the ultimate effect of Respondents'
13 position.

14 The National Guard is really a quintessential
15 state organization. The state militias, which every state
16 had and has had since the beginning, were organized into
17 the National Guard pursuant to Congress' power to organize
18 the militia. They have remained state organizations of
19 vast importance to the states throughout the years. The
20 National Guard is relied on very heavily --

21 QUESTION: Excuse me. You say they were
22 organized pursuant to Congress' power. Is there anything
23 that would have prevented the Governor of Minnesota from
24 simply issuing an order saying that henceforth what has
25 been the -- the state national guard is now denominated

1 the state unorganized militia? Could he do that?

2 MR. TUNHEIM: The State -- unorganized --

3 QUESTION: He just gives it a new name. He says
4 this is no longer Minnesota's organized militia.

5 Now the consequence of that will be that we
6 would get no federal assistance, no tanks, planes and so
7 forth, no firearms from the federal government, but it
8 would be our -- our own unorganized militia that we can
9 train wherever we want.

10 Is there anything in law that would prevent him
11 from doing that if he did not want a federally funded
12 state national guard?

13 MR. TUNHEIM: Justice Scalia, if the governor
14 wanted to do that he would not be able to maintain under
15 federal law any other organized militia other than these
16 defense forces.

17 QUESTION: Fine. It wouldn't be called an
18 organized militia, but it would be the same unit, the same
19 officers, the same enlisted personnel. He could do that,
20 couldn't he? Just give it a different name. You are
21 henceforth an unorganized militia.

22 And the only consequence of that would be he'd
23 get no federal money.

24 MR. TUNHEIM: They would not participate at all
25 in -- in the federal system?

1 QUESTION: That's right.

2 MR. TUNHEIM: That's true; but, of course,
3 federal law would not allow any organized militia.

4 You say an unorganized militia --

5 QUESTION: But this is -- he's called it an
6 unorganized militia.

7 MR. TUNHEIM: Okay. Well, the unorganized
8 militia really is nothing. It's not organized at all.
9 It's just a group of citizens.

10 QUESTION: Well, he's chosen to do that.

11 QUESTION: He's chosen otherwise.

12 QUESTION: So, really, all you're complaining
13 about is you want the federal money but you don't want to
14 be subject to federal training orders.

15 QUESTION: Yeah.

16 MR. TUNHEIM: I don't think that's the issue,
17 Justice Scalia. The issue is that the states were
18 reserved the authority of training the National Guard, and
19 that authority is now being taken away in the Montgomery
20 Amendment.

21 It's express language in the Constitution in
22 clause 16 that training authority is reserved to the
23 states and just by --

24 QUESTION: For -- for the organized militia,
25 which is your point?

1 MR. TUNHEIM: For -- for the organized militia,
2 right.

3 QUESTION: But in the Selective Draft Law Cases
4 the court said that the power of Congress to raise armies
5 could narrow the effect of a militia clause.

6 MR. TUNHEIM: During an emergency or wartime
7 situation.

8 QUESTION: Well, it did, but the language
9 doesn't say that.

10 MR. TUNHEIM: Well, I think -- I think, Mr.
11 Chief Justice, in reviewing the Selective Draft Law cases
12 you really can't separate that case from the context in
13 which it was written.

14 The issue in that case was whether the militia
15 clauses somehow immunized an ordinary citizen from
16 mandatory conscription during a world war and, of course,
17 the answer to that was no. Congress would not have any
18 power to raise an army without conscription other than by
19 volunteers.

20 That case did not involve the National Guard.
21 It did not involve the organized militia. It did not
22 involve the states or the states' reserved power under
23 clause 16. It did not involve training, either peacetime
24 or wartime.

25 In fact, the Solicitor General in arguing that

1 the Selective Draft Law was constitutional assured the
2 court that had had no impact on peacetime training of the
3 National Guard which was reserved to the states.

4 And that really in that case if you look at it
5 properly, there was no conflict between the clauses
6 because the militia clauses do not give rights to
7 individuals. They give rights to Congress and to the
8 states in this balance of power that -- that the framers
9 created.

10 To the extent that I think Selective Draft Law
11 cases is relevant here, they recognize that Congress has
12 very strong powers during wartime and during emergency
13 situations.

14 Congress understood that in 1933 when it
15 codified this emergency power into -- in -- and created
16 the dual enlistment system.

17 The court also warned in the Selective Draft Law
18 cases against an interpretation that would effectively
19 destroy the militia clauses. I think that case has to be
20 limited to the context in emergency, and that's completely
21 consistent with the states' position in this case that
22 Congress does have the army -- army clause power during an
23 emergency to federalize the National Guard.

