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THE LEGAL STATUS OF THE NATIONAL GUARD UNDER THE ARMY REORGANIZATION BILL

B. M. CHIPERFIELD²

Washington—from his distressing experience with untrained and unequipped troops in the Revolutionary War—framed and expressed that formula, oftentimes quoted in this country and almost unanimously disregarded, “In time of peace prepare for war.” We glibly prate of the truth of this maxim, and stupidly and fatly and sleepily pay no heed to it.

This country has never been prepared for war, and today is likewise unprepared for strife.

In the past we have always had to pay dearly in life and treasure for our negligent condition of unpreparedness. In the first war with England we melted the statue of the King for bullets; in the War of 1812 we builded our vessels on the shores of the Lakes from timbers newly cut from the forest; in the Civil War we lacked for everything, and in the war with Spain we sent our troops to certain death from disease in the slaughter camps of the south.

Today, aside from the natural advance of ideas in connection with the science of war, we are but little better prepared to cope with a first-class power.

All this is closely related to my subject, “The Legal Status of the National Guard Under the Army Reorganization Bill.”

Not only must we prepare with men, guns and munitions, but we must as well be prepared with laws to govern the assembling and induction into the forces of the United States of the troops which are not a part of the Regular Army. If we fail then, the whole scheme of defense is endangered.

In the country today (August 28th, 1916) are found not to exceed 40,000 regular troops available for service against any foreign foe. The only reserve to this mere handful of soldiers is the National Guard of the various states. I use the words National Guard in the same sense that they are used in Section 58 of the Army reorganization bill where it says:

¹Read before the American Society of Military Law, Chicago, Aug. 28, 1916.

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"The National Guard shall consist of the regularly enlisted militia between the ages of eighteen and forty-five, organized, armed and equipped as hereafter provided and of commissioned officers between the ages of twenty-one and sixty-four years." It is of the legal status of this body of men, numbering at times from 100,000 to 175,000 men that I desire to speak. It requires no argument to establish the contention that it is of the highest importance to the nation that the "legal status" of these men should be certain and definite, that the country may surely and without question have their services in the time of need and that those composing the Guard may know both the extent of their rights and the measure of their duty.

Gouverneur Morris in a letter which he wrote to Moss Kent January 12th, 1815, recognized the need for National Control and Regulation of the Militia when he said:

"When, in framing the Constitution, we restricted so closely the power of government over our fellow citizens of the Militia, it was not because we supposed there would ever be a Congress so mad as to attempt tyrannizing over the people or militia, by the militia. The danger we meant chiefly to provide against was, the hazarding of the national safety by a reliance on that expensive and inefficient force. An overweening vanity leads the fond many, each man against the conviction of his own heart, to believe or affect to believe, that militia can beat veteran troops in the open field and even play of battle. This idle notion, fed by vaunting demagogues, alarmed us for our country, when in the course of that time and chance, which happen to all, she should be at war with a great power.

"Those, who, during the Revolutionary storm, had confidential acquaintance with the conduct of affairs, knew well that to rely on militia was to lean on a broken reed. We knew, also, that to coop up in a camp those habituated to the freedom and comforts of social life, without subjecting them to the strict observation and severe control of officers regularly bred, would expose them to such fell disease, that pestilence would make more havoc than the sword. We knew that when militia were of necessity called out, and nothing but necessity can justify the call, mercy as well as policy requires, that they be lead immediately to attack their foe. This gives them a tolerable chance; and when superior in number possessing, as they must, a correct knowledge of the country, it is not improbable that their efforts may be crowned with success. To that end, nevertheless, it is proper to maintain in them a good opinion of themselves, for despondency is not the road to victory.

“But to rely on undisciplined, ill-officered men, though each were individually as brave as Caesar, to resist the well-directed impulse of veterans, is to act in defiance of reason and experience.”

