The Model State Guard Act

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The only really new contribution to the art of warfare so far disclosed by the present conflict in Europe is the skilful and widespread employment of a "fifth column" behind the defending army. The more or less well defined zone of former wars known as the "battle front" may now be spread across an entire country. It has been proven in Norway and the Low Countries that the well prepared action of the "fifth column", coordinated with the action of his conventional military forces, may contribute decisively to the victory of the enemy. The creation of confusion and panic among the civil population, the sabotage of communication facilities, the destruction of industrial plants and munitions, and the seizure of airports, are only a few of the duties assigned to the new auxiliary of the military. To assist the "fifth column", the enemy may be expected to drop groups of parachute troops or to land "airplane infantry" at appropriate spots well behind the "fighting front" of the regular armies.

These new techniques indicate that whenever war threatens or is actually in progress any peaceful city or village must not be surprised to discover an unsuspected nest of vipers in its midst suddenly aroused to its deadly work. Simultaneously, perhaps, the community will receive a parish call from a group of parachutists armed to the teeth for no pleasant purposes. As was said by Under Secretary of War Patterson, "... the wars of today know no front lines; a tiny village hundreds of miles from the theoretical front may suddenly become the scene of desperate and blazing action."²

The means of coping with these rear zone attacks upon national defense cannot be left to improvisation. The United States Army cannot be expected to scatter its forces in the hundreds of places where subversive action may suddenly blaze out. Its mission is to meet the main battle line of the enemy and to knock it out. Although the police forces

1. The draft of the Model State Guard Act was the work of many men. Among them were Judge Richard Hartshorne, President of the Interstate Commerce Commission on Crime and member of the Joint-Conference Committee of the Federal-State Conference on Law Enforcement Problems of National Defense which fathered the Act; R. Keith Kane, Special Assistant to the Attorney General of the United States; and Paul B. Carroll of the Fordham University Law School Faculty. Others are hereafter mentioned; see notes 3 and 68 infra and text, page 43 infra.

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2. Quoted in the New York Times, November 19th, 1940, from an address in Indianapolis.
of the states and municipalities are competent to cope with sporadic outbursts of subversive activity it has long been recognized that in periods of grave public danger they need to be supplemented. For that reason we have, in ordinary times, the National Guard. But if war is imminent or actually in progress the forces of the National Guard will have been withdrawn for service in the national army. Hence the need of a State Guard to fill its place under such circumstances.

The Federal-State Conference

The leaders of a number of organizations concerned with efficient methods of putting down crime and implementing national defense efforts with state aid joined forces last summer, with the Department of Justice cooperating, and formed the Federal-State Conference on Law Enforcement Problems of National Defense. The participating organizations are the Governors’ Conference, The Council of State Governments, The National Association of Attorneys General, and The Interstate Commission on Crime. The object of the Federal-State Conference is primarily to study the need of state legislation or administrative regulation in the interest of national defense and to prepare and obtain the enactment of legislation and the promulgation of regulations found to be desirable. In November the drafting committee called together by the Conference met in Washington and revised several Acts which had been drafted meanwhile and which will be proposed to the state legislatures at their forthcoming sessions. One of them is the Model State Guard Act and another is the Model Act Providing For Fresh Pursuit By Military Forces.

While those two acts were in course of drafting several consultations were held with Brigadier-General Tyner together with his aides, Brig-

3. These additional bodies were represented at the meeting of the drafting committee: The Advisory Commission of the Council on National Defense; The Commissioners on Uniform State Laws; and the International Association of Chiefs of Police.

Sub-committees first considered each proposed Act. Then the whole committee took up the revised forms section by section. The members of the sub-committee on the Model State Guard Act are given in note 68 infra.

4. Others are: A Model Sabotage Prevention Act, designed to protect property by making criminal certain unlawful entries on, injuries to and interferences with property, willfully defective workmanship, and authorizing the closing of streets; a Model Explosives Act, regulating the manufacture, sale, distribution, use and possession of explosives; and a Model Act for the Protection of Public Property, authorizing the appointment and prescribing the powers and duties of special policemen for the protection and preservation of public property.
adler-Gerlach, General Kilbreth and Colonel Herbst, all of whom are retired officers of the United States Army. General Tyner, as Chief of Staff to Major-General William Ottman, Commander of the New York State Guard, has already completed the organization of a State Guard under the existing provisions of the Military Law of New York. Thus he was in a position to recommend provisions based on his practical experience and his advice and assistance were most valuable to the committee in charge of the acts. The committee also had the advantage of the advice of Colonel J. M. Churchill, Chief, Civil Defense Branch, Operations and Training Division, G 3, War Department General Staff. Colonel Churchill also detailed Major E. W. Riddings of his division to sit with the committee of the Federal-State Conference when the drafting was completed. The Committee, therefore, has had the benefit of expert advice and criticism.

Militia Laws

Although it is not generally known by laymen, the constitution or statute law of every state provides that all able-bodied male citizens, between the ages of eighteen and forty-five years, who are residents of the state, are members of the militia. The militia is usually divided into two classes, the “active”, comprising the National Guard and the Naval Militia and the “unorganized”, comprising the rest. Provision is made for calling out the unorganized militia for active duty in case of “breach of the peace, tumult, riot or resistance to process of this state, or imminent danger thereof.” A regular organization with a program of training apparently is not intended by such provisions. It seems to be contemplated that the members of the unorganized militia are to be called up on short notice as a sort of posse comitatus to aid the police forces and the National Guard during sudden emergencies and are to be returned to their civilian status as soon as the emergency passes. However, several states have adopted acts or included provisions in their military law which provide for an organized State Guard distinct from the National Guard.

