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THE PIONEERS' MILITARY ESTABLISHMENT— A QUESTION OF THE CONSTITUTION¹

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A useful consideration and moderization of the laws regulating the American volunteer military establishment demands a degree of judicial deliberation and poise not to be expected of a pacifist, of the regular Army, of the National Guard or of the political opportunist. Therefore, there is justification in predicting that if a satisfactory system of military law and procedure ever be established in America, it will be the result of a happy co-ordination of unselfish patriotic efforts by well qualified persons able to command the confidence and support of the people. And I venture, in the beginning, to say that any lasting plan will be a scientific development of the military program unanimously agreed upon by the pioneers who established governments in this country.

THERE IS NOTHING NOVEL IN THE DUAL RELATION.

If the problem thereby becomes the more difficult by perpetuating a dual system, the reward for a happy solution will be all the greater in honor, public respect, confidence and contentment. It presents nothing novel. The very evolution of the American government has been the wise solution of a succession of similar problems. The best illustration of it is the development of the interstate commerce laws out of a chaos of national and state conflict. Students of the public defense, like all others engaged in a human endeavor, must possess a vision that reaches beyond incidental inconveniences and a patience to exercise it, in order to embrace the magnificent structure of government as a whole and to keep in mind the interest of generations yet unborn. The elimination of one part without reference to its relation to the whole, might disastrously affect the whole by destroying the necessary ideal of checks and balances entering into the very warp and woof of the Constitution. The language of the pioneers leaves no doubt about these views. Is it not wise, then, for those persons of this generation, into whose care the evolution of time has placed the sacred structure, to measure well their conduct, inspirations and aspirations by the spirit of 1776? The patriots had just emerged from the shadow of danger and knew it practically." With us today danger from

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militarism is purely academic. Burke tells us that "people will not look forward to posterity who never look backward to their ancestors." The interest of the future that lies beyond us is a sacred trust of the present.

A CONSTITUTIONAL DUAL RELATION AN AMERICAN FETISH.

Those persons close to the hearts of the American people and so placed as to observe the workings of the national spirit, will testify to a veneration that has become a fetish, for the Constitutional division of power and duty between the regular and volunteer armies, and between the Federal and State governments. It is as much a part of the American's life as his religion, his politics and his family ties. It may be laid down as a premise that inherited hostility to a large standing army is an individual instinct and not a political creed and that any man or group of men, undertaking to stem that tide of human emotion, will be swept into political oblivion on a mighty wave of hostile protest. For these two reasons the inevitable must be accepted by military law makers in spirit and in deed, before there can be obtained a proper return in efficiency from the Government's expenditure upon its military organization, however liberal its future course may become.

EACH MUST GRACEFULLY ACCEPT ITS ORGANIC PLACE.

There is still another thought. By reason of the fact that the very genius of the Government assigns them as checks upon each other and denies the existence of either without the presence of the other, the thought is insistent that the usefulness, efficiency and contentment of the regular Army and of the National Guard, depends upon mutual successful operation and respect, and that neither will long survive a hostile attitude upon the part of the other. Our forefathers after days of serious, intelligent deliberation, found a place and a necessity for both. It will prove a sad day for the offender when the impression goes abroad that either feels itself circumscribed in its assigned position or refuses its practical sympathy to the other. Men will be measured by their spirit and deeds, not by proclamations or platitudes.

MUST CO-ORDINATE IN INTEREST OF UNIFORMITY.

Therefore, the suggestion is confidently made that those persons who are really interested in securing an efficient military establishment in America will best serve their country by establishing a brotherhood between the regular and the volunteer forces, to the end that in the spirit of service they may become one; act as one in the public defense; be instructed and regulated by the same laws; trained by the same

discipline; aim for the same high standards, and be controlled by the same soldierly spirit.