While we may not fully share the opinion so vigorously expressed by Gouverneur Morris, we can readily understand that one hundred years ago as well as now the militia was a grave and disturbing problem so far as its utility was concerned. It is a question that will never be satisfactorily settled under the present constitutional provisions.

In years past in a desultory kind of way Congress has sought to provide some certainty by various enactments, with reference to the National Guard, but not much has been accomplished in this direction.

The Dick bill provided for Federal aid in the training of the Guard; for its better organization, and to some extent sought to establish a scheme for its incorporation into the national plan of defense. It fell far short of accomplishing the purposes which it was intended to accomplish, but it was nevertheless a step forward and did some good. The law is still in force, so far as it is not abrogated by the army reorganization bill, as are also other laws, not repealed by implication by this last enactment.

Strange as it may seem it is a matter of the utmost difficulty to say just what laws passed by Congress since the adoption of the Constitution, with reference to the Army and the National Guard are now effective and in force.

In the last Congress at the instance of Representative Greene of Vermont, with the co-operation of Judge Advocate General Crowder, provision was made to collect and collate and annotate—possibly codify—all existing law upon this subject and this work is now in progress under the supervision of General Crowder. When this is compiled much uncertainty will have been removed as to what laws on these subjects are really in force today.

With the demand for greater preparedness came the thought that the Army and National Guard must be reorganized by suitable legislation, and growing out of this demand and need, came the Army reorganization bill. It is only with reference to the National Guard that I wish to consider this measure. The underlying thought and foundation on which this bill was constructed was the complete federalization of the National Guard.

As Congress approached the construction of this bill it was divided into a number of different groups. There were those of the opinion, as previously expressed by Gouverneur Morris, that the National Guard could never be made an effective part of the National

plan of defense. Those who composed this group, led by Representative Gardner of Massachusetts, could see no possible good and no potential help in the Guard. For their shibboleth they adopted the idea that "No good thing can come out of Nazareth."

Another group was composed of those who avowed themselves to be the sincere friends of the Guard. Among this group were Chairman Hay of the Military Committee and Representative McKenzie of Illinois in the House.

Another group were those who favored doing nothing for either the betterment of the Army or the Guard. Like those of old "being blind they saw not, being deaf they heard not."

Those in charge of the Congressional programme had determined upon the complete federalization of the Guard, and with them to think was to act. They proceeded upon the theory that "if 'twere done, then 'twere well, 'twere quickly done."

The Constitution of the United States in the sixteenth sub-division of Section 7 of Article one—that Congress should have the power:

"To 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," presented many difficulties to those having in charge the framing of the bill, but was not permitted to dampen their zeal and ardor or to delay the action of the supporters of federalization. Inspired by the sage interrogatory of one Congressional celebrity of "What's the constitution among friends," they hurried gayly on their way.

When the bill was finally drafted and reported from the Military Affairs Committee of the House, it was apparent that their determination at all hazards to federalize the National Guard had badly warped the judgment of the Committee. In the bill they had written the things that they thought necessary to accomplish this purpose and in the writing of many of them much violence was done to the Constitution.

According to the very plain terms of this organic act, the States could determine each for itself whether or not it would organize any National Guard—if so how many it would organize—how it would equip its National Guard. To each state was exclusively confided and entrusted by the Constitution in time of peace, the determination as to how the Guard should be trained (and I think that means how discipline should be enforced) what officers should be appointed and what qualifications these officers should possess. For

more than 100 years no one questioned that these rights belonged to the state, and in the opinion of Judges Advocate and Attorneys General, and by the decision of many courts these rights of the states were confirmed and approved. To the General government was reserved the right to use this force to repel invasion, to suppress insurrection and to enforce the laws of the Union. For this period this division of rights, duties and responsibilities was satisfactory, but of late years gradually growing out of unsatisfactory experience the conviction arose that there must be greater Federal control and regulation, or that the National Guard could not be an effective National aid.

In this view I concur. But because I agree I cannot close my eyes to the unconstitutional sections of the army re-organization bill as it affects the National Guard.