6. Certain classes of persons are exempted. For a typical statute see the N. Y. MILITARY LAW § 1, N. Y. Consol. Laws, Chap. 37, § 1.
7. Some States call the second class “the reserve militia.” In one state, Indiana, the inactive militia is called “sedentary militia.” IND. STAT. ANN. (Baldwin, 1934) § 10854. Florida provides for a Marine Corps in addition to the National Guard and Naval Militia. FLA. COMP. GEN. LAWS ANN. (Skillman, 1927) § 2015. Usually able-bodied males who have declared their intention to become citizens are also included in the militia.
8. IND. STAT. ANN. (Burns, 1933) § 45-701. This is a typical provision.
9. The statutes of some states authorize the governor to organize a state guard sep-
One defect of the militia laws of many states is, then, that there is no provision for replacing the National Guard with a body of organized troops trained to cope with the "fifth column" and small units of enemy forces like parachutists and airplane troops. Another defect is that the age limit of members of the unorganized militia who may be drafted into service is set at forty-five years and this age limit appears to be true also as to volunteers who may be accepted for service.\textsuperscript{10} The War Department tells us that the average age of veterans of the World War at this time is forty-five. Thus under the law of practically all of the states a number of capable, experienced and able-bodied men who would be glad to volunteer for service in the State Guard are excluded.

The State Guards, of course, will not be called upon to undertake the severe physical hardship of a protracted campaign. They will be used locally and for short periods. To quote Under Secretary of War Patterson again, these troops must prepare "a comprehensive program of organization and training for guard duty, handling disorderly crowds and overcoming the light resistance of armed forces."\textsuperscript{11} There are many citizens, veterans and others, who are more than forty-five years of age.

\textsuperscript{10} In some states a temporary military force to replace the National Guard may be organized only when a part thereof is called into federal service. For instance: \textit{Ala. Code Ann.} (Michie, Supp. 1936) § 1600 (83); \textit{Pa. Stat. Ann.} (Purdon, 1930) tit. 51, § 171. (Pennsylvania has the most elaborate of the state guard acts now on the books.) Arizona has an uncommon provision: "whenever the national guard may prove inadequate to execute the laws." \textit{Rev. Code Ann.} (Struckmeyer, 1928) § 2196. \textit{Quaere:} If the National Guard is in federal service is it "inadequate to execute the laws"? It would seem so.

\textsuperscript{11} In most states it seems that no provision is made for a temporary military force, except that in time of riot, insurrection, invasion, or imminent danger thereof, drafts may be made from the unorganized militia. For example: \textit{Vt. Pub. Laws} (1933) § 8051. Some states add "emergency", as in \textit{Cal. Mil. & Vet. Code} (Deering, 1937) § 128. \textit{Quaere:} Does the absence of part or all the National Guard in federal service create an emergency?

In Delaware no provision in the Constitution or laws appears to be made for active use of military forces other than the National Guard. \textit{Del. Rev. Code} (1935). This also appears to be the case in Oklahoma. \textit{Okla. Stat. Ann.} (1936) tit. 44.

In New Jersey however, the upper age limit for the State Guard, as distinguished from the National Guard, is fifty-five years for enlisted men, and sixty-four years for officers. \textit{N. J. Laws}, 1937, c. 49, Art. XII, § 2. In Pennsylvania, the age limits for the State Guard are left to be fixed by the governor from time to time. \textit{Pa. Stat. Ann.} (Purdon, 1930) § 210.
who will fit into such a program. Still another defect in existing statutes is that no provision is made for the use of militia or state guards outside the state under certain circumstances that will be discussed later. Before taking up the provisions of the Model State Guard Act, which it is hoped will correct these deficiencies if it is enacted, a word needs to be said as to the authority of the states to create military forces of this character.

The Enabling Act

It is disputed whether the United States Constitution permits the states to maintain an organized state guard without express Congressional approval. Diverse views on this question were presented in a debate in the Senate on October 8th, 1940. On the one hand it was argued that the states may not maintain troops without the consent of Congress. The pertinent part of Article I, Section 10, Clause 3, of the Constitution declares:

“No State shall, without the consent of Congress, . . . keep troops, or ships of war in time of peace . . . .”

Article I, Section 8, Clause 16, provides:

“The Congress shall have power . . . to provide for organizing, arming, and disciplining the militia . . . reserving to the States respectively the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress.”

These sections seem to be clear enough and (1) to prohibit the states from maintaining organized troops in time of peace without Congressional consent, and (2) to give to Congress the power to prescribe the organization, arming and disciplining of the militia. On the other hand it has been argued that the Second Amendment overrules the above quoted sections or if not, that the militia are not “troops.” The Amendment provides:

12. Even the liberal age limits of the New Jersey statute, note 10 supra, are not wholly satisfactory. There are many United States Army officers, recently retired at the age of sixty-four, who would make exceptionally valuable officers in the higher command of the State Guards.

13. See commentary to Sections 5 and 6 of the Model Act, p. 51 infra.


15. Some state cases in the last century took this view. Dunne v. People, 94 Ill. 120, 138 (1879); State ex rel. Madigan v. Wagener, 74 Minn. 518, 523, 77 N. W. 424, 426 (1898); Smith v. Wanser, 68 N. J. L. 249, 258, 52 Atl. 309, 312 (1902). See Wiener, op. cit. supra note 15. Wiener evidently is of the opinion that the clauses in the main body of the Constitution do control. This is also the opinion of the writer.
"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 do not undertake to consider here the merits of the dispute. In any event the recent adoption of an act by Congress authorizing the establishment of state guards assures the legality of state legislation. It will now be in order to consider the provisions of the Model Act.

Section One

Authority and Name. Whenever any part of the National Guard of this State is in active Federal service, the governor is hereby authorized to organize and maintain within this state during such period, under such regulations as the Secretary of War of the United States may prescribe for discipline in training, such military forces as the governor may deem necessary to defend this state. Such forces shall be composed of officers commissioned or assigned, and such able-bodied male citizens of the State as shall volunteer for service therein, supplemented, if necessary, by men of the [___________] militia enrolled by draft or otherwise as provided by law. Such forces shall be additional to and distinct from the National Guard and shall be known as the [_________ State Guard]. Such forces shall be uniformed.

