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OHIO DEFENSE CORPS—GOVERNOR HAS AUTHORITY TO ORGANIZE AND MAINTAIN MILITARY FORCES WITHIN THIS STATE KNOWN AS OHIO DEFENSE CORPS—BASIS PROVIDED IN SECTIONS 5920.01, 5923.01 RC, 5176, 5304 GC.

SYLLABUS:

Under the provisions of Section 5920.01, Revised Code, Section 5304, General Code, and Section 5923.01, Revised Code Section 5176, General Code, authority is given to the Governor to organize and maintain within this state the military forces known as the Ohio Defense Corps on the basis therein provided.

Columbus, Ohio, October 22, 1953

Major General A. E. Henderson
Adjutant General of Ohio
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"A question has arisen concerning the legal status of the Ohio Defense Corps in view of the provisions of subparagraphs (a) and (b) of Section 194, Title 12, United States Code.

"Enclosed herewith is a copy of the memorandum opinion of The Judge Advocate of this Department.

"Upon examination of the memorandum you will note that there appears to be no decisions precisely in point by courts of competent jurisdiction. I therefore would appreciate your official opinion."

The provision of subparagraphs (a) and (b) of Section 194, Title 32, United States Code, in pertinent part are as follows:

> "(a) No state shall maintain troops in time of peace other than as authorized in accordance with the organization prescribed under this Act (this title). Nothing contained in this Act shall be construed to limit the rights of the States in the use of the National Guard within their respective borders in time of peace or to prevent the organization and maintenance of State police or constabulary.
>
> "(b) Effective for a period of two years after the date of enactment of this amendment (September 27, 1950), and under such regulations as the Secretary may prescribe for the organization, standards of training, instruction, and discipline, the organization by and maintenance within any State of such military forces other than a National Guard as may be provided by the laws of such State is hereby authorized while any part of the National Guard of such State is in active Federal service * * *."

The statutory authorization for the organization and maintenance of the Ohio defense corps is found in Section 5920.01, Revised Code, Section 5304, et seq., General Code, which reads as follows:

> "The governor shall organize and maintain within this state on a cadre or reserve basis military forces capable of being expanded and trained to defend this state whenever the Ohio national guard, or a part thereof, is employed so as to leave this state without adequate defense. In case of an emergency proclaimed by the president, or the Congress of the United States, or the governor, or caused by enemy action or imminent danger thereof, the governor, as commander in chief, shall expand such forces as the exigency of the occasion requires. Such forces shall be organized and maintained under regulations which shall not be inconsistent with such regulations as the secretary of defense prescribes for discipline and training and shall be composed of officers commissioned and assigned, and such able-bodied citizens of the state as are accepted therein. Such forces shall be equipped with suitable uniforms not in violation of federal laws or contrary to the regulations of the secretary of defense. Such forces shall be known as the Ohio defense corps. During the period of organization on a cadre or reserve basis the commander in chief may fix lesser rates of pay for armory drill purposes or for service in encampments and maneuvers. In the event that the regulations of the department of defense are modified so as to recognize the Ohio defense corps as a part of the Ohio national guard not subject to induction into federal service, the laws pertaining to the Ohio national guard shall apply to the Ohio defense corps and it shall be known as a component of the Ohio national guard."

It will be observed that this state legislative enactment employs broad general terms in providing authority for the establishment of the Ohio defense corps and that it contains no limitation similar to that provided in subparagraph (b) of Section 194, Title 32, supra. That is to say, it would appear to be the legislative intent that the authority therein conferred upon the governor to organize and maintain such corps is to be of indefinite duration. In the memorandum which you have submitted with your inquiry the question is raised whether these two statutory enactments are in conflict and whether the effectiveness of the state legislation was not destroyed at the termination of the two-year period following September 27, 1950, the date of the enactment of subparagraph (b), Section 194, Title 32, United States Code.

In Section 1, Article II, Ohio Constitution, provision is made for the organization by law of the state militia "in such manner, not incompatible with the constitution and laws of the United States, as may be prescribed by law."

The congress is given power under Section 8, Article I, United States Constitution, to "provide for the common defense * * * of the United States." In Section 10, Article I, United States Constitution, we find the provision that "No State shall, without the consent of Congress * * * keep Troops, or Ships of War in time of Peace * * *."

In the second amendment of the United States Constitution it is provided that:

> "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."

It would appear that Section 194, Title 12, United States Code, hereinbefore quoted in pertinent part, was enacted by the congress under authority of the constitutional provisions above indicated. Moreover, it would appear that the provisions of Section (a), forbidding the States to "maintain troops in time of peace," except as authorized by the national defense act, is based on the provision just noted in Article I, Section 10, requiring the consent of the congress for a state to "keep troops * * * in time of peace"; and that the purpose of the congress in enacting subparagraph (b) in Section 194, Title 32, was to extend their consent for a limited period of time for the several states to "keep troops" in addition to those the organization of which was provided for in the national defense act.