Of such unconstitutional sections there are many.

Where, I inquire, is the constitutional authority for the following provisions?

Section 60. "Organization of National Guard Units.—Except as otherwise specifically provided herein, the organization of the National Guard, including the composition of all units thereof, shall be the same as that which is or may hereafter be prescribed for the regular army, subject in time of peace to such general exceptions as may be authorized by the Secretary of War. And the President may prescribe the particular unit or units, as to branch or arm of service, to be maintained in each State, Territory, or the District of Columbia, in order to secure a force which, when combined, shall form complete higher tactical units."

Section 61. "Maintenance of other troops by the States.—No state shall maintain troops in time of peace other than as authorized in accordance with the organization prescribed under this Act: *Provided*, That nothing contained in this Act shall be construed as limiting the rights of the States and Territories in the use of the Guard within their respective borders in time of peace: *Provided further*, That nothing contained in this Act shall prevent the organization and maintenance of State police or constabulary."

Section 62. "Number of the National Guard.—The number of the enlisted men of the National Guard to be organized under this Act within one year from its passage shall be for each State in the proportion of two hundred such men for each Senator and Representative in Congress from such State, and a number to be determined by the President for each Territory and the District of Columbia, and

shall be increased each year thereafter in the proportion of not less than fifty per centum until a total peace strength of not less than eight hundred enlisted men for each Senator and Representative in Congress shall have been reached: *Provided*, That in States which have but one Representative in Congress such increase shall be at the discretion of the President: *Provided further*, That this shall not be construed to prevent any State, Territory, or the District of Columbia from organizing the full number of troops required under this section in less time than is specified in this section, or from maintaining existing organization if they shall conform to such rules and regulations regarding organizations, strength, and armament as the President may prescribe: *And provided further*, That nothing in this Act shall be construed to prevent any State with but one Representative in Congress from organizing one or more regiments of troops, with such organizations and members of such organizations to receive all the benefits accruing under this Act under the conditions set forth herein: *Provided further*, That the word Territory as used in this Act and in all laws relating to the land militia and National Guard shall include and apply to Hawaii, Alaska, Porto Rico, and the Canal Zone, and the militia of the Canal Zone shall be organized under such rules and regulations, not in conflict with the provisions of this Act, as the President may prescribe."

Section 64. "Assignment of National Guard to Brigades and Divisions.—For the purpose of maintaining appropriate organization and to assist in instruction and training, the President may assign the National Guard of the several States and Territories and the District of Columbia to divisions, brigades, and other tactical units, and may detail officers either from the National Guard or the Regular Army to command such units: *Provided*, There where complete units are organized within a State, Territory, or the District of Columbia the commanding officers thereof shall not be displaced under the provisions of this section."

Section 68. "Location of Units.—The States and Territories shall have the right to determine and fix the location of the units and headquarters of the National Guard within their respective borders: *Provided*, That no organization of the National Guard, members of which shall be entitled to and shall have received compensation under the provisions of this Act, shall be disbanded without the consent of the President, nor, without such consent, shall the commissioned or enlisted strength of any such organization be reduced below the minimum that shall be prescribed therefor by the President."

Section 69. "Enlistments in the National Guard.—Hereafter the period of enlistment in the National Guard shall be for six years, the first three of which shall be in an active organization and the remaining three years in the National Guard Reserve, hereinafter provided for, and the qualifications for enlistment shall be the same as those prescribed for admission to the Regular Army: *Provided*, That in the National Guard the privilege of continuing in active service during the whole of an enlistment period and of re-enlistment in said service shall not be denied by reason of anything contained in this Act."

Section 71. "Hereafter all men enlisting for service in the National Guard shall sign an enlistment contract and take and subscribe to the oath prescribed in the preceding section of this Act."