An examination of the enabling act discloses two limits upon the authority of the states to maintain troops of the character of state guards (if they are to be considered as troops). The first is that they are authorized to be organized and maintained only "while any part of the National Guard of the State concerned is in active Federal service." Hence the state may not organize such troops before some part of the National Guard is in actual federal service nor may it maintain them after all the National Guard of the state has been returned to its state status. Section One, therefore, has been drafted to conform with the enabling act in these two respects.

It seems unfortunate that a state which, as under present circum-

16. Public Law No. 874, 76th Cong. 3d Sess. (1940), amends National Defense Act § 61 (1916), 32 U. S. C. A. 194, to read: "No State shall maintain troops in time of peace other than as authorized in accordance with the organization prescribed under this Act: . . . provided further, that under such regulations as the Secretary of War may prescribe for discipline in training, the organization by and maintenance within any State of such military forces other than the National Guard as may be provided by the laws of such State is hereby authorized while any part of the National Guard of the State concerned is in active Federal service. . . ."

Other provisions of the enabling act will be referred to subsequently.

17. The draft here supplies the following note: "$s$(Insert appropriate word "reserve", "unorganized", "sedentary" as provided in State constitution or law)").

18. Note 16, supra.

stances, has reason to expect that its National Guard will be called into service within a few months, cannot at once organize a guard and commence its training in anticipation of that event. It will take a matter of weeks to enlist the men and complete the organization even before training can begin. It will take more weeks of training before the Guard will be shaken down into a really efficient force. So if the whole of the National Guard is called into federal service at one time there will be a shorter or longer period during which the state will be without the efficient protection of the authorized troops. The existence of the situation is not the fault of the Model Act but of the enabling act and it seems desirable to secure from Congress an amendment to that act which will correct this condition of things. If such an amendment is secured Section One of the Model Act should be revised to conform. As matters stand now, however, some time can be saved by completing the paper organization in anticipation of the day when the actual organization can be commenced and no doubt many states will do so. There appears to be no legal objection to this.

The second limitation in the enabling act is that the state is subject to "such regulations as the Secretary of War may prescribe for discipline in training" of such troops. The phrase "discipline in training" is somewhat vague, not to say peculiar. It appears to be incorporated in the act because of the provisions in Article I, Section 8, Clause 16 of the Constitution, previously quoted. The exact limits of this phrase will have to be determined as time goes on. The draftsmen of the Model Act did not attempt to do this but were careful to conform to both of the limits discussed above so that no constitutional question will arise as to its validity.

Section One does not require the governor to organize a state guard whenever the National Guard or a part thereof is withdrawn by the federal government. It is left to his judgment as to whether or not and when such forces are necessary to the defense of the state. He is given authority to commission officers in such forces or to assign to command in such forces officers already commissioned in other military organizations of the state. Officers in the National Guard Reserve and officers on the active list of the National Guard who have been rejected by the federal government as physically unfit for the strenuous work to be expected of the National Guard on federal service may well be capable of performing the less arduous duties to be expected of the State Guard.

None but citizens may be accepted as volunteers. Although the militia

20. Note 16, supra.
laws of the several states generally include in the militia all able-bodied males of the requisite ages who have declared their intention to become citizens, it was not deemed wise by draftsmen of this act to include them. Many resident aliens who have declared their intention to become citizens are intensely loyal to this country and would make useful members of the guard. If accepted they might, however, be dealt with as traitors if taken prisoner by the country of their origin. Especially would that be likely to be so if they were taken in battle. It must be foreseen that the state guard may be called upon to do battle with small units of enemy forces as Under Secretary Patterson has pointed out. On the other hand some resident aliens probably have recently applied for citizenship for the very purpose of worming their way into defensive organizations of this country. The danger to the loyal applicant for citizenship and the danger to the state are prevented by limiting membership to citizens.

Doubtless the desired strength of the State Guard can be recruited from volunteers but provision is nevertheless made, in the unlikely event that a sufficient number is not forthcoming, to draft under the existing military law of the state the necessary quota of persons to fill the need. The forces of the State Guard are required to be uniformed so that they shall have the protection of international law as recognizable organized military forces. As such they may not be summarily executed upon capture as _franc-tireurs_ or guerrillas.

22. Page 44, supra.
23. See Section 9, also, p. 61, infra. Although Section 1 does not require that officers commissioned or assigned be citizens, Section 9 does require that only citizens be commissioned. It seems, however, that an officer who may be assigned need not be a citizen of the state unless the law governing the military organization in which he has been commissioned required citizenship in the state for such a commission. Although, under Section 1, members of the unorganized militia may be drafted into such forces, and under the military law of the state able-bodied males who have filed intentions to become citizens are part of the unorganized militia, it seems doubtful whether Section 9 should be interpreted so as to permit their inclusion in the state guard. The term “enlisted” is generally understood to mean the enlistment of volunteers. “Drafted” or “enrolled” are the terms usually used when non-volunteers are called up by law.
24. Various provisions exist in the law of the different states authorizing the drafting or enrolling from the unorganized or reserve militia of persons for military service. See the heading “Militia Laws”, p. 43, supra, and notes thereunder.
25. *Vattel, Law of Nations* (1852) iii, § 226. Article I, Hague War-Regulations of 1899 as amended in 1907, provides: “The laws, rights and duties of war apply not only to an army, but also to militia and volunteer corps fulfilling the following conditions: (a) To be commanded by a person responsible for his subordinates; (b) to have a fixed distinctive emblem recognizable at a distance; (c) to carry arms openly; and (d) to conduct their operations in accordance with the laws and customs of war. In countries where
Section Two

Organization; Rules and Regulations. The governor is hereby authorized to prescribe rules and regulations not inconsistent with the provisions of this act governing the enlistment, organization, administration, equipment, maintenance, training and discipline of such forces: Provided, such rules and regulations, insofar as he deems practicable and desirable, shall conform to existing law governing and pertaining to the National Guard and the rules and regulations promulgated thereunder and shall prohibit the acceptance of gifts, donations, gratuities or anything of value by such forces or by any member of such forces from any individual, firm, association, or corporation by reason of such membership.

