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Deanna Hall
Operator's Signature

10/23/03
Date

2003 SENATE POLITICAL SUBDIVISIONS

SE 2420

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10/23/03
Date

2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2420

Senate Political Subdivisions Committee

☐ Conference Committee

Hearing Date March 21, 2003

Tape Number	Side A	Side B	Meter #
1	X		0 - End
		X	0 - 1636
Committee Clerk Signature <i>Dorley Borg</i>			

Minutes:

CHAIRMAN COOK called the committee to order. All members (6) were present.

CHAIRMAN COOK opened the hearing on SB 2420 relating to the militia and the national guard.

CHAIRMAN COOK, District 34, Mandan, ND, introduced SB 2420. He refreshed the committee's memory as to how we got to this point with a delayed bill. We had HCR 3005 on the senate floor which would have removed all references to the militia in the North Dakota Constitution. The problem that was identified was a discrimination issue which was: can women nonresidence or males over forty five serve in the National Guard. His argument on the floor that day was that the National Guard was not mentioned in the North Dakota Constitution and believed the problem needed to be and could be corrected by amending or correcting the Century Code. The biggest point he tried to make was that reference to males 18 to 45 who must serve if called by the governor. On page 15 of SB 2420 you will find what the penalty will be to any

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Senate Political Subdivisions Committee

Bill/Resolution Number SB 2420

Hearing Date March 21, 2003

male eighteen to forty five that does not serve they will be a deserter. General Haugen, Al Dohrmann, AG, Majority Leader and I discussed how we would move forward and find a solution to this problem of discrimination. Senator Cook took the lead responsibility on working on a delayed bill draft that deals with the century code, Mr Dohrmann took the lead responsibility of drafting some proposed amendments to HCR3005 if we were to reconsider our action. There is consensus that the century code is outdated and needs to be amended. There is not consensus that amending the century code alone would solve this problem. The other challenge is what to do first. Do you first change the constitution and then change the century code to match the new constitution or do you first address this problem by correcting problems that are in century code right now to match existing constitutional law. Tim Dawson will walk the committee through the bill. Senator Cook handed out legislation (See attached)

Tim Dawson, Legislative Council, appeared not for or against the bill but to explain it. The bill draft has conventions in it. There are two separate ideas, the first one is dealing with the militia and the second one is dealing with the terms active duty, on duty, active service, military duty, state active duty, active service of the state and non civilian service. He broke this down and used just three terms, active duty, active service and state active duty. His basis for the use of the term militia is based on part of our constitution that says that the legislative assembly shall provide by law for the establishment of volunteer organizations of the civil armed services which shall be classified as the active militia. The active militia means the organized and uniformed military forces of this state known as the North Dakota National Guard. The reserve service has to be call to active duty before it is the active militia

No testimony in support of SB2420.

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Senate Political Subdivisions Committee

Bill/Resolution Number SB 2420

Hearing Date March 21, 2003

Testimony in opposition of SB 2420.

Major General Michael Haugen, Adjutant General of North Dakota, appeared in opposition to SB 2420. (See attached testimony) Brought the committee up to this point on how this process got started. A few years ago the state of Wyoming, which has a constitution almost identical to ours had a legal challenge in the National Guard because personnel were promoted that did not reside in the state. A lawsuit brought against the state by the non resident members of the national guard because they had the same residency requirements listed. It was found that those individuals that did not reside in Wyoming could not be promoted in the National Guard over and above the residence of Wyoming. They were then removed from their offices in the National Guard and the residents were promoted. Then the non residence appealed through the federal courts and that ruling was overcome. So the statutory and federal law took precedence over the Wyoming constitution. The members were then reinstated. The states that have similar constitutions such as ours have been looking at this and had decided that we should look at our constitution so that we don't face the same lawsuits.

CHAIRMAN COOK asked if it was not how we are looking at a particular term. If he heard him right when he sees the word militia and the definition of the militia, the word militia means a group of individuals defined in the constitution, the militia is then all males eighteen to forty five. We also have a definition of active militia which means the North Dakota National Guard. If we changed that to organized militia would your concern go away.

General Michael Haugen, answered that he did not believe so, because he believes you must be in the militia to start with to be a National Guard member. He said you can not separate them out

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Senate Political Subdivisions Committee

Bill/Resolution Number SB 2420

Hearing Date March 21, 2003

as two separate entities. That is why our constitution needs to be updated and allow other members to be in the militia, not to exclude the National Guard from the militia.

Al Dohrmann, Legal Officer for National Guard, answered the question about are we including or excluding the North Dakota National Guard into the militia by the statute. The answer is yes we have, but the question is what is your legal authority to do that. To play out the basis in this bill and its argument that we can take a part the National Guard and make them a part of the active militia and have the active militia be something other than an subordinate organization of the militia you would have to rely on the section 18 of article 11 of the century code. Under section 18 the legislative assembly can stand up this organization call the National Guard and does not have to be tied to Section 16, 17, 19, 20 and 21 of Article 11 in the constitution. His research in this area has led him to the conclusion that it would be a huge mistake to ever diminish the ties that the National Guard has with the militia. It is extremely important to the National Guard. Their existence could be in jeopardy with out the militia clause.

CHAIRMAN COOK said that is where we are on the same page

Al Dohrmann said the sovereign power of the State of North Dakota to have a militia is secure forever. The militia clause will always allow the State of North Dakota to have a militia. It the fact that the National Guard in his opinion must be squarely with in that definition.

CHAIRMAN COOK asked if Mr Dohrmann did see SB 2420 as an improvement.

Al Dohrmann replied that he did not believe that because of the debate he had with the Government Veterans Affairs Committee. It made him to look back and really look at this bill. There is still references in the bill to the Authorization Act of 1920. It is a danger to incorporate

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Senate Political Subdivisions Committee
Bill/Resolution Number SB 2420
Hearing Date March 21, 2003

things by reference. The sections right now that in his opinion violate the US Constitution he believes they can defend.