Section 74. "Qualification for National Guard Officers.—Persons hereafter commissioned as officers of the National Guard shall not be recognized as such under any of the provisions of this Act unless they shall have been selected from the following classes and shall have taken and subscribed to the oath of office prescribed in the preceding section of this Act: Officers or enlisted men of the National Guard; officers on the reserve or unassigned list of the National Guard; officers, active or retired, and former officers of the United States Army, Navy, and Marine Corps; graduates of the United States Military and Naval Academies and graduates of schools, colleges, and universities where military science is taught under the supervision of an officers of the Regular Army, and, for the technical branches and staff corps or departments, such other civilians as may be especially qualified for duty therein."

Section 75. "The provisions of this Act shall not apply to any person hereafter appointed an officer of the National Guard unless he first shall have successfully passed such tests as to his physical, moral, and professional fitness as the President shall prescribe. The examination to determine such qualifications for commission shall be conducted by a board of three commissioned officers appointed by the Secretary of War from the Regular Army or the National Guard, or both."

Section 91. "Discipline to Conform to that of Regular Army.—The discipline (which includes training) of the National Guard shall conform to the system which is now or may hereafter be prescribed for the Regular Army, and the training shall be carried out by the several States, Territories, and the District of Columbia so as to conform to the provisions of this Act."

Section 92. "Training of the National Guard.—"Each company,

troop, battery, and detachment in the National Guard shall assemble for drill and instruction, including indoor target practice, not less than forty-eight times each year, and shall, in addition thereto, participate in encampments, maneuvers, or other exercises, including outdoor target practice, at least fifteen days in training each year, including target practice, unless each company, troop, battery, or detachment shall have been excused from participation in any part thereof by the Secretary of War: *Provided*, That credit for an assembly for drill or for indoor target practice shall not be given unless the number of officers and enlisted men present for duty at such assembly shall equal or exceed a minimum to be prescribed by the President, nor unless the period of actual military duty and instruction participated in by each officer and enlisted man at each such assembly at which he shall be credited as having been present shall be of at least one and one-half hours' duration and the character of training such as may be prescribed by the Secretary of War."

Section 103. "General courts-martial of the National Guard not in the service of the United States may be convened by orders of the President, or of the governors of the respective States and Territories, or by the commanding general of the National Guard of the District of Columbia, and such courts shall have the power to impose fines not exceeding \$200; to sentence to forfeiture of pay and allowances; to a reprimand; to dismissal or dishonorable discharge from the service; to reduction of noncommissioned officers to the ranks; or any two or more of such punishments may be combined in the sentences imposed by such courts."

That all of these sections are necessary for a proper co-ordination of the National Guard, the Army and the scheme for National defense, I do not question, and if the Guard is to be Federalized I am heartily in sympathy with the principle contained in each.

Neither do I have any doubt of the absolute unconstitutionality of each and every one of these sections. In time of peace the General Government cannot either appoint or remove officers of the National Guard, yet these sections (64, 65, 74, 75, 77, 103) virtually do both of these things either directly or indirectly.

The General Government cannot tell the states how many National Guard they must provide, and yet these sections (61, 62, 68) do direct them to enlist and maintain a certain number, and not to exceed a certain number.

The General Government cannot, in my judgment, prescribe the form of oath that must be taken by officers and enlisted men in the

National Guard, but by this law (sections 71, 72, 73, 74) it assumes this right—and assumes to extend by oath the duty of both officer and man to respond for foreign offensive operations—a thing not contemplated by the Constitution—and the Act further provides that no officer or enlisted man shall be a member of the Guard unless he takes such oath. I have no hesitancy in asserting that it is not within the power of Congress to prohibit the States from organizing and maintaining such part of the militia as such States may desire.

The power of the State to provide for the organization of its own militia is not originally derived from the Constitution of the United States.

The power existed and was exercised before the adoption of the Constitution, and its exercise by the State is not prohibited by that instrument.