The Model Act does not attempt to define the numbers of troops which are to be raised or to direct their division into infantry, artillery, signal corps, etc. The needs of the different states will vary in this respect and the need in a single state may vary from time to time. It is not advisable to direct that the existing law pertaining to the National Guard shall be incorporated in such an act as this because the existing law with respect to the National Guard conforms with the National Defense Act of 1916, as amended, with respect to organization, training, etc. This is because it is contemplated that the National Guard will be absorbed into the Army of the United States in war times. Many provisions would not, therefore, be suitable to a state guard of the character contemplated by this act. Nevertheless the legislature by enacting this section indicates that its policy is that, insofar as is practicable and desirable, the existing military law of the state should be made applicable to these newly authorized forces.

This section does not provide for the disbandment of the Guard. With respect to this matter the governor is given discretion in one situation and is legally bound to act in another. Section One authorizes the governor to "organize and maintain ... such military forces as the governor may deem necessary to defend this state." If he deems that all or a part of the Guard which has been organized is no longer needed, the governor need no longer maintain it. But when all of the National Guard is returned from active federal service the state guard must be disbanded. Under Section One the Guard may be maintained only "whenever any part of the National Guard of this State is in active Federal service."
Section Four

Requisitions; Armories; Other Buildings. For the use of such forces, the governor is hereby authorized to requisition from the Secretary of War such arms and equipment as may be in possession of and can be spared by the War Department; and to make available to such forces the facilities of state armories and their equipment and such other state premises and property as may be available.

The Congressional enabling act provides:

"That the Secretary of War in his discretion and under regulations determined by him, is authorized to issue, from time to time, for the use of such military units, to any State, upon requisition of the Governor thereof, such arms and equipment as may be in possession of and can be spared by the War Department."

This section authorizes the governor to take advantage of the privilege granted by Congress. The draftsmen have been informed that certain equipment, particularly rifles, accumulated as a result of the World War and still in the hands of the War Department, which would be useful to the state guards, will probably be available.

Companies or other units of the state guards may be formed and located in towns distant from any armories or other state premises suitable for their assembly and drill places. If, by law, school buildings and grounds may not be used other than for educational purposes, an appropriate clause should be enacted as part of this section.

A few of the states have already enacted statutes providing for the organization of state guards in the absence of the National Guard. Such statutes do not contain provisions similar to those of the two which follow. As these two sections are regarded as important and as such states might desire to add them to their military law, they were set up separately in another act called the Model Act Providing For Fresh Pursuit By Military Forces. Obviously the two are also included in the Model State Guard Act. These sections of the two acts are identical and are here analyzed together.
Section Five

Use without this state. Such forces shall not be required to serve outside the boundaries of this state except:

(a) Upon the request of the governor of another state, the governor of this state may, in his discretion, order any portion or all of such forces to assist the military or police forces of such other state who are actually engaged in defending such other state. Such forces may be recalled by the governor at his discretion.

(b) Any organization, unit or detachment of such forces, upon order of the officer in immediate command thereof, may continue in fresh pursuit of insurrectionists, saboteurs, enemies or enemy forces beyond the borders of this state into another state until they are apprehended or captured by such organization, unit or detachment or until the military or police forces of the other state or the forces of the United States have had a reasonable opportunity to take up the pursuit or to apprehend or capture such persons: Provided, such other state shall have given authority by law for such pursuit by such forces of this state. Any such person who shall be apprehended or captured in such other state by an organization, unit or detachment of the forces of this state shall without unnecessary delay be surrendered to the military or police forces of the state in which he is taken or to the United States, but such surrender shall not constitute a waiver by this state of its right to extradite or prosecute such person for any crime committed in this state.

It would be most unfortunate if the work of the state guard is hampered by legal obstacles due to our federal system of sovereign states. In the absence of the forces of the regular army it might happen that parachute troops or troops landed by airplane might secure a lodgement for a time near the borders of two states. The nearby guards of the state in which such troops landed might be insufficient to cope with the situation and perhaps nearby forces of a sister state could quickly reach the scene of danger and join hands with them. In case of such need there should be no doubt of the authority of the governor of the sister state to lend aid upon request. This section gives such authority.

In war we cannot conduct our defense in tight compartments. It is a case of “one for all, and all for one”. Lessons from the recent campaigns in Norway, the Low Countries and France teach us that a clever enemy who plans his campaign with meticulous care and foresight will be capable of taking every advantage that our separate state jurisdictions will afford him. His “fifth column” friends will also be on the alert

Military Forces reads: “No military forces of this state other than the National Guard (and the Naval Militia) shall be required to serve outside the boundaries of this state except: ...” The rest of the section is identical with Section Five of the State Guard Act.
to use state lines as a convenient means to confound those who are hunting them down.

It does not permit of argument that the pursuit of insurrectionists, saboteurs or enemy forces should not be abandoned upon arrival at a state boundary, thus giving precious time to those in flight while the military or police forces of the state of asylum are brought into action. This section makes the necessary provision in this regard, fully protecting the sovereignty and rights of the respective states involved. This section and the next one carry out the same policy that has been approved by thirty states which have adopted the Uniform Act On the Fresh Pursuit of Criminals. Congress has likewise approved such a policy.