Further discussion Tape 1 Side B . Meter # 0 - 900

CHAIRMAN COOK recognized that there are people who would like to take away from states the right to have a militia. You also recognize the importance that that doesn't happen in North Dakota.

Al Dohrmann said that was correct and he pointed out the ability for anybody to get rid of the state militia's would take a constitutional amendment of the Federal Constitution. It is next to impossible. One of the things the National Guard prides it self on is that they are provided for in the United States Constitution forever.

No other testimony.

CHAIRMAN COOK closed the hearing on SB 2420

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2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2420

Senate Political Subdivisions Committee

☐ Conference Committee

Hearing Date March 27, 2003

Tape Number	Side A	Side B	Meter #
1		X	1238 - End
2	X		0 - 117
2	X		230 - 707
Committee Clerk Signature <i>Shirley Borg</i>			

Minutes:

CHAIRMAN COOK called the committee to order. All members (6) present.

CHAIRMAN COOK brought the committee up to date on SB 2420. The committee heard the bill last Friday and since then there has been some on going conversations. There were two bills here, one is a HCR 3005 and he handed out hog house amendments to HCR 3005 (See attached #1) Al Dohrmann, JAG for National Guard drafted the purposed changes. Instead of deleting sections of the constitution dealing with the militia to try to find resolution to the problems of gender and residency discrimination we will be leaving everything in and then adding the words and those who volunteer for services in the militia of this state. The challenge has been if we make a constitutional change then do we have to make a change to the century code to match the new constitution. He believes that they can get SB 2420 in order so that it will match the constitution.

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Senate Political Subdivisions Committee

Bill/Resolution Number SB 2420

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Col Al Dohrmann, Legal Advisor for National Guard and Adjutant General, explained the amendments to SB 2420 (Amendment to SB 2420 attached) The intent is to take and work on the constitution to fix that as far as age, gender and residency issues. We also have those same problems in the century code. SB 2420 with the amendments will bring that century code in line with how the national guard operates and clear up definition issues we have as far as gender, residency and other requirements we have for both the national guards and the militia.

Tim Dawson, Legislative Council, in reviewing the amendments said the only change he would recommend on the amendments would be to clarify the language in Section 2 on militia. It says more than eighteen years but less than forty five years. This should be changed to between the ages of eighteen and forty five.

SENATOR JUDY LEE moved the Amendments 30793.0102 be adopted.

SENATOR GARY LEE seconded the motion.

Roll call Vote: Yes 6 No 0 Absent 0

SENATOR GARY LEE moved a DO PASS AS AMENDED.

SENATOR POLOVITZ seconded the motion.

Roll call vote: Yes 6 No 0 Absent 0

Carrier: SENATOR COOK

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10/23/03
Date

30793.0101
Title.

House Amend. to
HJR 3005 #1
Prepared by the Legislative Council staff for
Senator Cook

March 27, 2003

PROPOSED AMENDMENTS TO SENATE BILL NO. 2420

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to amend and reenact sections 37-01-01, 37-02-01, 37-02-02, and 37-08-01 of the North Dakota Century Code, relating to the militia.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 37-01-01 of the North Dakota Century Code is amended and reenacted as follows:

37-01-01. Definitions. In this title, unless the context or subject matter otherwise requires:

1. "Active militia" ~~consists of~~ means the organized and uniformed military forces of this state, ~~which must be known as the "North Dakota national guard" and the reserve militia when called to active service.~~
2. "Active service" means ~~service on behalf of the state~~ active duty in case of public disaster, riot, tumult, breach of the peace, resistance of process, or the threat thereof, whenever called in aid of civil authorities, or under martial law, or at encampments, whether ordered by state or federal authorities, and includes the performance of any other duty requiring the entire time of the organization or person, except when called or drafted into the federal service by the president of the United States. ~~Such~~ The term includes service in case of, or to prevent, insurrection, riot, or invasion under the order of the commander in chief communicated through proper military channels.
3. "Battalion" ~~includes a "squadron" of cavalry, and of the air service as well as a battalion of infantry, artillery, engineers, and signal corps.~~
4. "Company" ~~includes a company of infantry, engineers, and signal corps, an air unit, a battery of field artillery, a troop of cavalry, or any similar organization in any branch of the military service authorized by federal law for this state, including a permanent detachment.~~
5. "Defense department" ~~includes the department of army and the department of air force.~~
6. "In service of the United States" and "not in the service of the United States" ~~have the same meaning as such terms have as used in the National Defense Act (Pub. L. 64-85, 30 Stat. 166), approved June 3, 1916, and in amendments thereto.~~
7. "Militia" ~~means the forces provided for in the Constitution of North Dakota, and is divided into two classes designated as the active militia and the reserve militia.~~
8. "Military forces of this state" ~~consists of~~ means those persons subject to military duty individuals in the active militia as defined in the Constitution of North Dakota and those persons subject to duty in the national guard as defined in the National Defense Act of the United States of America.

Page No. 1

30793.0101

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4. "Militia" means a group of individuals defined in the Constitution of North Dakota.
9. 5. "National guard" means that part of the military ~~force~~ forces of this state which is organized, equipped, and federally recognized under the provisions of the National Defense Act, as amended, of the United States as the "national guard, air national guard, of the United States and the state of North Dakota". # The term includes also the term "national guard of the state of North Dakota".
10. 6. "On duty" includes periods of drill and of such other training and service as may be required under state or federal law, regulation, or order.
11. 7. "Reserve militia" consists of all those ~~persons~~ individuals who are subject to service in the active militia, but and who are not serving in the national guard of this state.
8. "State active duty" means active service on behalf of the state under authority of the governor at the expense of the state.
9. "State defense force" means the group of individuals in the reserve militia in state active duty under chapter 37-12.1.

