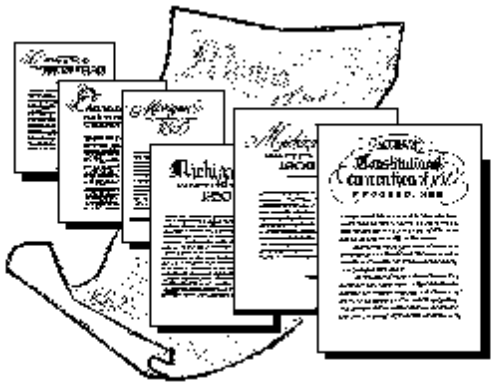
A Comparative Analysis of the Michigan Constitution

Volumes II

Articles XV



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XV MILITIA

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Article XV: Section 2. The legislature shall provide by law for organizing, equipping and disciplining the militia in such manner as it shall deem expedient, not incompatible with the laws of the United States.

Constitutions of 1835 and 1850

The constitution of 1835 provided in Section 1 of Article IX that "The Legislature shall provide by law for organizing and disciplining the militia in such manner as they shall deem expedient, not incompatible with the constitution and laws of the United States." The 1835 document further provided under Section 2, Article IX, that "The Legislature shall provide for the efficient discipline of the officers, commissioned and non-commissioned, and musicians, and may provide by law for the organization and discipline of volunteer companies."

The constitution of 1850, Article XVII, Section 2 contained a section almost identical to Section 1, Article IX of the 1835 document, but added "equipping" to organizing and disciplining, and deleted the reference to incompatibility with the U.S. Constitution. The 1850 constitution did not contain the provisions of Article IX, Section 2 of the 1835 document.

Constitution of 1908

The 1850 provision was carried over to the constitution of 1908 except for the change "they" (the legislature) to "it." This provision has not been amended.

Statutory Implementation

With respect to the provision for disciplining the militia, it has long been held that the militia, when not in federal service, is not responsive to the Federal Uniform Code of Military Justice. So as to provide for such discipline, the State of Michigan has enacted its own code of military justice.[1]

[1] Public Act No. 291 (1951); M.S.A. 4.686 (1) et seq.

Other State Constitutions

The constitutions of nearly half of the states contain militia provisions which are almost identical with those found in Michigan's present constitution.[2]

The older state constitutions, for the most part, contain very similar provisions, and some attempt to go into such detail as to leave the legislature virtually hamstrung in the field. While some uniformity exists as between the basic militia clauses in the various state constitutions, subsidiary provisions show such wide diversity that comparisons are very difficult, if not impossible. Furthermore, as many such provisions have been vitiated by the Congress since 1903, no useful purpose would be served in attempting a generalized comparison.

However, two of the newer state constitutions provide interesting study.[3] The new constitution of Georgia gives to the legislature the authority to say how the militia shall be officered, trained, armed, equipped and of whom it shall consist; how it shall be organized and how it shall be paid. Most of such authority the Congress has now arrogated to itself.

On the other hand, the new constitution of Missouri provides that "the General Assembly shall provide for the organization, equipment, regulations and functions of an adequate militia and shall conform the same as nearly as practicable to the regulations for the government of the armed forces of the United States." Here, in effect, the constitution of that state says to the legislature: "You may go as far as Uncle Sam will let you."

The Model State Constitution contains no militia article recommended for inclusion in a state constitution.

Comment

Under its paramount power as enunciated in the militia clauses of the Constitution of the United States, the Congress has enacted four laws, among others, which have virtually abolished the militia as a state military force and entirely changed the "state militia" concept.[4] The four significant federal laws are as follows:

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[2] Arizona, Colorado, Florida, Idaho, Illinois, Indiana, Iowa, Kentucky, Mississippi, Montana, New Mexico, New York, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Utah, Washington and Wyoming.

[3] Georgia (1945) and Missouri (1945).

[4] Article 1, Section 8, Clauses 15 and 16, Constitution of the U.S. (For an exhaustive treatise on the subject of the "militia clauses", see 54 Harvard Law Review, pp. 181-220.)

The Dick Act of Jan. 21, 1903, which provided that the militia of the states must conform to the organization of the regular army, be equipped at federal expense and be trained by instructors of the regular army.

The National Defense Act of 1916, which made the organized militia a part of the armed forces of the United States and which prohibited the states from maintaining troops save to the extent Congress might permit. It also provided, inter alia, that while the states might continue to appoint officers as permitted by the United States Constitution, officers so appointed might receive no federal status or pay until recognized, upon examination, as possessing requisite physical, mental, moral and professional qualifications.

The Army Reorganization Act of 1920, which established "The National Guard of the United States" and which provided that officers would be commissioned therein by the President of the United States, as well as initially by the various governors.

The Universal Military Training and Service Act of 1951, which, as a practical matter, divested the governors of the power to draft into military service men in the 18-26 age group and vested this power in the president. In requiring also that men released from military training, after being drafted by the president, continue as trainees in a reserve military component for as many as eight years more, the law thus left in an inchoate, unorganized state militia only those men of about 35 and older.

