ESSAY

"NO ARMED BODIES OF MEN" - MONTANANS' FORGOTTEN CONSTITUTIONAL RIGHT

(With Some Passing Notes on Recent Environmental Rights Cases)

Robert G. Natelson*

I. INTRODUCTION

In July, 2000, the Police Department of the City of Missoula, Montana, imported approximately seventy-six outside police officers, many from other states, to assist with law enforcement during an anticipated visit by the Hell's Angels Motorcycle Club. Trouble did arise when the Hell's Angels were

---

* Professor of Law, University of Montana; J.D. 1973, Cornell Law School: A.B. 1970 (History), Lafayette College; PhD.-Level Equivalency Certificate in Latin, 1984, University of Colorado; Senior Fellow in Western Studies, the Independence Institute, Golden, Colorado; Senior Research Fellow, Initiative and Referendum Institute, Washington, D.C.; Founding Chairman, Montanans for Better Government (1993-97); Member, Colorado bar.

I would like to thank Varya Petrosyan, Class of 2003, University of Montana School of Law, for her research assistance; Professor Jeff Renz, University of Montana School of Law, for his comments on an earlier memorandum that served as the starting point for this essay; Professor Andy Morriss, Case Western Reserve University School of Law, for his research guidance; and the staff at the University of Montana and Montana State Law Libraries for assistance in tracking down primary source materials.

in town. But it did not involve the Hell's Angels. To the surprise of many, clashes and confrontations, both verbal and violent, flared up between the police, including the out-of-state officers, and the local citizenry.[1]

The mayor of Missoula appointed a review committee to investigate the incident. During the investigation, several citizens testifying before the committee questioned whether the importation of armed men from other states for peacekeeping purposes violated Article II, Section 33 of the Montana Constitution. That section reads as follows:

> **Importation of armed persons.** No armed person or persons or armed body of men shall be brought into this state for the preservation of the peace, or the suppression of domestic violence, except upon the application of the legislature, or of the governor when the legislature cannot be convened.[2]

In its report, the review committee found no constitutional violation. The committee report asserted Article II, Section 33 applied only to importations by *private* parties – specifically mining companies' importation of strikebreakers – and not to "governmental law enforcement agencies dealing with legitimate emergencies." The report also averred that a state law, the Montana Interstate Law Enforcement Mutual Aid Act of 1983,[3] provided the necessary legal authority for the importation.[4]

---

1. *See generally* City of Missoula, Citizens Review Committee Report (Dec. 1, 2000) (unpublished Report, on file with MONTANA LAW REVIEW) [hereinafter "Report"].

2. MONT. CONST. art. II, § 33.

3. MONT. CODE ANN. §§ 44-11-301 to -312 (2001).

4. The Citizens Review Committee stated its constitutional conclusions in rather strong terms:

> In the course of its review, the Committee heard several assertions that are demonstrably false and should be put to rest.
>
> Misconception No. 1: Importing police officers from out of state violated the Montana Constitution.
>
> Some in the community have stated that bringing in armed officers from other states violates Article II, section 33 of the Montana Constitution, which prohibits bringing "armed" persons into the state to preserve the peace without the approval of the legislature or governor. Although this Committee is not a judicial body charged with interpreting the Constitution, the three lawyers on the Committee firmly believe the Police Department's reliance on out-of-state officers was not unconstitutional. The history of the provision in question, which was taken from Montana's 1889 Constitution by the members of the 1972 Constitutional Convention, shows it was intended to keep mining companies from importing private guards as strikebreakers. The law was not intended to apply to governmental law enforcement agencies dealing with legitimate emergencies. More importantly, the Legislature expressly

In this essay, I discuss the issue of whether Article II, Section 33 is targeted at importations of "armed bodies of men" by government, by private parties, or by both. I conclude:

- that the section certainly bans governmental importations not specifically approved by the legislature or governor, and that this is evident from facial analysis (the placement and text of the section) and from its history;

- that facial analysis suggests that private importation is *not* banned, although there is sufficient uncertainty to justify a court considering the underlying history of the section;

- that although the historical case is not compelling either way, the balance of the evidence is that private importations *are* banned; and

- that compliance with the Interstate Law Enforcement Mutual Aid Act without following the specific waiver procedures in Article II, Section 33 does not render such an importation constitutional.