It is only such legislation as is repugnant to the authority of Congress that must give way even when the authority conferred upon Congress is being exercised. See *Gilman v. Philadelphia* (3 Wall., 713), *Livingston v. Van Ingen* (9 Johns., 566), *Sturges v. Crowninshield* (4 Wheat., 122), *Blanchard v. Russell* (13 Mass., 1).

The effect of the second amendment to the Constitution of the United States is as follows:

“A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.”

This was considered in the case of *Presser v. People of Illinois* (116 U. S., 252), where the court speaks as follows:

“We are next to inquire whether the fifth and sixth sections of Article XI of the Military Code are in violation of the other provisions of the Constitution of the United States, relied on by the plaintiff in error. The first of these is the second amendment, which declares: ‘A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.’

“We think it clear that the sections under consideration, which only forbid bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law, do not infringe the right of the people to keep and bear arms. But a conclusive answer to the contention that this amendment prohibits the legislation in question lies in the fact that the amendment is a limitation only upon the power of Congress and the National Government, and not upon that of the States. It was so held by this court

in the case of *United States v. Cruikshank* (92 U. S. 542, bk. 23, L. ed., 588), in which the Chief Justice, in delivering the judgment of the court, said that the right of the people to keep and bear arms "is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument. The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the National Government, leaving the people to look for their protection against any violation by their fellow citizens of the rights it recognizes to what is called in *New York v. Miln* (11 Pet., 139, 36 U. S., bk. 9, L. ed., 662), the powers which relate to merely municipal legislation, or what was perhaps more properly called internal police, 'not surrendered or restrained' by the Constitution of the United States." (See also *Barron v. Baltimore*, 7 Pet., 243, 32 U. S., bk. 8, L. ed., 672; *Fox v. Ohio*, 5 How., 410, 46 U. S., bk. 12, L. ed., 212; *Twitchell v. Commonwealth*, 7 Wall., 327, 74 U. S., bk. 19, L. ed., 224; *Jackson v. Wood*, 2 Cow., 819; *Commonwealth v. Purchase*, 2 Pick., 521; *United States v. Cruikshank*, 1 Woods, 308; *North Carolina v. Newsom*, 5 Ired., 250; *Andrews v. State*, 3 Heisk., 165; *Fife v. State*, 31 Ark., 455.)"

The extent and kind of training which the states shall give is prescribed by the Act (Secs. 82, 91, 92, 93, 94, 95) when by the Constitution the training of the National Guard is entrusted to the States.

An even more flagrant instance of patent unconstitutionality is the provision of the act which gives the President the right to court-martial a National Guard officer in time of peace when such officer is not in the service of the United States (Sec. 103).

Most certainly in the enactment of these provisions Congress did not intend to let the Constitution stand in the way of its head-long speed or to prevent the Federalization of the National Guard.

Now I am wholly in sympathy with the purpose to make the National Guard the fullest possible auxiliary and reserve to the Regular Army. Indeed, I have long been an advocate of that plan as a National Guard officer, and I believe, if the Guard is to be Federalized the things that Congress has attempted to do to be in the main necessary things—but I also fully believe that the things outlined above in the sections quoted are things which Congress is not authorized to do by the Constitution.

You ask what is to be done if such things are needed but are not authorized by the Constitution?

As I see it, the answer is very plain. The provisions of the Constitution above quoted as applied to the National Guard is entirely obsolete if the Guard is to be Federalized and is not then adapted to our national needs at the present time. We have become a world power and our reserve to the Regular Army must be constituted along such lines and upon such basis, as will meet the requirements of this condition.

To do this will require that the Constitution be amended so as to provide for a Guard that will be National in its scope and character, formed out of the citizens of the land who shall be as little disturbed as possible in their avocations and business, and private pursuits, having in view the National need, but who will understand that there is to be full response upon their parts when the Nation calls. The Constitution as amended must provide for adequate training, instruction and preparation for that response in time of peace.