24 Let me talk just briefly about -- about the
25 framers and what they intended here.

1 To the framers the militia were really the
2 citizen soldiers belonging to the various states, an issue
3 of -- of extreme controversy and -- and substantial debate
4 in the summer of 1787 was how much control to take away of
5 the militia, to take away from the states and give to the
6 new federal government.

7 Many wanted to retain plenary state control over
8 the militia because they greatly feared, the framers
9 greatly feared, the effect of a large standing federal
10 army, and they believed that state control would be a very
11 important -- a very important check on misuse of the
12 federal -- federal army.

13 They rejected Alexander Hamilton's proposal to
14 make the militia totally subject to the federal
15 government. They were also concerned, however, with
16 providing the federal government enough authority during
17 an emergency situation to be able to have access to the
18 militia, and so they reached a compromise. The militia
19 would remain a state organization, but in an emergency for
20 limited purposes Congress would have power to call the
21 militia into the federal service.

22 QUESTION: Could Congress have had power to call
23 the militia of Minnesota what we call the National Guard
24 to Honduras for a year to execute the laws of the United
25 States under clause 15?

1 MR. TUNHEIM: If that were the purpose of the
2 call, to call forth into the federal service to execute
3 the laws of the United States, yes.

4 QUESTION: And the governor would have no veto
5 power with reference to that?

6 MR. TUNHEIM: Absolutely none if there's a call
7 pursuant to clause 15.

8 QUESTION: But your position is that this call
9 was under the training provision --

10 MR. TUNHEIM: This was clearly --

11 QUESTION: -- not -- not under any of the three
12 purposes in clause 15?

13 MR. TUNHEIM: Yes, Justice O'Connor. This
14 clearly was a call for training purposes, or
15 federalization for training purposes, and nothing more.

16 QUESTION: So that means we are in a position
17 where we can't train them to do some of the things that we
18 have to call them forth to do?

19 MR. TUNHEIM: The Constitution, Justice Kennedy,
20 gives to states the power to train, the authority over
21 training the -- the militia.

22 Congress can prescribe the discipline so that
23 the militias, the National Guards of the various states
24 can work together and can fire the same weapons, can read
25 out of the same drill manuals, can drive the same tanks or

1 bulldozers. That's Congress' power to specify the
2 discipline. But the power, the -- the authority over the
3 training, which is the precise words in the Constitution,
4 is reserved to the states.

5 The framers thought it was so imperative to
6 reserve this power to the states that they wrote it into
7 the Constitution. A document that writes in very little
8 express reserved powers for states because it's a document
9 that gives limited powers to a new federal government, it
10 was so imperative for maintaining this control, this
11 balance of power, the checks and balances which are
12 inherent in the Constitution that they wrote it in, and it
13 is the language of the Constitution.

14 QUESTION: The power of training reserved to the
15 state was to be exercised according to the discipline
16 prescribed by Congress. What does that mean?

17 MR. TUNHEIM: The discipline, Justice White --

18 QUESTION: You mean, does that --

19 MR. TUNHEIM: -- means the standards.

20 QUESTION: The standards and what they're
21 supposed to teach them?

22 MR. TUNHEIM: What they're supposed to teach
23 them.

24 QUESTION: What they're supposed to learn?

25 MR. TUNHEIM: The -- the -- originally it was a

1 drill manual.

2 QUESTION: So the states would just be -- would
3 just be -- sort of a, just carrying out what Congress says
4 they must do.

5 MR. TUNHEIM: That's -- that's precisely
6 correct. The states, though, have the authority over the
7 training. I think that that --

8 QUESTION: What is that -- what is that
9 authority over the training? What if the Congress says
10 twice a year you will train, and here's what you will --
11 here's the routine you will go through, and the state has
12 absolutely no discretion about either time or place or
13 what they are supposed to do when they train.

14 MR. TUNHEIM: Well, if you read discipline --

15 QUESTION: Is that right?

16 MR. TUNHEIM: I -- I don't think that's right,
17 Justice White. If you read the term discipline that
18 broadly, it encompasses a good part of what's involved in
19 the authority of training. There's not -- it's difficult
20 to find a bright line in here between discipline and
21 training, but I think it is that the discipline is the
22 generalized commands that are given by Congress to the
23 states, and the particularized application of those
24 general commands are what training is and what is reserved
25 for the authority of the states.

1 I will reserve my remaining time if there are no
2 further questions.

3 QUESTION: Very well, Mr. Tunheim.

4 General Starr.

5 ORAL ARGUMENT OF KENNETH W. STARR

6 ON BEHALF OF THE RESPONDENTS

7 MR. STARR: Mr. Chief Justice, and may it please
8 the Court:

9 The army clause of the United States
10 Constitution provides in broad terms that the Congress
11 shall have power to raise and support armies, and
12 consistent with the breadth of the text of the
13 Constitution this Court has broadly construed this clause
14 and the powers that are granted under this clause.

