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Legal Sidebar

The Army Clause, Part 5: Relationship with Principles of Federalism

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This Legal Sidebar is the last installment in a five-part series that discusses the Constitution's Army Clause, which authorizes the federal government to raise and support armies while also allowing for congressional control through the appropriations process. Because the Army Clause provides Congress with an essential element of the United States' suite of war powers, understanding the Army Clause may assist Congress in its legislative activities.

This Sidebar post provides analyzes the relationship between the Army Clause and constitutional principles of federalism. Other Sidebars in this series discuss the clause's historical backdrop; drafting and ratification history; relationship with appropriations, conscription, and war materials; and role in individual cases. Additional information on this and related topics is available at the Constitution Annotated.

The Supreme Court has occasionally addressed disputes over how principles of federalism interact with Congress's authority to raise and support armies. An early case on the issue arose in 1871 after the father of an Army servicemember filed a *habeas corpus* petition with Wisconsin state court officials seeking the release of his son, who had been accused of desertion and was being held by the Army. A Wisconsin court ordered the son's release under the theory that he was a minor at the time of enlistment and joined the Army without his father's consent, but the Supreme Court held that state officials lacked jurisdiction to grant the request. The federal government's power under the Army Clause is "plenary and exclusive," the Supreme Court reasoned, and it would undermine federal primacy and the military's ability to function if state courts could question the legality of military custody in habeas corpus proceedings.

In the *Selective Draft Law Cases*, the Supreme Court addressed a direct federalism-based challenge to Congress's power to raise armies. A group of individuals convicted of failing to register for the draft during World War I argued that "under the Constitution as originally framed state citizenship was primary[,]" and a nationwide, all-male draft would invert this constitutional structure by causing the federal government to dominate the states. The Supreme Court concluded that this view did not comport with the drafting history, intent, or text of the Constitution. The United States' inability to raise an army without relying on the states was one of the "recognized necessities" for adopting the Constitution, the Court reasoned, and the text and intent of the Constitution give complete control over the power to raise armies to Congress while purposely denying it to the states.

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While the federal government has broad power under the Army Clause, the Supreme Court has held that states still possess some concurrent authority to legislate in areas related to conscription and raising armies. In a 1920 case, *Gilbert v. Minnesota*, the Supreme Court upheld the constitutionality of a state statute that made it unlawful to interfere with or discourage enlistment in the military. In response to the argument that the state law intruded on exclusive federal power, the Supreme Court reasoned that "the states as well as the United States are intimately concerned" with the national defense, and both federal and state government occasionally must "be animated as one" in order to prevail against "the enemies of all."

In a 1961 decision, *United States v. Oregon*, the Supreme Court rejected a Tenth Amendment challenge to a federal law providing different inheritance rules for U.S. servicemembers than those that applied to such individuals under state law. When a person died without a will or legal heirs under Oregon law, the deceased's property escheated to (i.e., became the property of) the state. Federal law, on the other hand, provided that when a servicemember died in a veteran's hospital without a will or heirs, the servicemember's estate became the property of a U.S. veteran's fund. In this case, Oregon and the United States filed claims for an Oregon resident who died in a U.S. Veterans' Administration Hospital, with Oregon claiming that the United States had no valid claim because these matters had typically been reserved to the states by the Tenth Amendment. Even though estate and property law are "normally left to the States," the Supreme Court held that this background principle was displaced when it conflicts with a law passed under Congress's "constitutional powers to raise armies" and other war powers, and the statute did not violate the Tenth Amendment. When the Supreme Court adopted a broader view of state sovereignty under the Tenth Amendment in a 1976 decision, which clarified that there are some attributes of state sovereignty that Congress cannot impair, it added a caveat that "[n]othing we say in this opinion addresses the scope of Congress's authority under its war power."

In *Torres v. Texas Department of Public Safety*, decided in 2022, the Supreme Court held that the Army Clause provides "broad and sweeping" authority, which Congress may use to encourage military service in a variety of ways. *Torres* concerned a federal law that, among other things, gives servicemembers returning from duty the right to reclaim their prior employment with state governments and to sue those governments if they refuse to provide accommodations. The law was designed to smooth servicemembers' reentry into civilian life and allow them to enforce their statutory right to re-employment through private damages suits brought against uncooperative state employers. Texas argued that it was immune from such suits under the Eleventh Amendment and the doctrine of state sovereign immunity. The Supreme Court, however, denied the state immunity under the reasoning that, when states joined the Union, they "implicitly agreed that their sovereignty would yield to federal policy to build and keep a national military" and therefore the states "'renounced their right' to interfere with national policy in this area."

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