SECTION 2. AMENDMENT. Section 37-02-01 of the North Dakota Century Code is amended and reenacted as follows:

37-02-01. Militia - How constituted - Exceptions. All able-bodied male citizens; and all able-bodied ~~persons~~ males of foreign birth who have declared their ~~an~~ intention to become citizens, who are more than eighteen; and less than forty-five; years of age; and who are residents of this state, and other volunteers allowed by law constitute the militia; unless exempted by the laws of the United States; or by the laws of this state.

SECTION 3. AMENDMENT. Section 37-02-02 of the North Dakota Century Code is amended and reenacted as follows:

37-02-02. North Dakota national guard - Composition. The North Dakota national guard consists of the regularly enlisted and enrolled ~~male citizens, members~~ within the age limits prescribed by the ~~National Defense Act of 1920, as it may be amended~~ federal law; organized, armed, and equipped as provided in this title, and of commissioned officers within the ages conforming to the rules and regulations promulgated by the department of the army and department of the air force as conditions precedent to federal recognition. ~~The governor may authorize the appointment or enlistment of female citizens of the state in the medical corps, nurses corps, and other noncombatant branches and service of the national guard, and while so serving, they have the same status as male members of the national guard. Such national guard must be composed of such units as the defense department of the United States may allocate and designate, with the approval of the governor of this state.~~

SECTION 4. AMENDMENT. Section 37-08-01 of the North Dakota Century Code is amended and reenacted as follows:

37-08-01. National guard reserve - Organization. The national guard reserve is all individuals who are subject to service in the national guard and are not serving in the national guard of this state. Subject to such the rules and regulations as of the president may prescribe, a national guard reserve must be maintained in this state which shall consist consists of such organizations, officers, and enlisted men members as the president may prescribe, or and members thereof of the reserve may be assigned as reserves to an active organization of the national guard.

Renumber accordingly

Section

37-02-01 - How constituted...

Page No. 3

30793.0101

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10/23/03
Date

March 27, 2003

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3-27-03
1013

PROPOSED AMENDMENTS TO SENATE BILL NO. 2420

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to amend and reenact sections 37-01-01, 37-02-01, 37-02-02, and 37-08-01 of the North Dakota Century Code, relating to the militia.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 37-01-01 of the North Dakota Century Code is amended and reenacted as follows:

37-01-01. Definitions. In this title, unless the context or subject matter otherwise requires:

1. "Active militia" ~~consists of~~ means the organized and uniformed military forces of this state, ~~which must be known as the "North Dakota national guard" and the reserve militia when called to active service.~~
2. "Active service" means ~~service on behalf of the state~~ active duty in case of public disaster, riot, tumult, breach of the peace, resistance of process, or the threat thereof, whenever called in aid of civil authorities, or under martial law, or at encampments, whether ordered by state or federal authorities, and includes the performance of any other duty requiring the entire time of the organization or person, except when called or drafted into the federal service by the president of the United States. ~~Such~~ The term includes service in case of, or to prevent, insurrection, riot, or invasion under the order of the commander in chief communicated through proper military channels.
3. "Battalion" ~~includes a "squadron" of cavalry, and of the air service as well as a battalion of infantry, artillery, engineers, and signal corps.~~
4. "Company" ~~includes a company of infantry, engineers, and signal corps, an air unit, a battery of field artillery, a troop of cavalry, or any similar organization in any branch of the military service authorized by federal law for this state, including a permanent detachment.~~
5. "Defense department" ~~includes the department of army and the department of air force.~~
6. "In service of the United States" and "not in the service of the United States" ~~have the same meaning as such terms have as used in the National Defense Act (Pub. L. 64-85, 39 Stat. 166), approved June 3, 1916, and in amendments thereto.~~
7. "Militia" ~~means the forces provided for in the Constitution of North Dakota, and is divided into two classes designated as the active militia and the reserve militia.~~
8. "Military forces of this state" ~~consists of~~ means those persons subject to military duty individuals in the active militia ~~as defined in the Constitution of North Dakota and those persons subject to duty in the national guard as defined in the National Defense Act of the United States of America.~~

- 2 of 3
4. "Militia" means a group of individuals defined in the Constitution of North Dakota.
 9. 5. "National guard" means that part of the military ~~force~~ forces of this state which is organized, equipped, and federally recognized under the provisions of the National Defense Act, as amended, of the United States as the "national guard, air national guard, of the United States and the state of North Dakota". # The term includes also the term "national guard of the state of North Dakota".
 10. 6. "On duty" includes periods of drill and of such other training and service as may be required under state or federal law, regulation, or order.
 11. 7. "Reserve militia" consists of all those ~~persons~~ individuals who are subject to service in the active militia, but and who are not serving in the national guard of this state.
 8. "State active duty" means active service on behalf of the state under authority of the governor at the expense of the state.
 9. "State defense force" means the group of individuals in the reserve militia in state active duty under chapter 37-12.1.

SECTION 2. AMENDMENT. Section 37-02-01 of the North Dakota Century Code is amended and reenacted as follows:

37-02-01. Militia - How constituted - Exceptions. All able-bodied male citizens, and all able-bodied ~~persons~~ males of foreign birth who have declared their ~~an~~ intention to become citizens, who are ~~more than~~ between the ages of eighteen, and less than forty-five, years of age, and who are residents of this state, and other volunteers allowed by law constitute the militia, unless exempted by the laws of the United States, or by the laws of this state.