Please permit it to be said that without undue optimism, this is believed to be entirely possible and practical under the influence of a well organized propaganda with uniform State statutes, regulations, courts and procedure, interpreted by regular army officers, the efficacy of which is assured by federal and State governmental contributions to be sufficient to meet the necessary expense incident to such a service. These contributions are suggested because patriotism may go a long way in inspiring service in the rank and file, and all the way in actual hostilities but, like mercy as an element in justice, it may be strained beyond the point of usefulness and become dangerous. Discipline is not a boon companion of lengthy and hard, uncompensated peace service. The soldierly spirit weakens from the gnawing desire for freedom from drills and study, and from the oppression of restraint voluntarily undergone in the presence of others refusing or ignoring the same burden. Familiarity soon dulls the glamour of untasted military pomp, and it is not a dependable element in discipline or contentment. This is the psychology of the disciplinarian's chief trouble, but his main obstacle is a reluctance to fine or imprison a recalcitrant under these circumstances. There is no such condition in the regular Army and it is hard for their officers to see the viewpoint. They sometimes interpret a result as the influence of friendship or of politics when it is neither.

HOW SHALL THE ARMY OFFICER HELP?

It would be an intrusion upon the sensibilities of a highly trained, superbly educated, patriotic and earnest group of men to suggest in what manner, in view of the conditions named, the army officers may go about accomplishing the end desired. That they will succeed is the belief of the National Guard. It is most timely to remark that his inexperienced and badly neglected brother in the State uniform, feeling the need of instruction and training, looks to him as his exemplar, instructor and guide in the difficult effort to qualify in the service and fulfill his destiny.

The statement, I am sure will be permitted, that the indomitable spirit and patriotism that have held together the nucleus of the Constitutional volunteer Army for all these years, without reward or suitable recognition, and in spite of ridicule and neglect, must inspire the Regular Army, as it will command the admiration of generations yet unborn. They will be so generous as to agree that, aside from its

Constitutional status, the Guard deserves the best preparation and consideration at the command of a rich and powerful Government and at the command of those more favored in military training and discipline. Nor is the difficult work of imparting military knowledge to the National Guard an unreasonable return, nor an unsuitable manner to make it in time of peace, for the unexcelled training donated at West Point at the public expense. But, let it be said, that without a deep conviction justified by history that the National Guard shall live, and it is worthy of the necessary expenditures of labor and attention to perfect it, this and other military organizations are engaged in a useless thing. The mind and spirit are the standards of men and the measure of their usefulness.

THE CONSTITUTION BREATHED INTO IT ITS OWN LIFE.

In this respect it is well not only to be mindful of the fundamental principles just cited, but to live a moment in the spirit of the founders of the government. We are met on the threshold by the Constitutional provision that no appropriation of money to the use of the Army shall be for a longer period than two years. (Cl. 12, supra). It is timely to observe that there is no such restriction regarding the Navy, appropriations for which may extend over any period. In Clause 14, Congress is authorized "to make rules for the government and regulation of the land and naval forces," but not for the militia, that being provided for in Clause 16, as has been shown. But, let us turn now to the debates in the Constitutional Convention, for they should prove a lamp to the feet of every true American. (Madison Pap. 740). Mr. Pinckney proposed to give Congress the same power over the militia as over the land and sea forces, but after an earnest debate, the power to call it forth, alone, was retained. "We are come now," said Mr. Dickinson, "to a most important matter, that of the sword * * * The States never would, nor ought to give up all authority over the militia." Mr. Gerry declared such a policy would put upon the Constitution "as black a mark as was seen on Cain." Mr. Sherman was as emphatic and so were Mr. Hamilton, Mr. Ellsworth and Mr. Jefferson. Mr. Madison was repudiated by his own State for proposing to permit the appointment of general officers by the federal government (Mad. Pap. pp. 1355, 61, 62 and 1403 to 1408; Federalist Nos. XLVI and XXXIII). The standing Army was permitted only on the condition that "there would be opposed a militia amounting to nearly a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their

common liberties, and united and conducted by governments possessing their affections and confidence. It may well be doubted whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops." Mr. Hamilton used language equally as emphatic as that of Mr. Madison. These great philosophers, mindful of the destructive agencies of past ages, were providing against known human propensities, weaknesses and ambitions *and the temptation to exercise them*. It was one of the preparations for the perpetuation of the form of government that they had wisely designed. There were great soldiers of their number and it is powerfully persuasive that they must have known, and that they acted in spite of the inconveniences that would arise and that might become possible, of which complaint is now being made by many impatient people, who are unwilling to submit to the inconveniences that are conditions to the preservation of necessities. It is a manifest evidence of their wisdom that the standing army and the militia, during all these political years, have retained their organic *status quo*, the standing Army its usefulness and public respect, while the spirit of the people has remained unchanged.