Additionally, in Part II. C, I resort to the Montana Supreme Court's recent "environmental rights" cases to illustrate some problems in judicial review of a constitutional right against private parties.

II. THE IDENTITY OF IMPORTERS

A. Facial analysis

1. Reasons for facial analysis

No Montana case law specifically interprets Article II, Section 33. In the absence of controlling case law, the normal first step for interpreting a constitutional provision, as other written documents, is to determine whether the provision is

---

authorized mutual aid agreements with out-of-state law enforcement agencies when it passed the Interstate Law Enforcement Mutual Aid Act in 1983.

Report, *supra* note 2, at 14.

In preparing the memorandum that served as a starting point for this essay, I interviewed all three of the lawyer-members of the committee, but it remains unclear to me what could be the basis for the level of certainty expressed in the foregoing extract.

facially clear when read in its context in the document and in the language of the time of drafting.[5] If the provision is facially clear, it is enforced as written. To the extent that Article II, Section 33 is clear, a court should not look behind it by utilizing historical analysis or other outside evidence.

Thus, clear language is not qualified or narrowed by the historical contingency that led to its adoption. By way of illustration, the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States was adopted primarily for the protection of African-Americans. But its clear language protects "any person."[6] A court would not admit historical evidence as "proof" that the Clause denies protection to Asian-Americans. The words "any person" are too clear to deny that Asian-Americans enjoy the coverage of the Equal Protection Clause.[7] On the other hand, if a constitutional provision is ambiguous or otherwise unclear, then a court may turn to historical and other interpretive methods. [8]

Part of this essay is devoted to an examination of the history of the Section as a whole. However, the reader should be cautioned that to the extent the Section is clear on its face, that history may have no *legal* force.

---

5. *Cf.* MONT. CODE ANN. § 1-2-106 (2001) (construction of words and phrases is according to the context and the approved usage of the language).

The language of the time may have to be consulted because words change their meaning over long periods of time. For example, the phrase "more perfect union" in the Preamble of the Constitution of the United States means "more *nearly complete* union." No changes of meaning, however, are relevant to the issue discussed in this paper.

6. U.S. CONST. amend. XIV ("nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws.").

7. For the broad reach of the Equal Protection Clause, see JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 632-38 (West Publishing Co. 2000) (1981). On the other hand, evidence that the Amendment was triggered in part by southern states' Black Codes could be introduced to show the scope of the less clear term "equal protection of the laws." Moreover on other points, the term "any person" might require historical analysis: Is, for example, an unborn child a "person" within the meaning of the Clause?

8. Among these methods are the much-abused terms "strict construction" and "liberal construction." These are properly understood as merely different ways of resolving textual ambiguities. Courts applying strict construction resolve ambiguities against coverage, while courts applying liberal construction resolve ambiguities in accordance with the general intent of the legislator. *See, e.g.* BLACK'S LAW DICTIONARY 386 (4th ed. 1968) (discussing strict and liberal construction).

Outside of criminal law, liberal construction generally is preferred in Montana. *E.g.* MONT. CODE ANN. §§ 1-2-102 to -103 (2001). The historical analysis in this essay sheds light on intent, and thus should further liberal construction of unclear matters.

2. Placement and context

Facial analysis must take into account both the placement and context of Article II, Section 33 and its wording. We first turn to placement and context.

The Section is found in the Montana Declaration of Rights. This suggests, of course, that it partakes of characteristics similar to other sections in the Declaration of Rights. Two of these characteristics are relevant to our inquiry. First, with one partial exception,[9] all of the sections in the Declaration of Rights are citizen protections against governmental authority. In other words, they are not claims upon government nor proscriptions against private action. This is, indeed, rather typical of bills of rights in American constitutions.[10] Although the Montana Constitution does contain some positive guarantees and protections against private parties, those provisions are not located in the Declaration of Rights.[11]

The second relevant characteristic of provisions within the Declaration of Rights is that the state supreme court ascribes special attributes to them. They are "fundamental" rights that individuals may enforce in court and that government may infringe legitimately only if the government convinces the court