SECTION 3. AMENDMENT. Section 37-02-02 of the North Dakota Century Code is amended and reenacted as follows:

37-02-02. North Dakota national guard - Composition. The North Dakota national guard consists of ~~the regularly enlisted and enrolled male citizens, members~~ within the age limits prescribed by ~~the National Defense Act of 1920, as it may be amended federal law;~~ organized, armed, and equipped as provided in this title, and of commissioned officers within the ages conforming to the rules and regulations promulgated by the department of the army and department of the air force as conditions precedent to federal recognition. ~~The governor may authorize the appointment or enlistment of female citizens of the state in the medical corps, nurses corps, and other noncombatant branches and service of the national guard, and while so serving, they have the same status as male members of the national guard. Such national guard must be composed of such units as the defense department of the United States may allocate and designate, with the approval of the governor of this state.~~

SECTION 4. AMENDMENT. Section 37-08-01 of the North Dakota Century Code is amended and reenacted as follows:

37-08-01. National guard reserve - Organization. The national guard reserve is all individuals who are subject to service in the national guard and are not serving in the national guard of this state. Subject to such the rules and regulations as of the president may prescribe, a national guard reserve must be maintained in this state which shall consist consists of such organizations, officers, and enlisted men members as the president may prescribe, or and members thereof of the reserve may be assigned as reserves to an active organization of the national guard.

Renumber accordingly

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30793.0102

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Deanna Chiles
Operator's Signature

10/23/03
Date

Date: 3-27-03
Roll Call Vote #: 1

2003 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2420

Senate Political Subdivisions Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Adopt Amendments 30793.0101

Motion Made By Senator Judy Lee Seconded By Senator Gary Lee

Senators	Yes	No	Senators	Yes	No
Senator Dwight Cook, Chairman	X				
Senator John O. Syverson, V C	X				
Senator Gary A. Lee	X				
Senator Judy Lee	X				
Senator Linda Christenson	X				
Senator Michael Polovitz	X				

Total (Yes) 6 No 0

Absent 0

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

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Operator's Signature

10/23/03
Date

Date: 3-27-03
Roll Call Vote #: 2

2003 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB2420

Senate Political Subdivisions Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass as Amended

Motion Made By Senator Gary Lee Seconded By Senator Polovitz

Senators	Yes	No	Senators	Yes	No
Senator Dwight Cook, Chairman	X				
Senator John O. Syverson, V C	X				
Senator Gary A. Lee	X				
Senator Judy Lee	X				
Senator Linda Christenson	X				
Senator Michael Polovitz	X				

Total (Yes) 6 No 0

Absent 0

Floor Assignment Senator Cook

If the vote is on an amendment, briefly indicate intent:

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10/23/03
Date

REPORT OF STANDING COMMITTEE (410)
March 27, 2003 4:22 p.m.

Module No: SR-55-5982
Carrier: Cook
Insert LC: 30793.0102 Title: .0200

REPORT OF STANDING COMMITTEE

SB 2420: Political Subdivisions Committee (Sen. Cook, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends DO PASS (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2420 was placed on the Sixth order on the calendar.

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to amend and reenact sections 37-01-01, 37-02-01, 37-02-02, and 37-08-01 of the North Dakota Century Code, relating to the militia.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

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2. "Active service" means ~~service on behalf of the state~~ active duty in case of public disaster, riot, tumult, breach of the peace, resistance of process, or the threat thereof, whenever called in aid of civil authorities, or under martial law, or at encampments, whether ordered by state or federal authorities, and includes the performance of any other duty requiring the entire time of the organization or person, except when called or drafted into the federal service by the president of the United States. ~~Such~~ The term includes service in case of, or to prevent, insurrection, riot, or invasion under the order of the commander in chief communicated through proper military channels.
3. ~~"Battalion" includes a "squadron" of cavalry, and of the air service as well as a battalion of infantry, artillery, engineers, and signal corps.~~
4. ~~"Company" includes a company of infantry, engineers, and signal corps, an air unit, a battery of field artillery, a troop of cavalry, or any similar organization in any branch of the military service authorized by federal law for this state, including a permanent detachment.~~
5. ~~"Defense department" includes the department of army and the department of air force.~~
6. ~~"In service of the United States" and "not in the service of the United States" have the same meaning as such terms have as used in the National Defense Act (Pub. L. 64-85, 29 Stat. 166), approved June 3, 1916, and in amendments thereto.~~
7. ~~"Militia" means the forces provided for in the Constitution of North Dakota, and is divided into two classes designated as the active militia and the reserve militia.~~
8. "Military forces of this state" ~~consists of~~ means those persons subject to military duty ~~individuals~~ in the active militia as defined in the Constitution of North Dakota and those persons subject to duty in the national guard as defined in the National Defense Act of the United States of America.

(2) DESK, (3) COMM

Page No. 1

SR-55-5982

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Date

4. "Militia" means a group of individuals defined in the Constitution of North Dakota.
9. 5. "National guard" means that part of the military force forces of this state which is organized, equipped, and federally recognized under the provisions of the National Defense Act, as amended, of the United States as the "national guard, air national guard, of the United States and the state of North Dakota". # The term includes also the term "national guard of the state of North Dakota".
40. 6. "On duty" includes periods of drill and of such other training and service as may be required under state or federal law, regulation, or order.
44. 7. "Reserve militia" consists of all those persons individuals who are subject to service in the active militia, but and who are not serving in the national guard of this state.
8. "State active duty" means active service on behalf of the state under authority of the governor at the expense of the state.
9. "State defense force" means the group of individuals in the reserve militia in state active duty under chapter 37-12.1.

SECTION 2. AMENDMENT. Section 37-02-01 of the North Dakota Century Code is amended and reenacted as follows:

37-02-01. Militia - How constituted - Exceptions. All able-bodied male citizens, and all able-bodied persons males of foreign birth who have declared their an intention to become citizens, who are more than between the ages of eighteen, and less than forty-five, years of age, and who are residents of this state, and other volunteers allowed by law constitute the militia, unless exempted by the laws of the United States, or by the laws of this state.