Until this is done the argument of the enemies of the National Guard that they constitute forty-eight separate armies instead of one, will have much weight and be of much force. Instead of uniformity of excellence among the Guard there will be confusion and uncertainty as there has been in the recent mobilization of the Guard upon the Mexican border.

Opponents of this plan will say that under such a constitutional amendment a National Guard cannot be maintained. I am not at all certain that it can be, but if it can not the sooner we understand that we are leaning on a broken reed the better and then the only alternative is universal military training—note I say *training* and do not say universal service.

The legal status of the National Guard should be made such that it will be the most efficient reserve possible to the Regular Army. Such efficiency cannot be secured upon the basis of unconstitutional enactment, no matter how laudable may have been the purpose that secured the enactment.

So far this paper has been devoted to a consideration of those parts of the Army reorganization bill that are not valid and that cannot effect the legal status of the National Guard. With reference to the present status of the National Guard I cannot do better than adopt a memorandum furnished to the Secretary of War, July 29th, 1916, by General Crowder, Judge Advocate General, where he says:

“1. The views of this office are desired with respect to the

questions raised in the accompanying letter by the Honorable J. Hampton Moore, M. C., with respect to the status of members of the National Guard now in the service of the United States. The questions submitted by Mr. Moore are as follows:

“(a) ‘Is the National Guard, as at present mustered in by officers of the Regular Army under the oath required by the National Defense Act (the Hay Bill), in the jurisdiction of the States, subject to orders from the Governors, or is it now a part of the Regular Army of the United States, in the pay of the United States Government and subject to the regular army term of service? An answer to this inquiry might include the further question as to the pensionable status of members of the National Guard, as now sworn in for service along the Mexican border.

“(b) ‘If the National Guard, as at present in service along the Mexican border, has not been drafted along the Mexican border, has not been drafted under existing law, including the Dick Act and the National Defense Act, is it available for service under the Constitution beyond the borders of the United States? An answer to this question may include the statement of the effect of the Resolution of Congress, declaring an emergency to exist.”

“2. In answering these questions the term ‘Organized Militia’ will be applied to the militia organized under the Act of January 21, 1903, known as the ‘Dick Bill’ (32 Stat. 775), as amended, and the term ‘National Guard’ will be applied to the members of the Organized Militia who have qualified under the National Defense Act of June 3, 1916, by subscribing the oath and enlistment contract as provided in sections 70 and 73 of that Act.

“3. The Organized Militia of the States of Arizona, New Mexico, and Texas, have been mustered into the service under the call of May 9, 1916, and the Organized Militia and National Guard of the other States are in the service under the call issued by the President June 18, 1916, both calls being for the purpose of protecting the United States against aggression from Mexico.

“4. The questions submitted will be answered first with respect to the Organized Militia of the States of Arizona, New Mexico, and Texas. These were mustered into the service of the United States under section 7 of the Dick Bill, the officers and enlisted men taking in connection with the said muster the oath prescribed by the muster-in regulations promulgated under that law. Their status is that of militia called into the service of the United States for one of the purposes specified in the Constitution, that is, to protect the United

States against invasion. While in such service, they are subject to the laws and regulations governing the Regular Army, so far as applicable to their temporary status, and are subject only to the orders of the President. They are not, while in such service, under the jurisdiction of the States, nor are they subject to the orders of the governors, whose authority over them for the time being is suspended, except only with respect to the appointment of officers. They are not a part of the Regular Army of the United States, nor are they subject to the Regular Army term of service. They are in the service *as militia* called forth to meet the exigency for which the call was issued. While in the service they are, of course, in the pay of the United States Government; and are entitled to the same pay and allowance as the Regular troops. With regard to their pensionable status, Section 22 of the Dick Bill gives them the benefit of the pension laws for any disability incurred in the service, and, in case of death, confers on the widow or children of the deceased all the benefits of such pension laws. Under the decision of the Comptroller of July 20, 1916, the widow or beneficiary of a member of the Organized Militia misconduct, is entitled to the six months' gratuity pay, the same as in the case of officers or soldiers of the Regular Army.