---

9. A portion of the right to individual dignity. *See* MONT. CONST. art. II, § 4.

10. Traditionally, constitutions of government are limited to defining the organization of government agencies and scope of government powers, not the rights of private citizens *inter se*. Etymologically, the word *constitution* comes from the Latin verb, *constituere,* which in this context means "to arrange" or "to organize." CHARLES T. LEWIS, A LATIN DICTIONARY (reprint 1980) (1879). A constitution of government is an arrangement, organization, or, to use a common 18th century term, a "frame" of government. *Cf.* John Dickinson, Letters of Fabius No. 4, in PAUL LEICESTER FORD (Ed.), PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 181 (1888) (". . . a *constitution* is the *organization* of the contributed rights in society. *Government* is the *exercise* of them.") (emphasis in original).

This is why, in the American constitutional tradition, individual rights usually are phrased as limitations on government powers. *See, e.g.,* State v. Long, 216 Mont. 65, 70-71, 700 P.2d 153, 156-57 (1985):

> Historically, constitutions have been means for people to address their government. . . . Certainly, there is nothing in the constitutional debate that clearly indicates we should depart from traditional constitutional notions. Therefore, in accordance with well-established constitutional principles, we hold that the privacy section of the Montana Constitution contemplates privacy invasion by state action only.

216 Mont. at 70, 700 P.2d at 157.

11. Thus, the environmental right within the Declaration of Rights, Article II, Section 3, protects against state action. The protection against private action is located in Article IX, Section 1. Similarly, the state educational guarantee is not found in Article II, but in Article X. MONT. CONST. art. X, § 1. *See also id.*; MONT. CONST. art. IX, § 4 (government provision of cultural resources).

that the infringing action is "narrowly tailored" to serve a "compelling state interest."[12] This standard of review of government action is called "strict scrutiny."[13] Strict scrutiny has the practical effect of reversing the presumption of constitutionality usually afforded governmental actions.

Thus, the placement of Article II, Section 33 implies that it is (1) a right against government, (2) a citizen right, analogous to the requirement of trial by jury,[14] and (3) a fundamental right, so that government infringement is valid only if it serves a compelling state interest.

3. Text

The next step in our facial analysis is to examine the wording of Article II, Section 33. Once again, the text reads:

> **Importation of armed persons.** No armed person or persons or armed body of men shall be brought into this state for the preservation of the peace, or the suppression of domestic violence, except upon the application of the legislature, or of the governor when the legislature cannot be convened.[15]

The drafters phrased the text in the passive voice, without identification of particular importers or classes of importers. The natural reading, therefore, is that *all* importations of armed persons for peacekeeping purposes are banned, public or private, irrespective of who does the importing. Unfortunately for this natural reading, the interpretative convention is that rights in bills of rights, even if cast in the passive without a subject, apply only against government. The Montana supreme court's interpretation of the state right to privacy is an example.[16] The argument is strengthened in that certain other rights in the state constitution do specify that they are effective against

12. Wadsworth v. State, 275 Mont. 287, 911 P.2d 1165 (1996); Mont. Envtl. Info. Ctr. v. Dept. of Envtl. Quality, 1999 MT 248, ¶ 61, 296 Mont. 207, ¶ 61, 988 P.2d 1236, ¶ 61. *See also* Cape-France Enter. v. Estate of Peed, 2001 MT 139, 305 Mont. 513, 29 P.3d 1011.

13. *Id.*

14. MONT. CONST. art. II, § 24.

15. MONT. CONST. art. II, § 33.

16. *See* State v. Long, 216 Mont. 65, 70, 700 P.2d 153, 156 (1985) (interpreting MONT. CONST. art. II, § 10, which reads, "The right of individual privacy . . . shall not be infringed without the showing of a compelling state interest," as a right only against state, not private, action.) *See also* U.S. CONST. amends. II, III, IV & IX.

private action.[17]

Moreover, this text is materially different from laws and constitutional provisions targeted against private arms and private armies. The latter category includes (1) sections in other state constitutions that carve exceptions from the right to keep and bear arms so the legislature may regulate or prohibit private armies,[18] and (2) statutes that prohibit importations of armed personnel for *criminal* purposes.[19] The goal of such provisions is to prevent *disturbances of the peace,* and the means is to suppress private armies. But the goal of Article II, Section 33 does not seem to be, or at least is not limited to, preventing disturbances of the peace. It prohibits importations "for the *preservation* of the peace." Different goals often imply different means – especially here, since public, not private, actors are the usual preservers of the peace.