SECTION 3. AMENDMENT. Section 37-02-02 of the North Dakota Century Code is amended and reenacted as follows:

37-02-02. North Dakota national guard - Composition. The North Dakota national guard consists of the regularly enlisted and enrolled male citizens, members within the age limits prescribed by the National Defense Act of 1920, as it may be amended federal law; organized, armed, and equipped as provided in this title, and of commissioned officers within the ages conforming to the rules and regulations promulgated by the department of the army and department of the air force as conditions precedent to federal recognition. The governor may authorize the appointment or enlistment of female citizens of the state in the medical corps, nurse corps, and other noncombatant branches and service of the national guard, and while so serving, they have the same status as male members of the national guard. Such national guard must be composed of such units as the defense department of the United States may allocate and designate, with the approval of the governor of this state.

SECTION 4. AMENDMENT. Section 37-08-01 of the North Dakota Century Code is amended and reenacted as follows:

37-08-01. National guard reserve - Organization. The national guard reserve is all individuals who are subject to service in the national guard and are not serving in the national guard of this state. Subject to such the rules and regulations as of the

REPORT OF STANDING COMMITTEE (410)
March 27, 2003 4:22 p.m.

Module No: SR-55-5002
Carrier: Cook
Insert LC: 30793.0102 Title: .0200

president may prescribe, a national guard reserve must be maintained in this state which shall consist ~~consists~~ of such organizations, officers, and enlisted men ~~members~~ as the president may prescribe, ~~or and~~ members thereof ~~of the reserve~~ may be assigned as reserves to an active organization of the national guard."

Renumber accordingly

(2) DESK, (3) COMM

Page No. 3

SR-55-5002

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2003 HOUSE GOVERNMENT AND VETERANS AFFAIRS

SB 2420

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2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2420

House Government and Veterans Affairs Committee

☐ Conference Committee

Hearing Date 4-3-03

Tape Number	Side A	Side B	Meter #
1	x		0-31.8
Committee Clerk Signature <i>Joseph Burke</i>			

Minutes: Chairman Klein called the hearing to order on SB 2420.

Senator Cook appeared in support of SB 2420 and also was the sponsor. You folks deleted 1177 and then a Friday afternoon on the Senate floor 3005 got defeated. We are here with a solution that we certainly believe in them and hope you do also. I would like to walk you through a little bit of the bill if you look at section 16 you will see that the militia of the state shall consist of all able body persons residing in the state between the ages of 18 and 45 years. That seems to be what starts the concern as I read that all males 18-45 must serve if called upon by the Governor. What it tells me that women, children, and old men are not deserters if they don't serve however they should be able to volunteer and that seems to be the question.

If you look at page 2 of the bill, line 14, it simply means a group of individuals defined in the constitution of North Dakota. Then when you go back to the language in section 18, it says that the legislative assembly shall provide by law for the establishment of volunteer organizations of the arms services that shall be classed as active militia. For further testimony (SEE

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Page 2

House Government and Veterans Affairs Committee

Bill/Resolution Number SB 2420

Hearing Date 4-03-03

ATTACHED TESTIMONY. I believe that SB 2420 will solve the century code language that we need to address the concern whether or not we would with stand a legal challenge. I'm also handing out what I would be proposing to offer a hog house amendment to 3005, it is my hope that as 2420 leaves this committee and hopefully the house body as a whole will endorse it and support it, that we would recall 3005 that is in your possession now we would ask that you return it to the Senate, and move to reconsider our actions, at which time I would make hog house amendments to 3005 and you can see that those amendments would come in to Section 16.

Representative Klein: so the intent is that you would bring 3005 back amended.

Senator Cook: yes sir.

Representative Grande: when you go back to the 3005 are we leaving in the word able body and male in there?

Senator Cook: yes we are.

Representative Klemin: we have two types of military forces, one the militia and one the National Guard, as I under stand this, we are saying that males between the ages of 18 and 45 can be described in to the militia and women can volunteer for it.

Senator Cook: militia I would not call as defined here as a military force, its a group of people ages 18-45 who are not in the military, its a group of people that the Governor may go to, to seek people to serve in the military if they need, the active militia is the key definition.

Representative Klemin: the militia is a pool, the active militia are the ones that are drawn from that pool are those that volunteered in the National Guard right now.

Representative Sitte: so in section 1, page 1, line 10, when we are talking about the reserve militia we are talking about this other group of able bodied men 18-45 is that right?

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House Government and Veterans Affairs Committee
Bill/Resolution Number SB 2420
Hearing Date 4-03-03

Senator Cook: the reserve militia that is defined here would be individuals that are called from that pool on active duty, and they are part of the active militia.

Representative Winrich: can you give us some indication why males 18-45 language seems to be so important to some members of the Senate?

Senator Cook: its important that we have a pool of people, that must serve to protect the democracy that we all enjoy, I think the question is do you want to put into that pool, women who can be drafted, who can be considered a deserter if they don't. I don't know if I can speak for those who might think that that is wrong, I raised three children, 2 girls and a son, and when my son turned 18 I said Happy Birthday welcome to the North Dakota militia. I would encourage my daughters to volunteer and I certainly would not get in the way if they did volunteer, but that is how I read that language, and I believe that is how it intended to be.

Representative Sitte: page 2, line 11 and 8, why are we taking out militia as provided for because if we are changing the constitution to say and those who volunteer.

Senator Cook: the key of what we are doing is when you look at the militia definition in existing Century code it says that the militia consists of the active militia and the reserve militia, the militia is a pool of people, 18-45.

Representative Winrich: on page 2 line 10, as it would read, does that essentially define the National Guard as the active militia?

Senator Cook: the military forces of the state and the active militia are almost synonymous, and you look at the definition for active militia, that is to be known as the North Dakota National Guard that accomplishes what you just read.

Representative Sitte: so why do we even need that Section 8?