15 The Court has described the powers granted under
16 it as plenary, as broad and sweeping and, importantly for
17 purposes of this case, as not limited by the militia
18 clauses.

19 Coupled with the necessary and proper clause,
20 there is little doubt -- and we have heard today -- that
21 there is no dispute that Congress had the power under the
22 army clause to create an entity. That entity is the
23 National Guard of the United States, and it created it as
24 a component of the armed forces of the United States.

25 When it created the National Guard of the United

1 States in 1933, Congress was very clear. It relied
2 expressly on this Court's World War I decisions in the
3 Selective Draft Law cases and Cox against Wood. And the
4 theory of those cases is that to the extent that Congress
5 exercises its powers under the army clause the efficacy,
6 the sweep of the militia clause is thereby limited.

7 QUESTION: Well, General Starr, in the statutes
8 when Congress created this National Guard of the United
9 States, as I understand it the statutes did provide that
10 the Secretary of Defense could order any national guard
11 unit into active duty for not more than 15 days a year
12 with the consent of the governor.

13 Now I guess it's your position that that
14 provision wasn't necessary.

15 MR. STARR: That's correct. That is our
16 position.

17 QUESTION: That Congress didn't have to say
18 we'll give the governor a voice.

19 MR. STARR: That is precisely our position
20 because of what this entity is.

21 QUESTION: Would you -- would you be so kind as
22 to tell me in this case whether you claim that the
23 President called the guard to Honduras under one of the
24 three purposes of the militia clause?

25 MR. STARR: No, it did not. The President did

1 not, or the Secretary, and the authority did not. This is
2 not --

3 QUESTION: Well, were they called under the
4 training clause of the militia clause?

5 MR. STARR: No, they were not. They were called
6 under the army's clause. They were called in their
7 capacity as part of the Army and Air Force of the United
8 States.

9 QUESTION: Well, when -- when the National Guard
10 was created, was Congress acting pursuant to its power to
11 organize the militia?

12 MR. STARR: Congress was acting in 1933 under
13 its army clause powers, not under its organization --

14 QUESTION: Well, but Section 310 says that there
15 is the organized militia, which is the National Guard.
16 And it seems to me very odd for you to say that the
17 militia clause, the organization clause, is not being
18 relied upon when they create the National Guard. I just
19 can't square that with Section 310.

20 MR. STARR: This is critical, Justice Kennedy.
21 Section 311 speaks of the national guard. You're quite
22 right. What I'm speaking of is the National Guard of the
23 United States. There are two separate entities. That is
24 the thrust, that is the essence of the dual enlistment
25 concept. If I leave nothing else today, I want to leave

1 the Court with that clear distinction.

2 An individual who serves in his or her national
3 guard unit serves in two capacities. That individual is,
4 indeed, a state militia person, but that person also since
5 1933 takes an oath of allegiance under the Constitution of
6 the United States to obey the orders of the President, and
7 the Congress has seen fit to give powers both unto itself
8 in its exercise of army clause powers to make use of this
9 reserve component, and it's a critical part of the
10 reserves. The National Guard of the United States, when
11 it goes to Honduras, when it goes as it is now --

12 As we speak, approximately 4,000 national
13 guardspersons are in training operations in South Korea.
14 Some of those individuals who have been involved in that
15 exercise are from Minnesota. They are not there in their
16 militia hats. They do wear those hats when they return to
17 Minnesota and the other states, but when they have been
18 summoned under the authority of 672(b), they are summoned
19 in their capacity as members of the reserves of the United
20 States Armed Forces.

21 QUESTION: General Starr, is it within the power
22 of a governor of a state to say I want to have my own
23 militia that works for me full-time, I am willing to fund
24 them, to buy their arms or they will fight with karate if
25 necessary, but I do not want them to be part of the

1 national guard, and, therefore, I am establishing a state
2 militia that will be an unorganized militia, we will have
3 no organized militia. Can a governor do that?

4 MR. STARR: Several points. There is no
5 obligation on the part of any state to maintain a national
6 guard. The federal statutes --

7 QUESTION: Why don't you answer yes or no and
8 then go on and tell me?

9 Can a governor do that?

10 MR. STARR: The governor cannot violate Article
11 I, Section 9 of the Constitution with respect to
12 maintaining troops in peacetime without Congress' consent.
13 Congress has consented, as we have heard today, to the
14 creation of state defense forces, and we see that in
15 federal -- I'm sorry?

16 QUESTION: I thought the Constitution allows the
17 state to have a militia. They can't have a militia
18 without Congress' consent?