4. Conclusions from facial analysis

Facial analysis shows clearly that Article II, Section 33 bans government importations of armed men. To reach a definitive legal interpretation on that point, therefore, there is no need to examine the legislative history behind the section.

Facial analysis is less successful in determining whether

---

17. MONT. CONST. art. II, § 4 (part of the right of individual dignity), art. IX, § 3 (environmental right against private parties).

18. *E.g.,* ARIZ. CONST. art. 2, § 26 (adopted 1912): "The right of the individual citizen to bear arms in defense of himself or the State shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men." *See also* WASH. CONST. art. 1, § 24 (adopted 1889): "The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men." Some interpretative cases include Presser v. Illinois, 116 U.S. 252 (1886); State v. Gohl, 90 P. 259 (Wash. 1907); and Commonwealth v. Murphy, 44 N.E. 138 (Mass. 1896).

19. An example of the latter sort of enactment is MONT. CODE ANN. § 45-8-106(1) (2001):

> A person commits the offense of bringing armed men into the state when he knowingly brings or aids in bringing into this state an armed person or armed body of men *for the purpose of engaging in criminal or socially disruptive activities or to usurp the powers of law enforcement authorities.* (emphasis added).

This section superseded former MONT. REV. CODE ANN. § 94-3524 (Smith 1947), which covered only importation for preserving the peace, as does Article II, Section 33:

> Every person who brings into this state an armed person or armed body of men for the preservation of the peace or the suppression of domestic violence, except at the solicitation and by the permission of the legislative assembly or of the governor, is punishable by imprisonment in the state prison not exceeding ten years and by a fine not exceeding ten thousand dollars.

Article II, Section 33 interdicts purely private importations. The natural reading of the section in isolation suggests that it does. The legal context and various interpretative conventions suggest that it does not.

We turn, therefore, to the history of Article II, Section 33.

B. The history of Article II, Section 33

1. History before 1971

This section was first adopted as Article III, Section 31 of the 1889 Montana Constitution.[20] It is one of four fraternal quadruplets: Similar sections were inserted almost immediately thereafter into the constitutions of Wyoming, Idaho, and Kentucky. The Wyoming and Idaho conventions also met in 1889, the Kentucky convention in 1890. Following is the Wyoming section:

> No armed police force, or detective agency, or armed body, or unarmed body of men, shall ever be brought into this state, for the suppression of domestic violence, except upon the application of the legislature, or executive, when the legislature cannot be convened.[21]

Similarly, Idaho's constitution provides:

> No armed police force, or detective agency, or armed body of men, shall ever be brought into this state for the suppression of domestic violence except upon the application of the legislature, or the executive, when the legislature can not be convened.[22]

And Kentucky's:

> No armed person or bodies of men shall be brought into this State for the preservation of the peace or the suppression of domestic violence, except upon the application of the General Assembly, or of the Governor when the General Assembly may not be in

---

20. The 1889 section provided:
No armed person or persons or armed body of men shall be brought into this state for the preservation of the peace or the suppression of domestic violence, except upon application of the legislative assembly or of the governor when the legislature cannot be convened.

21. WYO. CONST. art. XIX, § 6 (effective 1890).

22. IDAHO CONST. art. XIV, § 6 (effective 1890).

session.[23]

All four quadruplets are formed in the passive voice, are targeted against importations for peacekeeping purposes, and provide for waiver by the legislature or, as a backup, by the governor.[24]

Although background information on the Kentucky provision is not available,[25] the transcripts of the convention debates that led to the adoption of these provisions in the three neighboring states of Idaho, Montana, and Wyoming enable us to reconstruct the community of understanding existing at the time.

First, the history amply supports the findings of facial analysis as to government importations. Although there was talk of the practice of mining companies and other kinds of businesses[26] bringing in armed men, there also was specific concern about public authorities such as local law enforcement agencies,[27] state authorities,[28] and the federal government.[29] Moreover, the convention discussions reflect the fact that many – perhaps most – of the abusive cases had arisen when local sheriffs and marshals deputized out-of-staters.[30] One Wyoming

---

23. KY. CONST. § 225 (effective 1891).

24. The first three provisions state that the governor may authorize the importation only if the legislature cannot be convened. The Kentucky provision is marginally looser, allowing the governor to act if the legislature is not actually in session.