As a result, it may be concluded that, to all practical intents and purposes, the United States has taken over the organized militia (national guard) both by law[5] and subsidization[6] and has placed such an inclusive priority label upon the unorganized, inchoate militia by law[7] as to leave the states virtually without any manpower pool potentially responsive to state military draft.

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[5] The four laws, cited above, should be considered in the light of the long-settled supremacy of the United States to legislate in this field. In one of his most famous opinions on this federal supremacy, John Marshall said: "The States have no power, by taxation or otherwise, to retard, impede, burden or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This, we think, is the unavoidable consequence of that supremacy which the Constitution has declared." (Also in point: McCulloch v. Maryland, 4 Wheat. 316 (1819); Houston v. Moore, 18 N.S., 5 Wheat., 5 L.Ed. 19 and Dunne v. People, 94 Ill. 120.)

[6] As to the extent to which the United States now subsidizes the Michigan national guard, a memorandum report of the United States property and fiscal officer for Michigan, dated 2 June 1961, discloses two interesting items: (1) that the United States has provided military arms, equipment, vehicles and aircraft for the use of the Michigan national guard of the value of $108,700,000 and (2) the United States meets an annual payroll for the Michigan national guard amounting to $10,700,000.

[7] Universal Military Training and Service Act of 1951.

Article XV: Section 1. The militia shall be composed of all able-bodied male citizens between the ages of 18 and 45 years, except such as are exempted by the laws of the United States or of this state; but all such citizens of any religious denomination who, from scruples or conscience, may be averse to bearing arms, shall be excused therefrom upon such conditions as shall be prescribed by law.

Constitutions of 1835 and 1850

The 1835 constitution did not contain a provision similar to this nor did the 1850 constitution as originally adopted. A provision almost identical to the present Section 1 was added in 1870 by amendment to the 1850 constitution.

Constitution of 1908

The 1908 constitution carried over the 1870 amendment in its entirety with changes in punctuation and with the omission of the word "whatever" from the 1850 phrase "of any religious discrimination whatever."

Other State Constitutions

The constitutions of three states use the same language but impose various age restrictions.[8] The constitutions of a few states are silent on the subject and those of the remaining states leave the composition thereof to the judgment and discretion of the legislature.[9] All states limit the militia to males, but two states, including Michigan, have attempted, administratively or by statute, to permit enrollment of females.[10]

The Model State Constitution contains no militia article recommended for inclusion in a state constitution.

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[8] Age Limits: Kansas, 21-45; North Carolina, 21-40; Oklahoma, 17-70.

[9] Alabama, California, Georgia, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, Pennsylvania, Tennessee, Texas, Vermont and Wisconsin.

[10] Rhode Island: By Statute (P.L. of R.I., Ch. 3742, Par. 1). Michigan: In reliance on an Opinion of the Attorney General (Advisory Op., Atty. Gen. to Adj. Gen., dated 18 June 1957, No. 3029).

While the courts (as in State ex rel. McGaughey v. Grayson, 163 S.W. 2d., 335) have defined the militia very broadly thus: "The terms 'militia' and 'militiaman' comprehend every temporary citizen soldier who, in time of war or emergency, forsakes his civilian pursuits to enter, for the time-being, the active military service of his country and are not restricted to the National Guard" (emphasis supplied), none have yet gone so far as to interpret the term "male" as also including female.

Article XV: Section 3. Officers of the militia shall be elected or appointed and be commissioned in such manner as may be prescribed by law.

Constitutions of 1835 and 1850

The 1835 constitution provided that "officers shall be elected or appointed in such manner as the legislature shall from time to time direct, and shall be commissioned by the governor." The 1850 instrument provided that "officers of the militia shall be elected or appointed and be commissioned in such manner as may be provided by law."

Constitution of 1908

The constitution of 1908 carried over, verbatim, the 1850 provision and there have been no amendments.

Other State Constitutions

The older state constitutions contain provisions similar to this section and many still provide for the election of officers, an ancient idea when personal popularity rather than military efficiency was thought to be an important consideration. The election of officers has long since been discarded in practice. A few states still permit the governor to appoint non-military individuals as "colonels" in the state militia, but this practice has, fortunately, abated with time.[11]

The Model State Constitution again is silent.

Comment

From the preceding discussion of Article XV, Section 2, it is apparent that, while under the militia clauses of the Constitution of the United States[12] the governors may (indeed, must) initially appoint officers of the militia, the United States has restricted appointees to fully qualified persons by denying unqualified persons federal recognition or payor status in the national guard of the United States. The convention may wish to give consideration to a constitutional prohibition against the appointment of officers in its organized militia who cannot gain and hold federal recognition, as such, by the United States. An implementing provision to this end might read: "Officers of the militia shall be appointed solely on the basis of mental, moral, physical and personal qualification as the same are, or may be, required by the United States." Such a provision would provide recognition of the fact that the organized militia of Michigan is now, and for many years has been, a highly trained instrument for the public safety and national security.

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[11] E.g., Kentucky and Wisconsin.

[12] Art. I, Sec. 8, Clauses 15 and 16, Constitution of the United States.