The correlative section, granting the consent required in subdivision (b) of the above section follows:

Section Six

Permission to Forces of Other States. Any military forces or organization, unit or detachment thereof, of another state who are in fresh pursuit of insurrectionists, saboteurs, enemies or enemy forces may continue such pursuit into this state until the military or police forces of this state or the forces of the United States have had a reasonable opportunity to take up the pursuit or to apprehend or capture such persons and are hereby authorized to arrest or capture such persons within this state while in fresh pursuit. Any such person who shall be captured or arrested by the military forces of such other state while in this state shall without unnecessary delay be surrendered to the military or police forces of this state to be dealt with according to law. This section shall not be construed so as to make unlawful any arrest in this state which would otherwise be lawful, [and nothing contained in this section shall be deemed to repeal any of the provisions of the Uniform Act on the Fresh Pursuit of Criminals.]

The adoption by the legislatures of these two above sections will give not only the sanction of authority, but also a needed protection to

33. See note 57, infra.

Idaho has a statute from which it may be inferred that troops of another state may be called to its aid. "No armed military force from another state, territory or district shall be permitted to enter the state of Idaho for the purpose of doing military duty therein, without the permission of the governor, unless such force has been called into the active service of the United States, and is acting under authority of the President of the United States." Idaho Code Ann. (1932) § 45-110.

34. See terms of the enabling act, note 16, supra, together with notes 56 and 60, infra.

35. This is Section 2 of the Model Act Providing For Fresh Pursuit By Military Forces. Sections 3, 4, 5 and 6 are the usual sections relating to severability, repeal, short title and time of taking effect.
the officers and men of the State Guards. It can be foreseen that, in the
heat of pursuit, a unit of the Guard may intentionally ignore a state line
if the prospects are bright that capture will be possible within a mile
or two of distance beyond the borders of its home state. If these sec-
tions are not in effect and an arrest is made, the officer in charge of the
unit might be prosecuted for making an illegal arrest. Furthermore, if,
in order to accomplish his arrest, any injury be done to the one cap-
tured, the officer and his men might be charged with criminal assault or
homicide, on the ground that they were acting without legal authority.
Hence the assault or homicide would not be justifiable, as it would be
if such units are given the authority to make arrests in the state of
asylum.36

36. N. Y. Penal Law § 246. "To use or attempt, or offer to use, force or violence upon
or towards the person of another is not unlawful in the following cases:
1. When necessarily committed by a public officer in the performance of a legal
duty; or by any other person assisting him or acting by his direction;
2. When necessarily committed by any person in arresting one who has committed
a felony, and delivering him to a public officer competent to receive him in
custody."

"Any person" seems to include non-citizens, so perhaps, as regards a justifiable assault
the members of the State Guard of another state would be protected in any event by such
statutes.

But as to homicide, the case is not so clear. N. Y. Penal Law § 1055: "Homicide is
justifiable when committed by a public officer, or person acting by his command and in
his aid and assistance: . . .
3. Necessarily, . . . in arresting a person who has committed a felony and is fleeing
from justice; or in attempting by lawful ways and means to apprehend a person
for a felony actually committed, or in lawfully suppressing a riot, or in lawfully
preserving the peace." (Italics supplied.)

It can be urged that the members of the State Guard of another state are not "public
officers" and are not acting by command of a public officer. Hence these sections are de-
sirable so that the members of the Guard will have the protection of law when they act
in a manner required by the exigencies of the situation.

For the reasons given in the text immediately following, there is little doubt of the
constitutionality of these sections under the Federal Constitution. If, however, we are mis-
taken, authority can still be given to the effect that the members of the Guard would not
be personally liable, if they acted pursuant to these sections.

"Although, as has been seen, an unconstitutional statute must, from the strictly logical
point of view, be regarded as never having had any potency to create legal rights or obli-
gations, practical considerations have led some of the State courts to ascribe a certain
validity to acts committed by persons exercising in good faith powers conferred by acts
which are later held to be unconstitutional. This is in accordance with the general princi-
ples of law which govern de facto officers or corporations.

"There have also been cases in which the existence upon the statute books of a measure
authorizing action that has been taken, though later held to be unconstitutional, has been
held to relieve from civil liability persons acting in good faith upon the assumption that
There seems to be but little question as to the constitutionality of the above two sections. Article I, Section 10, Clause 3 of the Constitution provides:

"No State shall, without the Consent of Congress . . . enter into any agreement or compact with another State . . . or engage in War, unless actually invaded, or in such imminent danger as will not admit of delay."

It may be argued that the adoption by several states of these sections does not constitute a compact or agreement among them. Subdivision (a) of the first of the pair does not direct the governor to lend troops and makes no promise to lend them, express or implied. The governor has absolute discretion as to whether or not they should be sent. Nor is there any agreement, express or implied, that troops which are sent shall remain in the requesting state until released by it. The governor of the lending state may withdraw his troops at his discretion. Furthermore, although the closing exceptive provisions of the section of the Constitution above quoted does not qualify the prohibition against agreements and compacts, but qualifies the prohibition against engaging in war, nevertheless it gives color to the compact portion of the same clause. If a state may engage in war when actually invaded or is in such imminent danger as will not admit of delay, it seems a reasonable construction of the Compact Clause to hold that it is not intended to the act was valid. In other cases, however, persons so acting have been held civilly liable under the doctrine that everyone is presumed to know the law. In Flaucher v. Camden, (56 N. J. L. 244), a private citizen was held criminally liable for an act assumed by him to be legal, because of a statute, which statute was later declared by the court to be unconstitutional." Citing: Nabel v. Bosworth, 198 Ky. 847 (1923); Lang v. Mayor of Bayonne, 74 N. J. L. 455, 68 Atl. 90 (1907); Henke v. McCord, 55 Iowa 378, 7 N. W. 623 (1880); Shafford v. Brown, 49 Wash. 307, 95 Pac. 270 (1908); Sumner v. Beeler, 50 Ind. 341, 19 Am. Rep. 718 (1875); Kelly v. Bemis, 4 Gray 83 (Mass. 1855); 1 Willoughby, The Constitution (2d ed. 1929) p. 13.