19 MR. STARR: In terms of maintaining -- it
20 depends on whether they are troops. If they are -- your
21 hypothetical, other than karate training, contemplated
22 equipping these individuals with arms.

23 QUESTION: Well, I assume militia have arms.
24 Don't you think that --

25 MR. STARR: Not at the time of the founding.

1 They supplied their own, and for over 100 years the
2 individuals in the militia were obliged to supply their
3 own arms. Therein lies the purpose of the Second
4 Amendment, to maintain the right of the people to bear
5 their arms so they can serve in the militia.

6 Under your hypothetical, the governor is seeking
7 to create an armed force. That he can only do with the
8 consent of Congress.

9 QUESTION: I see. Well, this is a harder case
10 than I thought, then. You -- you are saying, then, that
11 the state cannot have a -- a militia that it arms
12 unless -- any militia it arms will automatically be
13 subject to this dual system. It cannot avoid it.

14 MR. STARR: Unless it comes within 109(c), which
15 is the provision for state defense forces. Congress has
16 consented to the creation of --

17 QUESTION: That's a matter of grace.

18 MR. STARR: Exactly.

19 QUESTION: And you're saying that Congress can
20 set it up in such fashion that the state cannot have any
21 militia of its own which it arms that cannot be subject to
22 the beck and call of -- of the United States?

23 MR. STARR: It cannot equip individuals without
24 the consent of Congress.

25 May I -- may I, however, add this very critical

1 point? The militia is contemplated by the founders. This
2 is clear as can be. I don't think there is any dispute
3 that the militia was viewed as it is used in the
4 Constitution, as the able-bodied populace, able to pick up
5 and bear arms to defend. It did not mean those
6 individuals who are serving in a particular unit.

7 QUESTION: But the framers, General Starr, were
8 very careful to say that Congress has the authority to
9 organize that militia?

10 MR. STARR: That is true.

11 QUESTION: And you have been very careful to say
12 that that isn't what's happening here.

13 MR. STARR: In this respect, that is exactly
14 right, that Congress has not been exercising its militia
15 powers, which it does have under clause 15, to organize,
16 and we think that includes defining who is serving in the
17 militia.

18 QUESTION: Well, is it -- is it clear that the
19 framers thought that Congress could prevent the states
20 from setting up their own militia and giving them
21 equipment?

22 MR. STARR: In terms of giving them equipment, I
23 don't think the record is clear on that, but what we do
24 know is that the Congress in 1792 determined that the
25 individuals who would in fact be serving in the militia,

1 all able-bodied persons, would supply their own, and it
2 certainly was --

3 QUESTION: What -- what provision of the
4 Constitution is it that you rely on to say that a state
5 may not have its own militia that it arms?

6 MR. STARR: Oh, I'm sorry, not militia, but may
7 not maintain troops in peacetime without the consent of
8 Congress.

9 QUESTION: What provision is that?

10 MR. STARR: That is Article I, Section 9, which
11 limits the powers of the states. "No state shall, without
12 the consent of Congress, lay in a duty of tonnage, keep
13 troops or ships of war in time of peace," and so forth.

14 QUESTION: That means full-time troops, isn't
15 that the meaning? The militia, you know, the Minuteman,
16 he's a farmer and then he's called to service, but when
17 he's called to service it doesn't mean he can't use a
18 tank. I don't know how you read that to say that the
19 state can't arm them, as opposed to meaning that the state
20 cannot have a full-time army, but that's not what we're
21 talking about here.

22 MR. STARR: As long as the individuals do not
23 rise to the level of troops, there is no question that the
24 Governor -- first of all, the Governor enjoys --

25 QUESTION: But that's not involved here, is it,

1 Mr. Starr?

2 MR. STARR: It is not involved here, at all.
3 That is correct, Justice Kennedy. What is involved
4 here --

5 QUESTION: What troubles me is that the Congress
6 of the United States has authority to organize and arm the
7 militia, not to create it, and the state has the right to
8 create it, and there's a reserved right of the state to
9 control it. There is reserved power in the Governor to
10 control the militia, is there not, under the Constitution?

11 MR. STARR: The only control is that of the
12 appointment of officers, clause 16, and the authority of
13 training the militia according to the discipline
14 prescribed by Congress.

15 That is to say, Congress could, if it saw fit,
16 summon forth all able-bodied persons into service of the
17 country. It could authorize the President to do that.
18 That is precisely what the President did, and that's what
19 Congress has authorized it to do, in providing for
20 military training for those persons who wear their twin
21 hats, their double hats.