It will be noted that in the enactment of subparagraph (b) of Section 194, Title 32, the language employed does not refer in terms to the keeping of troops but rather that authorization is given for the "organization by and maintenance within any state of such military forces other than a National Guard as may be provided by the laws of such state * * *." It must be remembered, however, that this language is found in the same section with an inhibition against the keeping of troops in time of peace, and that the constitutional authority for the enactment refers only to the keeping of troops and not to the organization and maintenance of all military forces. The question thus presented is whether the terms "keeping troops" and "organizing and maintaining military forces" are synonymous, and further whether, in view of the federal constitutional and statutory provisions already pointed out, any power is left to the states to provide for a military organization such as the Ohio defense corps.

In 36 American Jurisprudence, pp. 213, 214, Section 44, the power of the states to provide for the organization and maintenance of militia is discussed in the following language:

> "The Constitutions of the several states universally provide for the organization and maintenance of a well-regulated militia, and grant to the legislatures the necessary authority to carry that provision into effect. The power of state governments to legislate concerning the militia existed and was exercised before the adoption of the Constitution of the United States, and as its exercise was not prohibited by that instrument, it remains with the states, subject only to the paramount authority of acts of Congress enacted in pursuance of the Constitution of the United States. It seems to be indispensable that there should be concurrent control over the militia in both governments within the limitations imposed by the Constitution. Accordingly, it is laid down by text writers and courts that the power given to Congress to provide for organizing, arming and disciplining the militia is not exclusive. It is defined to be merely an affirmative power, and not incompatible with the existence of a like power in the states; and hence the conclusion is that the power of concurrent legislation over the militia exists in several states with the national government. When Congress has once acted within the limits of the power granted in the Constitution, its laws for organizing, arming, and disciplining the militia are supreme, and all interfering regulations adopted by the states are thenceforth suspended, and for the same reasons all repugnant legislation is unconstitutional. That principle applies, however, only where Congress has assumed control of the militia under granted powers, and does not militate against the construction uniformly given to the Constitu-

tion that a state may organize and discipline its own militia, in the absence of or subordinate to the regulations of Congress. It is only repugnant and interfering state legislation that must give way to the paramount laws of Congress constitutionally enacted. Thus it is competent for a state to provide by statute that the militia shall be subject to the Articles of War and that its members shall be triable by a general court-marshal for a violation thereof. The reservation in the Federal Constitution of the power to the states, respectively, of the appointment of the officers and the authority to train the militia according to the discipline prescribed by Congress does not put any restriction upon the states in respect to the concurrent legislation concerning the militia. That reservation constitutes an exception merely from the power given to Congress to provide for organizing, arming, and disciplining the militia, and is a limitation upon the authority which would otherwise have devolved upon it as to the appointment of officers. The exception from a given power cannot, upon any fair reasoning, be considered as an enumeration of all the powers which belong to the states over the militia. In the exercise of its reserved powers, a state may enact and enforce legislation designed to prevent any hindrance or interference with the raising of armies and military forces by the nation."

Many of the statements set out in the foregoing comments are based on the decision in the case of Dunne v. The People, 94 Ill., 120, the second and fifth paragraphs of the headnotes reading as follows:

"2. The power in Congress to provide for organizing, arming, equipping and disciplining the militia, is not exclusive. It is merely an affirmative power, and not incompatible with the existence of a like power in the States; and hence the States have current power of legislation not inconsistent with that of Congress. It is only repugnant and interfering State legislation that must give way to the paramount laws of Congress constitutionally enacted."

"5. There is no question of the power of a State to organize such portion of its militia as may be deemed necessary in the execution of its laws, and to aid in maintaining domestic tranquility within its borders. The power given to the chief executive of the State to call out the militia to execute the laws, etc., by implication recognizes the right to organize a State militia."

Moreover, it is interesting to observe that in the opinion by Mr. Justice Scott, a distinction is drawn between the keeping of troops in time of peace and the organization of an active militia. On this point it is said at page 138:

> "An objection broader in its scope than either of those noted is, that the active militia organized under the statute comes within the prohibition of the second clause, section 10, art. 1 of the Constitution of the United States, which withholds from the States the power to keep 'troops' in time of peace. Our understanding is, the organization of the active militia of the State conforms exactly to the definitions usually given of militia. Lexicographers and others define militia, and so the common understanding is, to be 'a body of armed citizens trained to military duty, who may be called out in certain cases, but may not be kept on service like standing armies, in time of peace.' That is the case as to the active militia of this State. The men comprising it come from the body of the militia, and when not engaged at stated periods in drilling and other exercises, they return to their usual avocations, as is usual with militia, and are subject to call when the public exigencies demand it. Such an organization, no matter by what name it may be designated, comes within no definition of 'troops,' as that word is used in the constitution. The word 'troops' conveys to the mind the idea of an armed body of soldiers, whose sole occupation is war or service, answering to the regular army. The organization of the active militia of the State bears no likeness to such a body of men. It is simply a domestic force as distinguished from regular 'troops,' and is only liable to be called into service when the exigencies of the State make it necessary."