Page 4

House Government and Veterans Affairs Committee

Bill/Resolution Number SB 2420

Hearing Date 4-03-03

Senator Cook: there are basically 6 key definitions in here, they really are all need because of some place that they are referenced before. The only one that maybe that we have here is the state defense force for example, the state defense force you will find is referenced in code somewhere else and the only difference between the state defense force and the reserve militia, is there is a condition that the state defense force can be called out. And that the condition is if half of our Guard is gone, and we are there right now. Everyone of these definitions that are protected here are need yet because you will find them somewhere else in code.

Representative Sitte: all we are really trying to solve is the discrimination issue?

Senator Cook: yes.

Representative Sitte: 3005 addresses this, why do we need it?

Senator Cook: we need this to remove reference to male citizens and members to tie the National Guard with the active militia and to remove the definition of militia that says the militia is active in reserve.

Representative Klein: when we pass this bill out you will then request 3005 to be returned and then you will hog house it and send it back again.

Senator Cook: that is exactly what we will do.

Major General Michael Haugen, North Dakota, National Guard: appeared in support of SB 2420 and gave a written statement (SEE ATTACHED TESTIMONY).

Representative Klein: where is it covered about out of state people joining the Guard?

General Haugen: in the section that states "those who volunteer".

Col. Al Dohrmann, National Guard: appeared in support of SB 2420. If to day we were forced to defend a challenge to the residency gender and age restriction, we would go to Section 18 of

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10/23/03
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House Government and Veterans Affairs Committee

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Hearing Date 4-03-03

the Constitution and try to make the argument that the Legislative Assembly was given the authority under section 18 of the constitution which reads the Legislative Assembly shall provide by law, the establishment of a volunteer organization several arms of service which shall be classified as the active militia, that is what we try to defend. This bill if passed into law, that's how we would defend it if there is a challenge, if this is on the books.

Representative Amerman: if the Governor calls up this pool of men from 18-45 is there is time limit, what are they getting into when they are called up?

Major General Mike Haugen: the Governor, by proclamation can declare who, how long, who's going administer how are they going to get paid, when he calls up the militia, the Governor will establish this, although it has never been called up it would seem that it would be done by the Generals Office, to provide the organization and leadership.

Representative Sitte: so if we look at page 3 under section 4, the National Guard Reserves is all individuals that are subject to service in the National Guard that are not serving in the National Guard, is that going to include women 18-45?

General Haugen: the National Guard Reserve is a very small group of individuals, who because of timing and rank requirements, they may go into reserves a nonaffiliated reserve of the National Guard, that means that they can still be called up but they are not actively drilling in North Dakota.

Representative Sitte: militia means the forces provided for it, why wouldn't we want that connotation of military forces rather than saying a group of individuals?

Col. Dohrmann: this particular section if you take it in consideration with proposed hog house amendment 3005, is another way of stating, with just a different choice of words, if 3005 were

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House Government and Veterans Affairs Committee

Bill/Resolution Number SB 2420

Hearing Date 4-03-03

not amended, this definition of militia would be problematic because basically then you would have the constitution saying the statutes will define the militia, and you would have a statute saying the constitution defines the militia.

Representative Grande: made a DO PASS motion on SB 2420.

Representative Meier: SECOND the motion.

VOTE: 11-YES 0-NO 3-ABSENT.

Representative Winrich: will carry the bill to the floor.

Meeting adjourned.

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Roll Call Vote #:

Date: 4-3-03

2003 HOUSE STANDING COMMITTEE ROLL CALL VOTE
SENATE BILL/RESOLUTION NO. SB 2420

House GOVERNMENT AND VETERANS AFFAIRS Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken Do Pass

Motion Made By Rep. Grande Seconded By Rep. Meier

Representatives	Yes	No	Representatives	Yes	No
Chairman M.M. Klein	X		B. Amerman	X	
Vice Chairman B.B. Grande	X		L. Potter	X	
W.R. Devlin	X		C. Williams	X	
C.B. Haas	A	A	L. Winrich	X	
J. Kasper	A	A			
L.R. Klemin	X				
L. Meier	X				
M. Sitte	X				
W.W. Tieman	A	A			
R.H. Wikenheiser	X				

Total (Yes) 11 No 0

Absent 3 (Tieman, Kasper, Haas)

Floor Assignment Rep. Winrich

If the vote is on an amendment, briefly indicate intent:

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Date 10/23/03

REPORT OF STANDING COMMITTEE (410)
April 3, 2003 11:21 a.m.

Module No: HR-60-6623
Carrier: Winrich
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

SB 2420, as engrossed: Government and Veterans Affairs Committee (Rep. M. Klein, Chairman) recommends **DO PASS** (11 YEAS, 0 NAYS, 3 ABSENT AND NOT VOTING). Engrossed SB 2420 was placed on the Fourteenth order on the calendar.

(2) DESK, (3) COMM

Page No. 1

HR-60-6623

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2003 TESTIMONY

SB 2420

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TESTIMONY OF
MAJOR GENERAL MICHAEL HAUGEN
NORTH DAKOTA NATIONAL GUARD
BEFORE THE
POLITICAL SUBDIVISIONS COMMITTEE

March 21, 2003

9:00 a.m.

SENATE BILL 2420

Mr. Chairman, Members of the Committee, good morning.

The North Dakota National Guard opposes this Bill. While we have concerns about amending 70% of the statutory law governing the North Dakota National Guard without an opportunity to study the matter, our major concern, and reason, for opposing this Bill is the fact that this Bill would remove a part, if not the entire North Dakota National Guard from the "Militia" of this state. This would strip away centuries of history that the National Guard—as the modern militia—traces back to the militiamen of Lexington and Concord.