22 These individuals are being trained in Honduras
23 or South Korea or Europe or elsewhere as members of the
24 reserves of the United States Armed Forces, and this is
25 critical. This is absolutely critical, that as a

1 practical matter, since the 1970s, U.S. strategic doctrine
2 is such that the use of the National Guard of the United
3 States as members of the reserve component of the Armed
4 Forces is critical.

5 As we outline in our brief at a time of full
6 mobilization, 18 of the Army's combat divisions, 18 of the
7 28, would be National Guard of the United States units. A
8 very substantial part of the United States Air Force is
9 the United States National Guard Air Force, the National
10 Guard of the United States.

11 QUESTION: Is it fair to say that the war power
12 here is being used, in effect, to override a reserved
13 power given to the states under Article 16?

14 MR. STARR: I don't think so. I think this
15 is -- I would say, it's an exercise of the army's clause
16 power. I don't think there's any override, because the
17 state interest that is involved here is a very strange
18 one. What the Governor is seeking to do is not to forbid
19 overseas training of the Armed Forces of the United
20 States. There's no objection to their being trained in
21 South Korea and Europe.

22 What the Governor has sought to do is to play a
23 role in the foreign policy and defense policy of the
24 United States, to say they should not be trained in
25 Central America, even though troops are employed in

1 Central America and National Guard of the United States
2 troops are employed and were employed in the Panamanian
3 operation, they were employed in the Grenadan operation,
4 they were employed in the Libyan air strike, and they have
5 been employed in all major activities of the Nation's
6 Armed Forces since the creation of the National Guard in
7 '33.

8 QUESTION: Did any governors object to any of
9 those instances you mentioned?

10 MR. STARR: No. There was no gubernatorial --

11 QUESTION: Well, then there was no
12 constitutional problem.

13 MR. STARR: There was no gubernatorial
14 objection, because I think until quite recently there was
15 no sense at all that there was any basis for objecting to
16 the training of individuals in their capacities as the
17 Armed Forces of the United States. Again, that is what
18 these individuals are.

19 QUESTION: General Starr, can I ask you a
20 question? I just want to be sure I understand your
21 position.

22 MR. STARR: Yes.

23 QUESTION: On the basic notion of the dual
24 enlistment system, do I correctly understand you to say
25 that the states really have no alternative, they cannot

1 operate a separate militia as contemplated by the militia
2 clause, if Congress says the only militia you can have has
3 to have this dual status? Do they have any kind of option
4 under the Constitution?

5 MR. STARR: They certainly have the option not
6 to participate in the National Guard system, that is
7 clear.

8 QUESTION: But can they have -- if they don't
9 participate in the National Guard system, may they have
10 their own separate militia?

11 MR. STARR: They may have their own state
12 defense forces --

13 QUESTION: No.

14 MR. STARR: -- that are carrying out militia
15 functions.

16 QUESTION: Can they have the militia -- whatever
17 that term means in the militia clause of the Constitution,
18 can they have that animal without having that animal
19 become part of the United States Army?

20 MR. STARR: Yes, they can. I don't see any
21 reason constitutionally that they cannot.

22 QUESTION: I thought earlier you said that they
23 couldn't. That's why I'm really puzzled.

24 MR. STARR: The concern I have is with respect
25 to consent with respect to maintaining troops. It has to

1 do with what the function is. If the function of the
2 state defense forces, as it is, is to maintain law and
3 order and to respond in terms of emergencies and the like,
4 then they certainly do have that power to maintain that
5 sort of entity.

6 QUESTION: Well, they want to have a militia
7 that would be available to become part of the United
8 States if war should be declared. They want to train
9 their own people, and so forth, according to the
10 discipline prescribed by Congress. But you say they
11 cannot do that, because that would be maintaining troops
12 in violation of --

13 MR. STARR: Well, in addition, what Congress has
14 seen fit to do is to define in federal law the militia of
15 the United States, and it is indicated that that consists
16 of all able-bodied males of a certain age. It then breaks
17 the militia into two classes.

18 QUESTION: What section is this?

19 MR. STARR: This is 10 United States Code
20 Section 311, and the organized militia is then defined as
21 the National Guard and the naval militia. Now, Congress
22 has seen fit, as I say, to provide for the creation of
23 state defense forces, but Congress has the power given to
24 it at the founding in the Constitution to provide for
25 organizing and arming and disciplining the militia, so

1 Congress can, in fact, organize it and has done so.

2 QUESTION: The Petitioner says that Congress has
3 also forbidden the states to have an organized militia
4 except under the terms that Congress has provided, which
5 also makes them part of the national reserve component.
6 Is that correct?

7 MR. STARR: Well, I take issue with that in
8 terms of the definition in the Constitution of the
9 militia. That is to say, the militia is not defined, and
10 it was understood -- it was understood at the founding
11 that the militia consisted of a body of persons. Those
12 individuals may, in fact, be called into the service of
13 the United States. That has the effect of preempting any
14 state functions that those individuals might in fact
15 otherwise be carrying on.