See also Field, The Effect of an Unconstitutional Statute (1935) 133-135.

"A member of the armed forces of the United States or any of the several States thereof is privileged to inflict a harmful contact or otherwise invade another's interests of personality if such invasion is reasonably necessary for the execution of a command issued by a superior, if the command is

(a) lawful, or

(b) is believed by the actor to be lawful and is not so palpably unlawful that any reasonable man would recognize its illegality." Restatement, Torts (1934) § 146.

37. This study of the constitutionality of these sections is largely the work of Caesar L. Pittas, Editor-in-Chief of the Fordham Law Review. The writer has checked his authorities and agrees with his reasoning and conclusions.
prevent states from collaborating in defense against an enemy. Under this interpretation, subdivision (a) of the first of these sections is valid constitutionally, even if it be considered that two states acting under it are acting pursuant to an agreement.\textsuperscript{58}

As to subdivision (b) it is true that it is not effective unless the state into which the guard pursues insurrectionists, saboteurs or enemy forces has given its assent. Such assent is given if the state of asylum has enacted the second section into law. But this section does not condition assent upon like assent given to its military forces. Reciprocity is not essential. State A says: "To whomever it may concern: You may pursue into our state provided, \textit{etc.}" But it does not add "and provided you give our troops the same permission." In other words no consideration is demanded for the permission granted. A mere permission to another is not ordinarily described as an "agreement", but as a license.\textsuperscript{59} If, however, it be answered that action taken by one state pursuant to license given by another state is action pursuant to an "agreement",\textsuperscript{40} we nevertheless maintain that such an agreement is not within the intent of the Compact Clause of the Constitution.\textsuperscript{41}

The Supreme Court has interpreted this clause as not applying to all compacts or agreements between states, although no case has been presented in which it has been necessary for the Court to determine authoritatively what type of state compacts and agreements require the consent of Congress. In \textit{Virginia v. Tennessee}\textsuperscript{42} the Court, in a \textit{dictum},\textsuperscript{43}...

\textsuperscript{38} In \textit{Holmes v. Jennison}, 39 U. S. 538, 572, 14 Pet. 540, 572 (1840), Taney, C. J., said: "If there is a verbal understanding, to which both parties have assented, and upon which both are acting, it is an 'agreement'". This statement was made in one of the opinions delivered by an equally divided court upon the question of the validity of the act of Vermont in arresting the relator for the purpose of surrendering him to Canada for punishment for a crime committed in Quebec. The case did not involve Article I, Section 10 in its application to agreements between two states, but in its application to the prohibition that "no state shall enter into any treaty, alliance or confederation" and that no state shall enter into any agreement or compact "with a foreign power".

\textsuperscript{39} The Oxford Dictionary, Concise Edition, defines "permission" as "leave, license (to do)".

\textsuperscript{40} Cf. Taney, C.J., in \textit{Holmes v. Jennison}, supra, note 38.

\textsuperscript{41} Although Section 5 (a) will probably never be invoked except in war, the business of pursuing saboteurs or insurrectionists may have to be undertaken in time of technical peace but when war is imminent. Hence the color lent to the Compact Clause by the closing portion of Article I, Section 10 of the Constitution will not help.

\textsuperscript{42} 148 U. S. 503 (1893). In this case by concurrent legislation, Virginia and Tennessee had agreed upon a boundary line between the two states. The question involved was whether this was a compact prohibited by the Constitution.

\textsuperscript{43} The language is not necessary to the decision since it was found that Congressional consent had been indicated by a long series of statutes recognizing the boundary with respect to judicial and revenue matters.
for the first time discussed the necessity for Congressional consent to interstate compacts.  

"Looking at the clause in which the terms 'compact' or 'agreement' appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States."  

Although this is a dictum it is submitted that this is the logical interpretation. Furthermore it has been approved by the courts in other cases and is the only available language of the Supreme Court on the question of the need for Congressional consent. This language and...
the language of the courts which cite it with approval leave no doubt as to the lines along which future decisions are likely to follow. Therefore the question is: Will adoption by two or more states of the proposed act increase the political power of the states, and will it interfere with the just supremacy of the Federal government? We believe not. Cooperation among the several states for the purpose of circumventing saboteurs, insurrectionists, and enemy forces can hardly be said to increase the political power of such states. On the contrary such cooperation has the object of preserving the integrity of the states and of the Union. It moreover cannot logically be argued that such cooperation will tend to interfere with the just supremacy of the Federal government, for the very purpose of the Act is to secure the safety of the nation against subversive or hostile action by saboteurs, insurrectionists, and enemy forces. These acts, it should be remembered, are part of a program undertaken mainly to aid national defense.

The Court in Virginia v. Tennessee goes on to say:

"So in the case of threatened invasions of cholera, plague, or other causes of sickness and death, it would be the height of absurdity to hold that the threatened States could not unite in providing means to prevent and repel the invasion of the pestilence without the consent of Congress. . . ."  


"Since it is definitely settled that the congressional consent required by the Constitution may be express or implied, it would have been more satisfactory to hold, in those cases, (where the courts have intimated that no congressional consent is necessary) that the consent of Congress was implied from its silent acquiescence after the fact. . . ." Comment (1922) 31 Yale L. J. 635, 637.

On the other hand this interpretation has been accepted by prominent Constitutional scholars.

"... we are led to conclude that only political compacts or agreements which affected their sovereignty as between themselves or between them and the federal government were sought to be regulated or controlled." Bruce, op. cit. supra note 46, at 514.

"The consent of Congress is required for interstate agreements having a substantial tendency to increase the political power or influence of one or more of the states affected." Magruder & Claire, The Constitution (1933) p. 147.

Consent of Congress would be required "... if its effect were or might be to increase the political power of the states involved and to encroach upon the full and free exercise of federal authority." Rostow, Constitutional Law (1939) § 104.