Section 3 of this Bill defines the "Militia" as "a group of individuals defined in the Constitution of North Dakota with a duty to be in active service." In the very next subsection it states that the "national guard consists of volunteers from the militia and *other members* allowed by law". Similarly, section 32 of this Bill allows both the "militia and others" to join the National Guard. Allowing "others" that do not belong to the militia to join the National Guard would violate Federal law, and our State's Constitution.

The Constitution of the United States, in the Militia Clause, provides the Congress with the authority to organize, arm and discipline the Militia, reserving to the states the authority to appoint officers and train their state militias in accordance with the rules set by Congress. [U.S. Const. Art. 1, § 16, Clause 16] Article 1, section 10 of the United States Constitution outlaws the keeping of "troops" in times of peace without the consent of Congress. So this grant of power to have a militia must be subordinate to expressed federal limitations.¹ Thus, Congress' definition of "militia" would be binding on the state of North Dakota, as it applies to the North Dakota National Guard. Section 311 of Title 10 of the United States Code provides that militia will consist of males between the ages of 17 and 45 and members of the National Guard, with the National Guard designated as the "organized militia" and the remainder designated as the "reserve militia". Clearly, these laws passed under the authority Militia Clause, conflict with the definitions found in SB 2420 and should not be enacted into our Century Code. Moreover, the

¹ See, Perpich v. DoD, 496 U.S. 334, 354 (1990)

Constitution of North Dakota only allows for one active component of the Militia, which the Legislative Assembly, consistent with federal law, has called the North Dakota National Guard. Arguably, with every Constitutional provision using the term militia, only militia members may be part of this organization.

As I have already stated, it is extremely important to the National Guard to maintain its link to the Militia. The Dick Act of 1903 formally affirmed that the National Guard is the organized militia of the several states. This was done by Congress to bring some consistency and efficiency to the militia. To try to make the National Guard, or a part thereof, something other than the militia, would have no basis in law. For your review, I have attached some quotes from the United States Constitution, The Dick Act of 1903, the United States Supreme Court, and the North Dakota Supreme Court, all of which state that the National Guard is part of the "militia".

In addition to our concerns about removing the National Guard from the Militia, we also have concerns with other sections of this Bill. I will not address each section of this Bill, but myself, or a member of my staff, could provide information, or answer questions on the other sections. We have no opposition to housekeeping amendments dealing with gender references or fixing grammatical errors. However, we believe updating Title 37 should be addressed in a deliberate fashion, insuring that all stakeholders within or outside the National Guard have an opportunity to offer their input and concurrence, before the bulk of the military forces section of the Century Code is updated.

I must urge you to recommend a "do not pass" on this Bill. While you enact the laws of this state, we must live with them. We should not be comfortable amending the majority of our military code without some careful study. I would be pleased to stand for any questions.

The National Guard as the Militia

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

-Constitution of the United States, Article 1, Section 8, Clause 16

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

-Constitution of the United States, Article 1, Section 10

Be it enacted by the Senate and House of Representatives of the United State of America in Congress assembled, The militia shall consist of every able-bodied male citizen of the respective States ... who is more than eighteen and less than forty-five years of age, and shall be divided into two classes, the organized militia, to be known as the National Guard of the State ... , and the remainder to be known as the Reserve Militia.

* * *

The organization, armament and discipline of the organized militia in the several states ... shall be the same as that which is now or may hereafter be prescribed for the Regular and Volunteer Armies of the United States ...

-Dick Act, 32 Stat. 775 (1903)

The National Guard is the modern Militia reserved to the States by Art. I, § 8, cl. 15, 16 of the Constitution. It has only been in recent years that the National Guard has been an organized force, capable of being assimilated with ease into the regular military establishment of the United States. From the days of the Minutemen of Lexington and Concord until just before World War I, the various militias embodied the concept of citizen army, but lacked the equipment and training necessary for their use as an integral part of the reserve force of the United States Armed Forces. The passage of the National Defense Act of 1916 materially altered the status of the militias by constituting them as the National Guard.

-United States Supreme Court [Maryland v. United States, 381 U.S. 41 (1965)]

Notwithstanding the brief periods of federal service, the members of the state Guard unit continue to satisfy this description of militia. In a sense, all of them now must keep three hats in their closets—a civilian hat, a state militia hat, and an army hat ...

-United States Supreme Court [Perpich v. Department of Defense, 496 U.S. 334 (1990)]

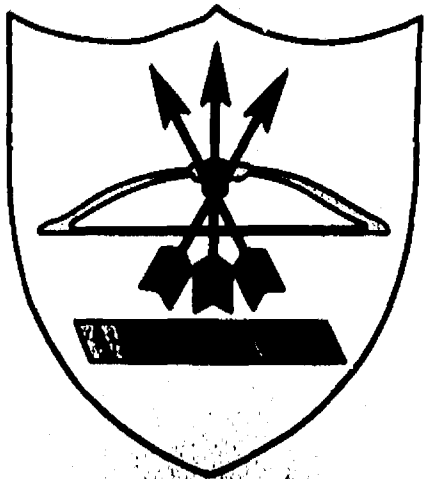
There is no room for doubt that "all able-bodied male persons residing in the state, between the ages of eighteen and forty five years," with certain exceptions, constitute the Militia of the state; nor is there any room for doubt that the organized Militia or National Guard constitute the "Active Militia".

-North Dakota Supreme Court [Poole v. Peake, 135 N.W. 197 (N.D. 1912)]

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Army National Guard
"The Straight Arrows"



Air National Guard
"The Happy Hooligans"

The
North Dakota
National Guard

Testimony of
Major General Michael Haugen
before the
Government and Veterans Affairs Committee
April 3, 2003
10:30 a.m.
SENATE BILL 2420

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TESTIMONY OF
MAJOR GENERAL MICHEAL HAUGEN, THE ADJUTANT GENERAL
NORTH DAKOTA NATIONAL GUARD
BEFORE THE
GOVERNMENT AND VETERANS AFFAIRS COMMITTEE

April 3, 2003

10:30 a.m.