WHEN INDIVIDUAL STATES MAY PROVIDE AN ARMY AND NAVY.

In continuance of this thought, though purely academic, it may prove interesting to be mindful of the Constitutional provision that, while "No state shall, without the consent of Congress * * * keep troops or ships of war in time of peace * * * or engage in war," it may do both of these things when "actually invaded, or in such imminent danger as will not admit of delay." (Const. Art. 1, Sec. 10 Cl. 3) This, of course, does not apply to the organized militia. The clause of the Federal Constitution concerning the militia is now quoted in order that it may be fresh in mind. It reads: (15 Cl. supra)

"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."

We are chiefly interested in the measure of power embraced in the word "discipline."

"This power," (sic organizing and disciplining) said Mr. John Randolph Tucker, (Const. Law §287) "as appears from the debates (heretofore read) looked to the organization of the militia into divisions, regiments and the like, and to furnishing arms, which had always been done, and to establishing rules by which recruits were

to be disciplined, involving tactics and the like. No control over the militia was given to the federal government, except when that government might call them into its service for the purpose stated in the fifteenth clause."

"The appointment of officers, including general officers and the power to train the militia according to the *discipline* prescribed by Congress, is exclusively reserved to the States."

They have the right to go into the service of the United States as State organizations, all of whose officers are commissioned by the States, and to hold under their authority. By the terms, however, of the Fifth Amendment the militia is then *governed* by the rules and articles of war. There is no longer room for dispute concerning this interpretation.

AN OPPORTUNITY FOR MUTUAL SERVICE.

Let us then as patriotic, practical men, observing and accepting a dual status—a difficult governmental situation impossible of alteration to suit the individual fancy, calling for wise, earnest and unselfish coordinated effort,—set to work to achieve a suitable practical result. It is difficult to conceive of a more important public duty if America shall be prepared. That this can be done only through uniformity amongst the States is apparent. That this uniformity cannot be accomplished save through an organized, authenticated propaganda is sufficiently obvious to justify the serious thought of this national organization, and possibly the creation of an official commission, to be presently discussed.

THE ATTEMPT AT STATE CONFORMITY.

Thus it is seen how, some years ago, the minds of thoughtful officers and statesmen turned to the spirit and ideal and need of State and National uniformity, the outward result being the celebrated "Conformity Act" of 1908. This was born of the belief or hope that the system of enforcing "discipline" by the States would conform to that of the regular Army. But, as we have seen, a condition precedent was suitable State legislation carrying it into effect. It was proposed to purchase this necessary State legislation through meagre federal appropriations—about enough to uniform the enlisted men, and to give them some target practice and ten days annually in camp. Otherwise, the Guard was left to continue its struggles along channels criticised as improper. Great men who had proved their adaptability and capability have peevishly criticised instead of magnanimously aiding along constructive lines. They would not have balked if forbidden to select their battle fields and it is not believed that they will much longer withhold

their valuable sympathy from the National Guard. And so the Conformity Act has not been a conspicuous success. It was assumed that the Articles of War, the form and procedure of military courts and the terms and conditions of enlistment would be adopted by the States, but the great multi-headed machine was left alone to work out its own destiny. The National government flung a bathing suit and some letters of advice to a drowning man who could not swim and requested him to observe the conventionalities upon reaching shore. And the life guard, impersonated by the regular Army, indignantly repudiated the usefulness of his humane act unless the unfortunate should instantly come under his sole authority and become an expert like himself. How near conformity in its spirit has even been approximated, and what are the reasons for its failure, there is not time to tell, and no officer needs information on the subject.

It is well, however, to observe that the philosophy and genius of American military conditions were possibly misunderstood. Such a status, as was proposed by the "Conformity Act," connotes State establishments as complete within themselves and as well sustained as the regular Army; as capable of imparting knowledge, of enforcing disciplinary punishment, and as likely for reasons of pure magnanimous patriotism,—and there were none other,—to maintain a spirit that would justify it. Undoubtedly, there are some units as responsive as any in the regular Army, but they are exceptions made possible by peculiar local conditions. Little difficulty will be had in counting them on one's fingers. All of these elements exist in no State and few of them are present in any. The volunteer's attitude is dominated by the feeling of contribution to, instead of receipt from, the Government. On the other hand, submission to rigid discipline and the development of the spirit of the soldier is the business of the Regular and is that largely for which he is paid in times of peace.