49. Rostow, Constitutional Law (1939) § 104.

50. The historic example of the type of compact that would increase the political power of a state and therefore be in violation of the Compact Clause is that of one state undertaking by compact with another state to cede territory to it. Virginia v. Tennessee, 148 U. S. 503 (1893).


52. 148 U. S. 503, 518 (1893).
What language could more clearly explain the very purpose of the proposed Act? Who will say that a wave of sabotage is less of a threat to a state and the nation than "an invasion of cholera"? Who will say that the visitation of a "plague" constitutes more danger to a state and the nation than the raising of insurrection? What "greater causes of sickness and death" can be imagined than those at which the proposed Act is aimed? Every day the press calls to our attention the danger of sickness and death in conquered and cowed Europe. That the forerunner of such danger was sabotage, fifth column activities, insurrection and invasion is a matter of common knowledge. It is submitted that "it would be the height of absurdity to hold that the threatened States could not unite in providing means to prevent and repel the invasion" of saboteurs, insurrectionists, and enemy forces, "without the consent of Congress." The sections therefore seem to be the proper use of the interstate compact for the solution of interstate and national defense problems which in no way tend to increase the political power of the states or to usurp the just power of the Federal government and is a use which has been strongly urged. Therefore we submit that in accepting what we believe to be, and what the only pertinent judicial language on the subject can lead one to believe is, the true interpretation of the Compact Clause of the Constitution, the proposed Act needs no enabling act from Congress.

However, since the above interpretation of the Constitution has been doubted, it is comforting to know that Congress, in the Ashurst-Sumners Act of 1934, authorized the states to enter into compacts or agreements "for mutual assistance in the prevention of crime." In pur-

53. With our modern advances in the field of medical science, we might bear an invasion of cholera with more equanimity than an invasion of an enemy; and if the scientists could develop a chemical formula to prevent insurrection and sabotage, they might well surpass their accomplishments in preventing plagues.


55. See note 48, supra.

56. "The consent of Congress is hereby given to any two or more States to enter into agreements or compacts for co-operative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies and to establish such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts." 18 U. S. C. A. § 420.

The Hon. Hatton W. Sumners, Chairman of Judiciary Committee, House of Representatives, one of the sponsors of the above act, is Federal Vice-President of the Interstate Commission on Crime and a member of the Joint Conference Committee of the Federal-State Conference on Law Enforcement Problems of National Defense.
suance of this statute, a Uniform Act on the Fresh Pursuit of Criminals has been adopted by thirty states.\textsuperscript{57} The section, of the two acts in question carry out exactly the same policy as does this existing act which has found so much favor.

The language of the Ashurst-Sumners Act is very broad and is not confined to the organized police forces of the states,\textsuperscript{58} and would most certainly cover the parts of these sections which deal with the fresh pursuit of saboteurs and insurrectionists over the state lines.\textsuperscript{59} Finally it may be said that Congress, by specifically authorizing the states to create such bodies of troops as the State Guards has impliedly authorized their use in a manner that will effectuate their reason for existence.\textsuperscript{60} In summary, the constitutionality of these sections may be maintained upon these grounds: (1) that the adoption by two or more states does not amount to a compact or agreement among them; (2) that if such an adoption does amount to a compact or agreement, such is not within the intended prohibition of the Compact Clause, and (3) that if such

\textsuperscript{57} The thirty states which have adopted the act are: Arizona, California, Colorado, Connecticut, Delaware, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Virginia, West Virginia, and Wisconsin. The District of Columbia has also adopted this act. HANDBOOK ON INTERSTATE CRIME CONTROL (1940) frontispiece table.

Section 6 of the Model State Guard Act is similar in principle to the Uniform Act on the Fresh Pursuit of Criminals. However the latter act might not be so construed as to include the action of military forces like the State Guard as it is limited to "any member of a duly organized state, county, or municipal peace unit of another state." HANDBOOK ON INTERSTATE CRIME CONTROL (1940) 15.

Even if the State Guard is considered to be a "peace unit", which seems reasonable, the Uniform Act on the Fresh Pursuit of Criminals limits authority to make arrests in the state of asylum to arrests of persons who are believed to have committed a felony in the state from which they fled. Insurrection is a felony—treason; sabotage may or may not be a felony. In most states at present it is a misdemeanor—malicious mischief. Under the Model Sabotage Prevention Act proposed to the states by the Federal-State Conference it is made a felony.

Enemy forces of a foreign nation, however, are probably not committing a felony under the common law or under treason statutes. When captured they are not tried in civil courts. Indeed they are not tried by the military courts, except when acting as spies, but are kept as prisoners under the Laws of War. Hence the Uniform Act on the Fresh Pursuit of Criminals does not authorize their capture, as does the Model State Guard Act and the Model Act Providing for Fresh Pursuit by Military Forces, herein analyzed.

\textsuperscript{58} See note 56, supra.

\textsuperscript{59} Sections 5 and 6 of the Model Act to Provide for a State Guard, and Sections One and Two of the companion act on Fresh Pursuit by Military Forces. See p. 51, supra.

\textsuperscript{60} The consent of Congress to an agreement between two or more states may be given otherwise than in the form of an express and formal statement of every proposition of the agreement, and of its consent thereto. Virginia v. West Virginia, 78 U. S. 39 (1870).
adoption is within the intended prohibition of the Compact Clause the consent of Congress has been given in terms by the Ashurst-Sumners Act and by implication in the enabling act which authorizes their organization and maintenance.

Section Seven of the Model State Guard Act

Federal Service. Nothing in this act shall be construed as authorizing such forces, or any part thereof to be called, ordered or in any manner drafted, as such into the military service of the United States, but no person shall by reason of his enlistment or commission in such forces be exempted from military service under any law of the United States.

This section follows the wording of the Congressional enabling act.61

Section Eight

Civil Groups. No civil organization, society, club, post, order, fraternity, association, brotherhood, body, union, league, or other combination of persons or civil group shall be enlisted in such forces as an organization or unit.