SENATE BILL 2420

Mr. Chairman, Members of the Committee, good morning.

We would like to add our support to Engrossed Senate Bill 2420. This Bill removes definitions in Title 37 that are provided for in federal law and regulation, amends the definitions of "militia" and "national Guard", and provides clarification on who is in the National Guard Reserve. The four sections of this Bill were also addressed in House Bill 1177, which was defeated by the House. HB 1177 was defeated, in large part, because it was a contingent Bill that would only spring into law if our proposed Constitutional Amendment—House Concurrent Resolution 3005—was passed by both houses of this body and approved by the voters of North Dakota.

As you may be aware, HCR 3005 was defeated in the Senate on February 28, 2003. Since that time, we have been working with the Senate's leadership and the Attorney General's office to address our concerns about limiting membership in the National Guard, which—under both federal and state law—is the active component of this State's militia. The result of these discussions is an agreement to pursue both a non-contingent amendment of statutory law, and recall HCR 3005 and amend it. SB 2420 is part of this agreement. We have assisted in drafting this engrossed Bill and now support it. While we have agreed to lend our support to the Bill before your today, the Senate leadership has agreed to pursue a recall of HCR 3005, amend it, and send it back to the House for consideration.

As part of this two-prong attack on our membership restriction concerns, this engrossed Bill is designed to address the most pressing problems with Title 37. Section one of this Bill addresses the definitions used throughout Title 37. It fixes grammatical errors, removes unneeded definitions, and adds definitions for "State Active Duty", and "State Defense Force"—terms that appear in Title 37, but are not defined. Sections two and three of this Bill amend the membership requirements for the Militia and National Guard, making them consistent with federal law, and, if amended, the Constitution of North Dakota. Finally, section four provides clarifying language on the organization of the National Guard Reserve.

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The National Guard work with Senator Cook and the legislative council in drafting engrossed Senate Bill 2420. This Bill, in conjunction with the reconsideration of HCR 3005, will satisfy our concerns with membership restriction contained in our Constitution and statutes. Again, we urge your support.

I would be pleased to respond to any questions, Mr. Chairman.

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PROPOSED AMENDMENTS TO HOUSE CONCURRENT RESOLUTION NO.
3005

Page 1, line 1, after "A Concurrent Resolution" replace the remainder of the resolution with "for the amendment of section 16 of article XI of the Constitution of North Dakota, relating to the qualifications for membership in the state's active militia which is known as the North Dakota National Guard; and to provide an effective date.

STATEMENT OF INTENT

This amendment removes outdated restriction in the Constitution in regard to age, gender, and residency requirements for membership in the North Dakota National Guard.

**BE IT RESOLVED BY THE SENATE OF NORTH DAKOTA, THE HOUSE OF
REPRESENTATIVES CONCURRING THEREIN:**

That the following proposed amendment to section 16 of article XI of the Constitution of North Dakota is agreed to and must be submitted to the qualified electors of North Dakota at the primary election to be held in 2004, in accordance with section 16 of article IV of the Constitution of North Dakota.

SECTION 1. AMENDMENT. Section 16 of article XI of the Constitution of North Dakota is amended and reenacted as follows:

Section 16. The militia of this state shall consist of all able-bodied male persons residing in the state, between the ages of eighteen and forty-five years, except such as may be exempted by the laws of the United States or of this state, and those who volunteer for service in the militia of this state. Persons whose religious tenets or conscientious scruples forbid them to bear arms shall not be compelled to do so in times of peace, but shall pay an equivalent for a personal service.

SECTION 2. EFFECTIVE DATE. If approved by the voters, this measure becomes effective on August 1, 2004.

Page 1

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Date

Section 16. The militia of this state shall consist of all able-bodied male persons residing in the state, between the ages of eighteen and forty-five years, except such as may be exempted by the laws of the United States or of this state. Persons whose religious tenets or conscientious scruples forbid them to bear arms shall not be compelled to do so in times of peace, but shall pay an equivalent for a personal service.

Source: Const. 1889, Art. XIII, § 188.

53 Am. Jur. 2d, Military, and Civil Defense, §§ 30, 33-45.

Cross-References.

Military matters, see title 37.

57 C.J.S. Armed Services, §§ 288-298.

Collateral References.

Militia — 1-3, 5-10.

Section 17. The militia shall be enrolled, organized, uniformed, armed and disciplined in such a manner as shall be provided by law, not incompatible with the constitution or laws of the United States.

Source: Const. 1889, Art. XIII, § 189.

Section 18. The legislative assembly shall provide by law for the establishment of volunteer organizations of the several arms of the service, which shall be classed as active militia; and no other organized body of armed men shall be permitted to perform military duty in this state except the army of the United States, without the proclamation of the governor of the state.

Source: Const. 1889, Art. XIII, § 190.

"militia when in active service". State ex rel. Poole v. Peake, 22 N.D. 457, 135 N.W. 197, 40 L.R.A. (n.s.) 354 (1912).

Active Militia.

The term "active militia" does not mean

Section 19. All militia officers shall be appointed or elected in such a manner as the legislative assembly shall provide.

Source: Const. 1889, Art. XIII, § 191.

Section 20. The commissioned officers of the militia shall be commissioned by the governor, and no commissioned officer shall be removed from office except by sentence of court-martial, pursuant to law.

Source: Const. 1889, Art. XIII, § 192.

lature makes provisions therefor. State ex rel. Poole v. Peake, 22 N.D. 457, 135 N.W. 197, 40 L.R.A. (n.s.) 354 (1912).

Trial by Courts-Martial.

This section contemplates trials by courts-martial, but not until such time as the legis-

Section 21. The militia forces shall in all cases, except treason, felony or breach of the peace, be privileged from arrest during their attendance at musters, parades and elections of officers, and in going to and returning from the same.