16 QUESTION: Yes, but they can only be called,
17 according to the Constitution, into the service of the
18 United States for the three purposes that are specified:
19 to execute the laws of the Union, suppress insurrection
20 and repel invasion.

21 MR. STARR: That's quite true. They can only be
22 called -- the militia can only be called into service --

23 QUESTION: That's quite different from calling
24 them into duty for the purposes of training in Honduras.

25 MR. STARR: That's quite right, and that's why

1 Congress in fact exercised army clause powers in 1933. It
2 did not exercise militia clause powers. If one looks at
3 the background of what Congress did, Congress did not say,
4 we are exercising our rights to organize the militia,
5 clause 16. We're doing that in order to prepare for the
6 exercise of clause 15 powers. Not at all. They said,
7 we're exercising our army clause powers. That's what
8 we're exercising, and these individuals are becoming
9 members of the reserves, of the Armed Forces of the United
10 States.

11 QUESTION: Well, Mr. Starr, when Section 311
12 says that -- in 311(b) -- the classes of the militia are
13 (1) the organized militia, which consists of the National
14 Guard and the naval militia, (2) the unorganized militia,
15 which consists of the members of the militia who are not
16 members of the National Guard or the naval militia, does
17 "organized" and "unorganized" have any objective meaning,
18 or is it just a convenient term to refer to those militia
19 that are the National Guard and those militia that aren't?

20 MR. STARR: I think it means Item (2), (b)(2),
21 means that part of the pool of able-bodied persons defined
22 in (a), the militia of the United States consists of
23 all -- in fact, it's --

24 QUESTION: What does "unorganized" mean? I
25 mean, does it mean that they can't be organized?

1 MR. STARR: No. What it means is, they have not
2 been organized.

3 QUESTION: They haven't been federally
4 organized?

5 MR. STARR: They haven't been organized at all.

6 QUESTION: So a state cannot have any organized
7 militia that isn't part of the National Guard. They can
8 also --

9 MR. STARR: No, that's not true. Cannot have a
10 militia --

11 QUESTION: Well, they have to be federally
12 organized?

13 MR. STARR: Our definitional difficulties are
14 arising by virtue of different uses of the term "militia."
15 The term "militia" as used in the Constitution, as I see
16 it, has to do with those able-bodied persons who can in
17 fact be summoned by the state, by the Governor -- and the
18 Governor has that power. This is important.

19 The Montgomery Amendment does not -- does not --
20 even if one were to say this is the militia, the
21 Montgomery Amendment simply says, Governor, you can't
22 object to their training as Armed Forces of the United
23 States on these four enumerated grounds.

24 If you need them -- if you need them in
25 Minnesota, you can keep them in Minnesota.

1 QUESTION: I'm trying to get back to whether the
2 Governor can organize them. I mean, surely the -- surely
3 the state's ability to train them includes the ability to
4 organize them. The state cannot have an organized
5 militia, it can only have -- you know, able-bodied men out
6 there who may have their own rifles, and it can't even
7 appoint officers and -- I mean, the appointment of the
8 officers is left to the state. That implies organization,
9 doesn't it?

10 MR. STARR: It certainly implies that those
11 individuals who are in the unorganized militia may become
12 organized. Now, Congress has been given the power
13 to organize.

14 QUESTION: So you really think the unorganized
15 militia means -- in this statute means unorganized, that
16 the state has no independent authority to organize a
17 militia, all it can do is designate a bunch of people who
18 we say, you are militia, but we can't organize you without
19 federal consent. Is that the government's position?

20 MR. STARR: In terms of maintain -- as long as
21 they do not run afoul -- it's not involved in this case,
22 but as long as they do not run afoul of the maintaining
23 troops in wartime -- in time of peace. I see -- there's
24 nothing specific that says, you cannot take certain
25 actions.

1 What we do have in federal law are
2 authorizations to establish state defense forces, and 30
3 states have availed themselves of that, and that is
4 completely outside the ambit of the National Guard.

5 QUESTION: I think you've said they can
6 organize, so long as they don't run afoul of the
7 maintaining troops clause, whatever that might mean.
8 Right?

9 MR. STARR: That is correct. They can -- they
10 can organize, but that power can in fact, it seems to me,
11 be overridden, if Congress sees fit to exercise its clause
12 16 power.

