SENATE....No. 18.

Commonwealth of Massachusetts.

In Senate, January 23, 1861.

The Committee on Federal Relations upon the Order to consider and report whether the laws of this Commonwealth relative to the enrolment, organization, officering, equipping and drilling of the State militia, and mustering them into the service of the United States, are in conformity to the provisions of the constitution and laws of the United States; also whether the militia of the State is enrolled, organized, and equipped as required by the laws of the United States; also whether any further legislation is necessary to render the military system of this Commonwealth conformable to the requirements of the laws of the United States,

REPORT:

The consideration of these questions necessarily involves a careful examination of the laws of the United States and of this Commonwealth, upon the subject of the militia.

The constitution of the United States provides, article 1, section 8, that congress shall have power "To make rules for the government and regulation of the land and naval forces;" —

"To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;" — "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."

Section 10. "No State shall, without the consent of congress, lay any duty of tonnage, keep troops, or ships of war, in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."

Article II., section 2. "The president shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States."

And an Act of congress passed May 8, 1792, provides "That each and every free able-bodied white male citizen of the respective States, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years, (except as is hereinafter excepted,) shall severally and respectively be enrolled in the militia by the captain or commanding officer of the company, within whose bounds such citizen shall reside, and that within twelve months after the passing of this Act."

The Act further provides for the equipping, officering, arranging into divisions, &c., of the militia so enrolled. This law also exempts from military duty, certain officers therein designated, and also provides, section 2, "That all persons who now are, or may hereafter be, exempted by the laws of the respective States, shall be and are hereby exempted from militia duty, notwithstanding their being above the age of eighteen and under the age of forty-five years."

The General Statutes of Massachusetts provide, chapter 13, commencing at section 13, for an active militia, under the name of the Volunteer Militia, not to exceed 5,000, officers and men, who, "in case of war, invasion, the prevention of invasion, the suppression of riots, and to aid civil officers in the execution

of the laws of the Commonwealth, shall first be ordered into service." And provides for the equipment, officering, arranging into divisions, &c. of this force substantially in conformity with the law of congress, excepting that it provides that each company shall have four lieutenants instead of two as required by the law of congress, which your Committee does not deem material, and also provides for a different number to compose a company from that required by the Act of congress.

This chapter of the General Statutes further provides, commencing with section 1, for the enrolment in the militia of all able bodied white male citizens of the age of eighteen years and under the age of forty-five years, excepting persons enlisted into volunteer companies, &c., with the absolute exemptions specified in the Act of congress, and additional ones created by said law. It further provides that "assessors shall annually in May or June make a list of persons living within their respective limits, liable to enrolment, and place a certified copy thereof in the hands of the clerks of their respective places, who shall record it in the records of their city or town, and annually in May, June, or July, transmit returns of the militia thus enrolled to the adjutant-general."

And further provides, section 4, that "the enrolled militia shall be subject to no active duty except in case of war, invasion, the prevention of invasion, the suppression of riots, and to aid civil officers in the execution of the laws of the Commonwealth; in which cases the commander-in-chief shall order out for actual service, by draft or otherwise, as many of the militia as necessity demands."

The object of the law clearly is to provide for the enrolment and placing on a war footing of a sufficient number of the militia for the protection of the State, and to meet any probable immediate requisition of the president of the United States; and for the enrolment of the remainder of the militia, so that, in the event of their services being required, they may at once be officered and drilled. Your Committee deem this law to be substantially and sufficiently in conformity with the requirements of the constitution and laws of the United States. When the law of congress was enacted, it might have been deemed expedient that the whole, or a large part, of the militia should

be thoroughly organized, but with the great increase in the number of the militia, corresponding with the growth of our population, it would be not only burdensome, but unnecessary and impolitic, to keep the entire force organized and in a state of discipline. Under the authority of the Act of congress, for States to exempt from military service, limited only by an exercise of good faith, we are clearly justified in maintaining a force adequate to any probable emergency in a proper state of drill and discipline, and to exempt the remainder of the militia, in time of peace, with a provision for their immediate services in the event of war. (See opinion of Supreme Court, 22 Pick. 571.)

Doubt has been expressed whether the volunteer militia are properly a portion of the enrolled militia of the State, as, by the 1st section of the law, they are excepted from the enrolment therein prescribed. It seems to the Committee very clear that the volunteer militia were only excepted from the mode of enrolment therein specified, as special provision for their enrolment by a different mode, is made in the subsequent sections of the chapter.

Your Committee can have no doubt but the volunteer militia are a part of the militia of the State. They are drafted, enrolled, and put on a war footing by their voluntary enlistment, and by the law of the State are the first to be sent out of the State, on the requisition of the president, provided there shall not be a sufficient number of citizens volunteer to meet the requisition. And any member of the volunteer militia who shall fail to respond to a requisition, duly transmitted, is liable to be tried and punished for the same by a court martial, as provided in the 5th section of the Act of 1795.

See Martin *vs.* Mott, 12 Wheaton, R. 19.

We have been asked to consider the question whether any additional legislation is necessary to authorize the transportation of the militia or any portion thereof beyond the limits of the State. By the constitution of Massachusetts, chapter 2d, (Executive Power,) sect. 1, article 7th, it is "provided that the said governor shall not, at any time hereafter, by virtue of any power by this constitution granted, or hereafter to be granted to him by the legislature, transport any of the inhabitants

of this Commonwealth, or oblige them to march out of the limits of the same, without their free and voluntary consent, or the consent of the general court, — except so far as may be necessary to march or transport them by land or water, for the defence of such part of the State to which they cannot otherwise conveniently have access." The constitution of Massachusetts was adopted before the constitution of the United States, and in the clause recited has reference to the authority of the governor, in matters pertaining to the State alone. It determines that the governor shall not transport any of the militia of the Commonwealth out of the limits of the same without their consent, but he may do it with their free and voluntary consent, *and* the consent of the general court, if the word *or* is construed *and*, as we properly and legally may construe it in the connection in which it is used. And a general law of the Commonwealth would be sufficient to confer authority in exigencies arising afterwards, which may be covered by it, providing the consent of the militia be obtained in each instance. But independent of any State legislation, it is the duty of the governor under the constitution and laws of the United States, to send beyond the limits of the State such number of the militia as the president of the United States in his requisition shall demand. In 1812 the governor of this State claimed that upon a requisition by the president, he, the governor, was to determine whether the exigency existed which required the State militia to be placed in the service of the United States, and the supreme court of this State at that time gave an opinion that the governor had a right thus to determine, but the supreme court of the United States in the case of Martin *v.* Mott, 12 Wheaton, 19, decided that this right vested solely in the president. In their opinion in this case they say: —

"Is the president the sole and exclusive judge whether the exigency has arisen, or is it to be considered as an open question, upon which every officer to whom the orders of the president are addressed, may decide for himself, and equally open to be contested by every militia man who shall refuse to obey the orders of the president? We are all of opinion that the authority to decide whether the exigency has arisen, belongs exclusively to the president, and that his decision is conclusive upon all other persons.

"The power itself is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union."

And this is undoubtedly the law.

Entertaining the opinions above expressed, your Committee do not deem any additional legislation necessary for the purposes embraced in said Order.

For the Committee,

W. D. NORTHEND.