"5. Answering the questions submitted with respect to the Organized Militia and National Guard who are in the service under the call of June 18, 1916, it should be observed that shortly after the passage of the National Defense Act of June 3, 1916, the Organized Militia of the several States began to transform themselves into the National Guard of the new National Defense Act. The call of June 18, 1916, found this process of transformation going on, and it was necessary, therefore, for that call to embrace both the Organized Militia and the National Guard, if it were to be effective to call into the service of the United States all of the Militia forces, and it was so drafted.

"6. With respect to those organizations of the Organized Militia that had transformed themselves, prior to June 18, 1916, into the National Guard under said act, no muster-in was necessary, as it was the effect of the call to place them in the service of the United States from the date they were required by the terms of the call to respond thereto (Sec. 101, National Defense Act). The muster-in rolls of the several organizations are on file in the War Department; but this office has not had an opportunity to give them any detailed examination. It is understood, however, that pursuant to instructions the members of the Organized Militia who had not qualified under the

National Defense Act were required to be mustered in, taking the prescribed muster-in oath; but as to those who had so qualified, their names were entered upon the muster rolls with a notation to the effect that they had already taken the oath prescribed in sections 70 and 73 of the National Defense Act.

"7. There are, therefore, in the service of the United States under the call of June 18, 1916, two classes of militia: One the militia organized under the Dick Bill, and the other the National Guard as organized under the National Defense Act. With respect to those who have not qualified under the National Defense Act, their status is identical with that of the Organized Militia of the States of Arizona, New Mexico and Texas, which is discussed above. The status of those who have qualified under the National Defense Act is that of National Guard 'called as such into the service of the United States' (Sec. 191. National Defense Act), and they are, while in such service, 'subject to the laws and regulations governing the Regular Army' so far as applicable to their temporary status, and are subject only to the orders of the President. They are not, while in service, under the jurisdiction of the States, nor are they subject to the orders of the governor, whose authority over them for the time being is suspended, except only with respect to the appointment of officers within the classes specified in the National Defense Act of June 3, 1916. They are not a part of the Regular Army of the United States, nor are they subject to the Regular Army term of service. Like the Organized Militia, whose status is discussed above, their status in the service under the call is that of militia called into the service of the United States for one of the purposes specified in the Constitution, that is, to protect the United States Government, and are entitled while in the service to the same pay and allowances as regular troops. In fact, both classes of troops, while in the service of the United States, are subject to the laws and regulations governing the Regular Army, so far as applicable to their temporary status, and subject only to the orders of the President. Neither class of troops, while in such service, is under the jurisdiction of a State or subject to the orders of a governor, whose only authority with respect to them is, as above stated, to appoint officers to any vacancies which may occur. Both classes of the militia are entitled to pensions for disabilities incurred during their period of service, under the same conditions as are regular troops; and their beneficiaries are also entitled, under the decision of the Comptroller of July 20, 1916, to the

six months' gratuity pay in the case of their death while in the service from wounds or disease 'not the result of their own misconduct.'

"8. Much of the misconception that has arisen regarding the status of the National Guard in service under the call of June 18, 1916, appears to rest on the assumption that it is the effect of the new oath and enlistment contract, and the call of that date, to make the National Guard available for any service for which the Regular Army may be used, during the period of service under the call. But that Congress did not so intend is evident from the fact that the Act of June 3, 1916, contains a provision (Sec. 101) applicable to the National Guard 'when called *as such* into the service of the United States,' and a district provision (Sec. 111) for drafting them into the Federal service, applicable only 'when Congress shall have authorized the use of the armed land forces of the United States, for any purpose requiring the use of troops in excess of those of the Regular Army.' As to persons so drafted, it is distinctly provided that they 'shall, from the date of their draft, stand discharged from the militia, and shall from said date be subject to such laws and regulations for the government of the Army of the United States as may be applicable to members of the Volunteer Army * * *.' It is clear, I think, that the National Defense Act contemplates that the National Guard shall be available for service, either as National Guard called into the service of the United States *as such* for the three constitutional purposes, or, when specially authorized by Congress, as a *national force* supplementing the Regular Army and available for any service for which regular troops may be used. In other words, the National Defense Act gives the Government the right, in return for the expenditure for pay, training and equipment of the National Guard, to draft them into the Federal service to supplement the Regular Army, but this right can be exercised only when Congress shall have authorized its exercise, as has been done in the joint resolution of July 1, 1916.