It is thus to be seen that a very strong argument can be made for the proposition that the reference in subparagraph 2 of Section 194, Title 32, to organization and maintenance of "military forces," must be deemed to be limited to the organization and maintenance of military forces in such a way as to constitute the "keeping of troops" within the meaning of the federal constitution; and that the organization of the Ohio defense corps, as a part of the active state militia, cannot be deemed, under the rule in the Dunne case, supra, to be forbidden by this federal enactment.

I do not, however, deem it necessary to resolve this question for the purpose of your inquiry. You will observe that the militia of the state of Ohio is defined in Section 5923.01, Revised Code, Section 5176, General Code, which provides as follows:

> "The militia of the state shall consist of all able-bodied male citizens of the state, who are more than eighteen years of age, and not more than forty-five years of age except as provided in section 5923.03 of the Revised Code. The militia shall be divided into four classes:

(A) The Ohio national guard;
(B) The Ohio naval militia;
(C) The Ohio defense corps;
(D) The unorganized militia.

"The Ohio national guard, the Ohio naval militia, and the Ohio defense corps shall be known collectively as the organized militia.

" 'Military forces' includes the Ohio national guard, the Ohio naval militia, the Ohio defense corps, and the unorganized militia.

" 'National defense act' means an act of congress, entitled 'An act for making further and more effectual provision for the national defense and for other purposes,' approved by the president June 3, 1916, and all acts amendatory thereof and supplementary thereto.

"No troops shall be maintained in time of peace other than as authorized and prescribed under the national defense act. Such limitation does not affect the right of the state to the use of the militia within its borders in time of peace as prescribed in the military laws of this state. This section does not prevent the organization and maintenance of police."

This statute, it may be noted, was enacted effective June 5, 1951, and the Legislature must be presumed to have been aware not only of the federal constitutional limitation on the keeping of troops, already pointed out herein, but aware also of the restrictive provisions of Section 194, Title 32, United States Code. With this in mind, we may observe that in the final paragraph of this section the Ohio Legislature has recognized the constitutional inhibition against the keeping of troops and has provided therein that "no troops shall be maintained in time of peace other than as authorized and prescribed in the national defense act;". This language is immediately followed, however, by the following proviso:

"Such limitation does not affect the right of the state to use the militia of Ohio within its borders in time of peace as prescribed in the military laws of this state."

The militia, the use of which the Legislature thus deemed to be outside the inhibition with respect to the keeping of troops, is defined in the same section as including the Ohio defense corps. This enactment is, therefore, a plain legislative declaration that the organization, maintenance and use of the Ohio defense corps was not deemed to be within the inhibition in the federal constitution and statutes relative to the keeping of troops in time of peace. Moreover, this declaration of policy plainly

appears to have been repeated by the 100th General Assembly by the inclusion in the provisions of Amended House Bill 816, approved by the governor July 30, 1953, of an appropriation item of $150,000 for the Ohio defense corps for the 1953-1955 biennium. Finally it may be pointed out that the statutory authorization for the creation of the Ohio defense corps, Section 5304, General Code, was enacted in Amended Senate Bill 259, 99th General Assembly, effective May 26, 1949, such enactment being made more than a year prior to the enactment by congress of the permissive provisions of subparagraph (b), Section 194, Title 32, United States Code. This circumstance is likewise a clear legislative declaration of the notion that the creation of the Ohio defense corps was not within the federal constitutional and statutory inhibitions against the keeping of troops by states in time of peace. Accordingly it becomes clear that the only basis upon which the validity of presently existing Ohio legislation on the subject of the Ohio defense corps can be questioned is that of a possible conflict with the federal constitutional and statutory provisions already noted. In Ohio the power to declare a statute unconstitutional, even by the Supreme Court, is sharply limited by the constitution; and such power is, of course, wholly beyond the province of my office. For this reason, and in view of the plain legislative indications already pointed out that the maintenance, organization and use of this corps was not deemed by the Legislature to be in conflict with the constitution, I have no alternative but to adopt the view which upholds its validity; and this I am more readily disposed to do by reason of the presumption which always obtains as to the constitutional validity of the legislative enactments, and by reason as well of the distinction pointed out in the Dunne case, supra, between (a) the keeping of troops and (b) organization, maintenance and use of the state militia.

Accordingly, in specific answer to your inquiry, it is my opinion that under the provisions of Section 5920.01, Revised Code, Section 5304, General Code, and Section 5923.01, Revised Code, Section 5176, General Code, authority is given to the Governor to organize and maintain within this state the military forces known as the Ohio defense corps on the basis therein provided.

Respectfully,

C. WILLIAM O'NEILL
Attorney General