13 QUESTION: There are a lot of questions that are
14 kind of lurking on the edge of this case --

15 MR. STARR: Yes.

16 QUESTION: -- that we really don't have to
17 decide in writing an opinion one way or the other.

18 MR. STARR: I fully agree with that.

19 (Laughter)

20 MR. STARR: And many of those questions have
21 been discussed at length here.

22 If one reads the Court of Appeals opinion en
23 banc, one sees, it seems to me, a very clear and correct
24 opinion.

25 When Judge Magill, in writing for the

1 overwhelming majority of the en banc court, comes to the
2 conclusion, at that part where he says, Congress was
3 exercising its army clause powers here, and that power is
4 sufficient to establish the armed forces of the United --
5 to include in the armed forces of the United States, these
6 individuals, that is the end of this case. Congress'
7 power is plenary. There is no question.

8 Getting back to Justice O'Connor's earlier
9 questions. There is no question that these individuals
10 were in federal status. Whatever the limits of power,
11 there is no question that they were in federal status.

12 Indeed, they need to be in federal status in
13 order to enjoy federal benefits, in order to enjoy federal
14 protections under status of forces agreements.

15 QUESTION: General Starr, I have no doubt that
16 Congress' power is plenary, but I'm not sure that we're
17 going to read Congress' power to totally eliminate another
18 power, namely, the power of the states to maintain
19 militia, any more than we would enable Congress to -- to
20 draft all state governments, and say all members of state
21 governments are automatically members of the National
22 Guard, and we may send them abroad at our will.

23 That would be destroying another governmental
24 institution that's in the Constitution. And what I'm
25 concerned about is the position you're taking is indeed,

1 in fact, that that's what the government can do. That by
2 simply waving a wand over the state militia and saying you
3 are now federal militia, the government, you are saying, I
4 think, can eliminate the power that was reserved to the
5 states to have their own militia and to train them.

6 MR. STARR: I think, Justice Scalia, that,
7 although not involved in this case, I must state that that
8 is not involved in this case. This is an extremely
9 limited regulation. This is a system of cooperative
10 federalism that works very well. It worked
11 extraordinarily well until governors sought to play a role
12 on the stage of foreign policy, and then Congress stepped
13 in.

14 It stepped in narrowly; it stepped in precisely.
15 But, to get to your theory, I think that is the theory of
16 the case in selective draft law cases.

17 QUESTION: Do you know of any authority for the
18 proposition that an express power given to Congress can
19 override an express limitation on Congress' power under
20 some other provision of the Constitution?

21 MR. STARR: When these individuals -- the answer
22 is -- is no. But when these individuals have been
23 summoned to serve their country, I don't think there is
24 any doubt that Congress has the power to pass a law that
25 has the effect of summoning all able-bodied persons to

1 serve their country.

2 That has the effect -- and that's what Chief
3 Justice White recognized in Selected Draft Law cases, he
4 recognized it again in Cox against Wood, that that has the
5 inevitable effect of shrinking the compass, shrinking the
6 operation of the militia clauses.

7 Congress does not do that. It does not do that
8 because Madison saw it at the founding. That there were
9 protections -- there were political protections, that
10 states are represented in the Congress of the United
11 States.

12 But in terms of pure theory, pure theory, the
13 pure theory of Selective Draft Law cases is when it -- and
14 it stands to reason, that were we truly in a time of
15 crisis, and the nation needed the help of every
16 able-bodied person, then we ask the Congress --

17 QUESTION: Of course, those cases are easy when
18 you get a time of crisis. The question is what about
19 training when you're not in a time of crisis? That's what
20 this case is about.

21 MR. STARR: That's correct. This is not the --

22 QUESTION: May I ask you? What do you think the
23 word militia means in the Constitution?

24 MR. STARR: I think it means the pool of
25 able-bodied persons who are able to serve their country or

1 to serve their state. I think it means a pool of persons.
2 And that is the definition, in effect, that was given to
3 the militia in 1792 by the initial Militia Act that
4 remained in effect until 1903.

5 The militia is you and I, if we're of a certain
6 age category --

7 QUESTION: Which we aren't --

8 MR. STARR: -- who can be --

9 (Laughter.)

10 MR. STARR: I am still in the militia.

11 QUESTION: All right.

12 (Laughter.)

13 MR. STARR: Others, I suppose, are emeriti
14 members of -- of -- of the militia.

15 (Laughter.)

16 MR. STARR: I think --

17 QUESTION: I don't know what I was now.

18 (Laughter.)

19 MR. STARR: But I think that's what the militia
20 clauses of the Constitution are getting at.

21 QUESTION: May I ask --

22 MR. STARR: They're talking about that pool of
23 persons who can be summoned.

24 QUESTION: May I ask one other question? Is the
25 argument you're making today the same argument you

1 submitted in your brief? Have you changed your position
2 at all? I didn't really -- I had a different view of your
3 position in your written brief than I do now.