"9. With regard to the effect of the declaration in the Joint Resolution of July 1, 1916, that an emergency exists, I think there can be no question but that this declaration serves as the reason for conferring the authority to make the draft, and also as a limitation upon the authority with regard to the term of service under the draft. It is provided therein that the draft shall be '*for the period of the emergency*, not exceeding three years, unless sooner discharged.' The Resolution confers a discretion on the President to issue the draft, or not, as the exigencies of the situation may require."

Section 111 is a valuable and effective section couched in most objectionable language when it provided for the "drafting" of the National Guard.

I protested against the use of those words in the House of Representatives. The section provided:

Section 111. "National Guard when drafted into Federal services.—When Congress shall have authorized the use of the armed land forces of the United States, for any purpose requiring the use of troops in excess of those of the Regular Army, the President may, under such regulations, including such physical examinations as he may prescribe, draft into the military service of the United States, to serve therein for the period of the war unless sooner discharged, any or all members of the National Guard and of the National Guard Reserve. All persons so drafted shall, from the date of their draft, stand discharged from the militia, and shall from said date be subject to such laws and regulations for the government of the Army, of the United States as may be applicable to members of the Volunteer Army, and shall be embodied in organizations corresponding as far as practicable to those of the Regular Army or shall be otherwise assigned as the President may direct. The commissioned officers of said organizations shall be appointed from among the members thereof, officers with rank not above that of colonel to be appointed by the President alone, and all other officers to be appointed by the President by and with the advice and consent of the Senate. Officers and enlisted men in the service of the United States under the terms of this section shall have the same pay and allowances as officers and enlisted men of the Regular Army of the same grades and the same service."

But this section is not self-executing nor can the President declare that the emergency exists that requires that the National Guard be drafted nor can the President be required to draft the Guard even though Congress declares that the emergency does exist. Such was the case with reference to the Mexican situation. After the act was passed and became a law the President asked Congress to declare that an emergency existed requiring that the Guard be drafted into the service of the United States. On July 1st 1916, Congress complies with the request of the President, but to this day not a single man has been called into the service of the United States under the provisions of section 111. Because of a failure to so call the National Guard, the greatest confusion has resulted, and in many ways the Guard has

been put in an unenviable light, when in fact it was the failure to use this section that caused the embarrassment.

So in this particular case there was a hiatus between Congress and the President that is unprovided for and that has caused this valuable section to lose its vitality and to be rendered nugatory and of no effect.

This was the heart of the Army reorganization bill so far as the National Guard was concerned and it has been paralyzed.

So then after viewing the whole situation, I conclude that the status of the National Guard under the Army reorganization bill is most indefinite and uncertain and but little improved over what it was before the passage of that bill. Indeed, but little progress has been made in the way of National enactment since the first Militia bill of 1792. But little progress can be made under the present Constitutional provisions. The need of truly Nationalizing the Guard is great, but the difficulties are many and hard to overcome.

Of the valor and patriotism of the Guard I have the highest opinion. As an officer of that body modesty would suggest that I let others speak upon that subject.

But in concluding I cannot refrain from the expression of the opinion that the effectiveness of the Guard is greatly lessened, that the safety of the nation is to some extent imperiled by a lack of adequate legislation upon this subject and by lack of adequate constitutional power on the part of the General Government.