It is believed that the efficiency of the guard will be increased if the governor has a free hand to appoint available officers who have had military experience and who are qualified in other respects to exercise command. It also seems wise to leave to the officers a free hand in appointing the most capable men to non-commissioned posts. If an existing civil group were accepted in toto as a company or a battalion it is probable that the group would demand the right to designate its officers and non-commissioned officers and that it would resist appointments of persons who were not previously members of the group. Furthermore some members of any civil group probably would not be physically fit for membership in military forces of this character. This section does not, however, conflict with provisions of law existing in some states which direct that officers in any military forces of the state be elected by its members.62 The section does not prohibit elections of officers but does prohibit the enlistment of civil groups as distinct organizations or units in the guard. It does not, of course, disqualify individual members of civil groups from acceptance in the guard by reason of such membership.

Sections Nine, Ten and Eleven follow in order, without comment.

61. Public Law 874, 76th Cong., 3d Sess. (1940). "Provided further, that such forces shall not be called, ordered, or in any manner drafted, as such, into the military services of the United States; however, no person shall, by reason of his membership in any such unit, be exempted from military service under any Federal law. . . ."

62. Nor does Section 1, supra p. 46. "Such forces shall be composed of officers commissioned. . . ." This does not define the basis for giving commissions.
Section Nine

Disqualifications. No person shall be commissioned or enlisted in such forces who is not a citizen of the United States or who has been expelled or dishonorably discharged from any military or naval organization of this state, or of another state, or of the United States.

Section Ten

Oath of Officers. The oath to be taken by officers commissioned in such forces shall be substantially in the form prescribed for officers of the National Guard, substituting the words (——— State Guard) where necessary.

Section Eleven

Enlisted Men. No person shall be enlisted for more than (one year), but such enlistment may be renewed. The oath to be taken upon enlistment in such forces shall be substantially in the form prescribed for enlisted men of the National Guard, substituting the words (——— State Guard) where necessary.

Section Twelve

Articles of War; Freedom from Arrest; Jury Duty.

(a) Whenever such forces or any part thereof shall be ordered out for active service the Articles of War of the United States applicable to members of the National Guard of this state in relation to courts martial, their jurisdiction and the limits of punishment and the rules and regulations prescribed thereunder shall be in full force and effect with respect to [the ——— State Guard.]

(b) No officer or enlisted man of such forces shall be arrested on any warrant, except for treason or felony, while going to, remaining at, or returning from a place where he is ordered to attend for military duty. Every officer and enlisted man of such forces shall, during his service therein, be exempt from service upon any posse comitatus and from jury duty.

The composition and jurisdiction of courts martial seems to be a matter that belongs to the legislature and not one that can legally be left to executive discretion. So that there cannot be any question as to the legality of the action of the courts martial, subdivision (a) of this section is added to the act. Such a provision, incorporating the Articles of War, is found in most of the state statutes relating to the National Guard.63 Provisions similar to those of subdivision (b) are likewise found in most of such statutes.64

63. For a typical provision see N. Y. MILITARY LAW § 14; N. Y. Consol. Laws Chap. 37, § 14.
64. For a typical provision see PA. STAT. ANN. (Purdon, 1930) tit. 51, §§ 77, 185.
The Articles of War are punitive and not protective. They provide for the punishment of crimes against the civil community committed by soldiers on active duty, as well as providing for the punishment of purely military offenses. Furthermore Article Seventy-four provides for the surrender to the civil courts of offenders against the civil law of the state, except in time of war. This Article has been construed by many cases to preserve the general jurisdiction of the civil courts in time of peace over persons in military service. The adoption of the State Guard Act will in no way affect the existing law relative to suspending the writ of habeas corpus.

The remaining sections are the customary ones added to most acts.

Section Thirteen

Severability. If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.


66. Delivery of offenders to civil authorities. Article 74, 10 U. S. C. § 1546, 41 Stat. § 803. When any person subject to military law, except one who is held by the military authorities to answer, or who is awaiting trial or result of trial, or who is undergoing sentence for a crime or offense punishable under these articles, is accused of a crime or offense committed within the geographical limits of the States of the Union and the District of Columbia, and punishable by the laws of the land, the commanding officer is required, except in time of war, upon application duly made, to use his utmost endeavor to deliver over such accused person to the civil authorities, or to aid the officers of justice in apprehending and securing him, in order that he may be brought to trial. Any commanding officers who upon such application refuses or willfully neglects, except in time of war, to deliver over such accused person to the civil authorities or to aid the officers of justice in apprehending and securing him shall be dismissed from the service or suffer such other punishment as a court-martial may direct.

When, under the provisions of this article, delivery is made to the civil authorities of an offender undergoing sentence of a court-martial, such delivery, if followed by conviction, shall be held to interrupt the execution of the sentence of the court-martial, and the offender shall be returned to military custody, after having answered to the civil authorities for his offense, for the completion of the said court-martial sentence.

Section Fourteen

Repeal. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

Section Fifteen

Short Title. This act may be cited as the (State Guard Act).

Section Sixteen

Time of Taking Effect. This act shall take effect (______________). 68

68. Any information concerning the two acts discussed in this article may be obtained from the Secretary of the Joint Conference Committee of the Federal-State Conference on Law Enforcement Problems of National Defense, Hubert R. Gallagher, Esq., 522 Transportation Building, Washington, D. C.

The sub-committee which drafted the Model State Guard Act was composed of the Hon. Lawrence C. Jones, Attorney General of Vermont, Chairman; the Hon. Thomas J. Herbert, Attorney General of Ohio; Allen Moore, Esq., Legal Counsel, Division of State and Local Cooperation, Advisory Commission to the Council of National Defense, War Department, who laid the foundation on which the Act was built; and the writer, Assistant Reporter of the Interstate Commission on Crime.
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