TWO PARAMOUNT THOUGHTS

If my humble practical remarks inspired by several years of service, have accomplished any purpose it is to awaken two paramount thoughts. First, there must be established and sustained uniform State laws, regulations, courts and the procedure therein. Second, there must be established conditions and an atmosphere in all the States and at Washington, conducive to the encouragement of the growth amongst National Guardsmen of the real spirit of the soldier, free from the taint of militarism, the interference of politics and personal ambition. The men must feel and be made to know that the sacrifices that they undergo and the work that they do is a necessary service in

the land defense of the country; that they are an integral part of the great scheme of preparation. There must be one accredited organized head or Commission, acceptable to both the States and to the Secretary of War to serve as a source of intelligence and a sort of arbitrator in all matters. The first proposition can be solved by the adoption only of such legislation as is endorsed by the proposed Commission. The second is conditioned upon a lively public sentiment: a governmental recognition of volunteer service such as to give it dignity; a compensation for actual expense of time at drills, and a fixed period of universal training in a military school, the regular Army or the National Guard. Certainly, universal training would justify a stricter enforcement of discipline and would destroy the feeling of imposition inspired by the failure of others to enlist in times of peace. It is also obvious that the two propositions are so co-ordinated as to be of mutual aid.

SOME ADVANTAGES TOWARDS UNIFORMITY AND CONFORMITY.

Let us turn our attention briefly at this juncture to the spirit and genius of military law and its enforcement. Being executive agencies and belonging to the Executive Department, military laws are necessarily defined, directly or indirectly, by statute. They have no place in the Judicial branch of government and, therefore, are not affected by the Third Article of the Federal Constitution, or by the several provisions in the State Constitutions relating to the Judicial branch of the respective State governments. It is much to be doubted whether discretionary acts are justiciable. Military offenses are triable without jury. These distinctions between the military and civil law present incomparable advantages and wipe away many obstacles that might interfere with a general conformity and uniformity. Furthermore, the National Guard should administer its own law free from civil courts, sheriffs and constables in order that ulterior influences may be avoided, and full sympathy given to every official act. The military court must be complete within itself to administer regulations and enforce punishment. There must exist in the ranks a conviction of a swift and certain, though a just, necessary and merciful punishment, at the instance of those upon whom rests the future responsibility for the good name and usefulness of the citizen soldiery. Then, and not till then, will the habitual recalcitrant and the rebellious conscript be trained into a better citizen and be an agency more of good than of evil both in the ranks and in the community. "Lack of discipline," said Napoleon, "is worse than disease—even worse than bullets." It is a curse of the National Guard that it is laboring hard to eradicate; at the

same moment it is making the service sufficiently attractive to draw good men into the ranks. It is a situation calling for the exercise of the highest diplomacy and a profound knowledge of human nature.

DISCIPLINE AND GOOD CITIZENSHIP INSEPARABLE

It must be so that men will see with the eyes of George Wharton Pepper, "that military instruction and discipline, when properly administered, is an important factor in the preparation not for war, but in the preparation of a loyal citizen." The highest encomium ever paid West Point and the historic Virginia Military Institute or any other Institution where the strictest discipline is provided, is simply that "it makes men." A certain laxness in mental and spiritual discipline, too obvious to be longer disputed, and as evident in the home as in the street is destroying the vital characteristics of the American spirit and the spontaneous tendency to obedience and respect for authority concomitant with military organization. Young men need to be taught the old fashioned religion that the "soldierly spirit" is the desire to "serve," and the word "obey" is the supremest and most beautiful in the language. Discipline must retain its ascendancy either by submission or by duress. There is a matter of neglected training and education with which to deal. There are men who do not understand its elemental purposes, who imagine shame instead of feeling pride in executing military orders. Such as these mistake insubordination for protection of self-respect. Since their whole nature cannot be changed, their conduct must be regulated by an unflinching discipline wholly within the control of trained and patriotic officers who, themselves, have graduated from the school of experience. Said Ruskin:

"Make your educational laws strict, and your criminal ones will be gentle; but leave youth its liberty and you will have to dig dungeons for age."