4 MR. STARR: No, and --

5 QUESTION: For example, I don't think you relied
6 at all on the troops -- the prohibition --

7 MR. STARR: Oh, I did that only in response to
8 questions about what is the authority of governors to go
9 and organize militia units? That's correct. This case is
10 a very narrow case. The argument has very been wide
11 ranging. But the case, the issue that is before the Court
12 is exceptionally narrow, that does not require us to
13 visit --

14 QUESTION: It involves training in a time when
15 there's no emergency.

16 MR. STARR: That is correct. But the critical
17 point, Justice Stevens, is, what are these individuals
18 when they are "being trained"? They are troops of the
19 United States. They wear two hats. When they went to
20 Honduras, they were wearing their federal hats.

21 QUESTION: They wear two hats, and as I
22 understand it now, and frankly I didn't -- but they must
23 wear two hats, too. That's what I -- that's the
24 impression I have from your whole argument.

25 MR. STARR: The National Guard, since -- that is

1 correct. To be in the National Guard of the United States
2 one must be in the National Guard, the state National
3 Guard.

4 There may be some individuals who are members of
5 the National Guard but who are not members of the National
6 Guard of the United States. I understand there are a few
7 persons in that category, but you're quite right, since
8 1933, an individual to sign up, to enlist in the National
9 Guard, enlists in both.

10 QUESTION: General Starr, as an old buck private
11 in the rear rank of a Minnesota guard, I can say that not
12 a one of us in the rear rank would understand this
13 argument today.

14 (Laughter.)

15 QUESTION: We -- we knew that we had to go to
16 Camp Ripley -- you won't know where that is, but Mr.
17 Tunheim will. Or to, indeed, Lake City. But the thought
18 of this dichotomy would be too much for the ignoramuses,
19 such as I, that were in that rear rank.

20 (Laughter.)

21 QUESTION: I'm delighted to learn about the
22 Minnesota National Guard.

23 MR. STARR: May I respond very briefly to that?

24 QUESTION: No, that's not a question, General
25 Starr.

1 (Laughter.)

2 MR. STARR: I thank the Court.

3 QUESTION: Mr. Tunheim, you have two minutes
4 remaining.

5 REBUTTAL ARGUMENT OF JOHN R. TUNHEIM
6 ON BEHALF OF THE PETITIONERS

7 MR. TUNHEIM: Thank you, Mr. Chief Justice.

8 The essence in this case is really a dispute
9 over what dual enlistment means. And I remind the Court
10 that these two entities are the same organization. These
11 are the same people. Dual enlistment merely created a
12 reserve force which relies completely on the states, on
13 the National Guard, that the state organize militias for
14 its members.

15 The Respondent tries to claim, somehow, that the
16 National Guard of the United States and the National Guard
17 are kind of like apples and oranges; you can switch the
18 hats. They really aren't even apples and apples. They
19 are the same apple.

20 These are the same people, and you just cannot
21 wave this magic wand and eliminate constitutional
22 protections, constitutional limitations, which were the
23 essence of a compromise that the framers made 200 years
24 ago over the control over the -- of the militia.

25 The --

1 QUESTION: May I ask you what you think the term
2 militia means in the Constitution?

3 MR. TUNHEIM: I think the term militia in the
4 Constitution refers to the militia organizations that the
5 states had at the time that the framers sat down to write
6 the Constitution. It has been used in the sense of every
7 able-bodied person who's available, but once it is
8 organized, it is organized as a militia.

9 QUESTION: But -- but the power to organize the
10 militia is given to Congress.

11 MR. TUNHEIM: And Congress has exercised that
12 power, has organized the militia, and has created the
13 National Guard. That is the entity that we're talking
14 about today.

15 Now they've gone beyond that to interpret dual
16 enlistment, which has never been interpreted to -- to
17 eliminate constitutional protections to -- to now require
18 that -- that to be done under the army clause.

19 In 1933, when dual enlistment was created, its
20 use as a federal force, the National Guard of the United
21 States was expressly limited to emergencies, relying on
22 the Selective Draft Law cases. When that was changed to
23 bring the National Guard into federal training for the
24 first time in 1952, it was done only pursuant to the
25 governors' consent.

1 State authority over training has been
2 consistently recognized for 200 years, until the enactment
3 of the Montgomery Amendment.

4 QUESTION: Thank you, Mr. Tunheim.

5 MR. TUNHEIM: Thank you, Mr. Chief Justice.

6 CHIEF JUSTICE REHNQUIST: The case is submitted.

7 (Whereupon, at 11:10 a.m., the case in the
8 above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 89-542 - RUDY PERPICH, GOVERNOR OF MINNESOTA, ET AL., Petitioners V.

DEPARTMENT OF DEFENSE, ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY *Lona M. May*

(REPORTER)

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