UNIFORMITY MUST COME BY STATE STATUTE

Let us now consider the application of these principles. It has been made manifest, the federal "Conformation Statute" to the contrary notwithstanding, that the Articles of War and regulations provided for the regular Army become effective in the State military establishments only when, and as expressly put into effect, by State Statutes. As has been seen, any other method would be contrary to the letter and spirit of Federal Constitution (Art. 1, §8, cl. 16) and would be unenforcible. Every doubt must be solved against the Federal Government, for the States reserve all power not expressly granted to the federal government.

WHAT STATUTES SHOULD PROVIDE

Speaking generally, wherever State statutes abound, uniformity is not found and is not possible. This trait is not peculiar to military questions. Furthermore, statutes concerning highly technical subjects oftener reflect personal grievances than profound principles or necessary convenience. Therefore, as much as possible of the State military establishment should be the work of a trained, scientific Commission, done in the name of the Governor and Commander-in-chief, and the very first Statute should vest in the State Executive all necessary power in that behalf. This Commission should be national and official, and be big and broad enough to cope with the entire American military situation. Its object would be to crystallize sentiment; to be a receptacle for suggestions and complaints that would be invited; to standardize and make uniform and suggest all necessary statutes and to prevent all unnecessary State Statutes. This program finds its prototype in the successful campaign of the American Bar Association with reference to Federal and State civil court procedure and is worthy of thoughtful consideration. The Commission should meet bi-monthly and oftener, if necessary, but there should be a permanent Secretary in Washington ready to receive and transmit to the members all correspondence concerning its affairs so that views might be exchanged, advice sought, and evil situations given scientific attention. The attendant expense would be negligible since no compensation should be paid except to the Secretary. It would be the official mouthpiece and national superintendent of the National Guard with the one thought of welding them into one in spirit and in fact. Executive orders being entirely legal and quite sufficient to execute any agreed program, but few statutes would be necessary and these would, in due time, be those recommended by the Commission just as uniform commercial laws are accepted by almost all the States.

SOME PRACTICAL OBSERVATIONS

Having in mind that the period of the actual making of the soldier and of creating the soldierly spirit in his experience at his home post where, for eleven and three-quarter months in the year, training is provided and instruction imparted, there should be no dual system of military courts. At present in Virginia and, no doubt, in many other States the thing practiced and used in time of peace, is abandoned in time of actual service whether for the State or the Federal Government. If expense incident to the size of courts requires smaller ones, that might be permitted. The conditions and duration of enlistment which have ever been bones of contention and serious difficulties in

the way of filling the ranks, will assume a less formidable aspect under the inspiration of Federal pay and a powerful public sentiment in favor of preparedness. The election and selection of officers is a problem full of difficulty and deserving of serious and constructive thought. The opportunity for politics is sufficiently inviting to tempt some good men. Discharges from the volunteer forces should be regulated exactly like those in the Army. In Virginia and other States it is at times difficult to know whether the discharge is "with honor," "without honor," "dishonorable," or simply "for the good of the service." The list of retired officers should be standardized according to Federal practice. Both the time of service and the grade differs in the States, as well as the duties and penalties to which retired officers remain subject.

The amount of fines and extent and character of imprisonment should be standardized. Service of process and notices and the enforcement of judgments should be by persons in the service. The entire judicial establishment, as has been said, should be complete within itself and so scientifically organized as to command the respect of the public, the Bench and the Bar.

NEEDED—A SISTERHOOD OF STATES

There are many other vital matters that will be suggested by the experience and training of those whose sacred duty it will be to reorganize the National Guard into complete usefulness, and it will not be said without a patriotic purpose that every officer of the Army and the Guard stands ready to perform any service demanded of them in the preparation of a complete and authenticated national military program, and in directing the attention of State Legislatures to adopt it and preserve it in the same spirit in which it is offered. In the past there has been no sisterhood among the States and there has not been enough voluntary brotherhood on the part of the Regular Army. In the future there must be concert of action, uniformity of ideals, a magnanimous surrender of local customs, a sinking of personal prejudices and a wholesouled spirit of service, if a suitable public support is to be had, and America is to become adequately prepared. I leave with you the inscription on the monument to one of Georgia's greatest statesmen:

"Who saves his country, saves all things
And all things saved bless him.
Who lets his country die, lets all things die
And all things dying curse him."