25. E-mail from Carol J. Parris, Reference and Research Services Librarian at the University of Kentucky, to Varya Petrosyan, University of Montana School of Law, Class of 2003 (July 10, 2001) (on file with the author).

26. MONT. CONST. CONVENTION 129-130 (1889) [hereinafter Montana 1889 Convention] (statements of Delegate Fields and Delegate Breen).

27. *Id.* at 129-130 (on the concern with deputization by local law enforcement agencies).

28. Thus, Montana Delegate Knowles doubted whether the governor should have the right to call for armed forces from other states. *See* Montana 1889 Convention at 131 (statement of Delegate Knowles). An earlier draft of the Wyoming provision stated that even with consent of the authorities the only outside agency permitted in the state should be the U.S. Army. WYO. CONST. CONVENTION 192 (1889) [hereinafter "Wyoming Convention"].

29. *See* John Welling Smurr, A Critical Study of the Montana Constitutional Convention of 1889, 87-88 (1951) (unpublished M.A. thesis, Montana State University) (on file with the Mansfield Library, University of Montana).

30. For a Montana example of deputizing company employees, see McCarthy v. Anaconda Copper Mining Co., 70 Mont. 309, 225 P. 391 (1924) (although in that case they appear to have local residents). While deputization is not mentioned specifically in the Montana transcripts, deputization was a widespread practice that occurred in Montana, and some delegates' remarks seem to assume it. *See* Montana 1889

delegate explained the thrust of the proposal in this way:

> That is what this section is intended to prevent; that is that armed men shall be brought in from the slums of Chicago, *and that they shall be clothed with authority of law*.[31] (emphasis added).

Another Wyoming delegate said his goal was a provision that would

> keep out a foreign body of armed men, and not give them the pleasure of sticking on a badge, laying around the saloons at my little voting place, spoiling for a fight, made deputy marshals to guard Dale creek bridge as a dodge.[32]

Not surprisingly, however, the delegates were not all of one mind on such issues; some, for example, defended the police who had deputized out-of-staters.[33]

The more difficult question is history's verdict on whether these provisions were designed to forbid purely private importations, without deputization. There is good evidence that they were. The delegates' comments reflect concerns about corporations importing armed men to break strikes[34]and for other kinds of violence and intimidation.[35] Delegate Martin Maginnis' sentiments, thundered out at the Montana 1889 convention to general applause, were unambiguous:

> . . . for *anyone or anybody* to bring an armed body of men into this Territory *for any purpose whatever,* either to foment trouble or to put it down, is an invasion of the Territory of Montana, and its

---

Convention, *supra* note 27, at 130 (Delegate Breen, on arresting powers).

31. Wyoming Convention, *supra* note 29, at 402.

32. *Id.* at 404; another Wyoming delegate complained of the heavy focus on public deputization, urging that importations by "corporations and individuals be put on exactly the same basis."

33. *E.g., id.* at 403-04 (Delegate Riner).

34. The strikebreaking function is mentioned by one author, *see supra* note 30, at 88; but the transcripts and other sources show broader functions. *See also* K. ROSS TOOLE, TWENTIETH- CENTURY MONTANA: A STATE OF EXTREMES 148 (1972).

35. Professor Jeff Renz notes two cases that did not involve either mining companies or strikebreakers: (1) the Union Pacific's hiring of armed men to track down and kill the Hole-in-the-Wall Gang and (2) a Wyoming cattlemen's hiring of Tom Horn, on whom see T.A. LARSON, HISTORY OF WYOMING 372-74 (1978) (although Horn did not come to Wyoming until 1892 at the earliest). *See also* Joan Bishop, *Vigorous Attempts to Prosecute: Pinkerton Men on Montana's Range: 1914*, MONTANA: THE MAG. OF W. HIST., Spring 1980, at 2 (use of imported detectives to stop rustling, beginning in 1885) [hereinafter Bishop].

sacred rights and privileges.[36]

But other delegates were not so sure. Many of the delegates seemed to understood that some imported men, including employees of the widely disliked Pinkerton's National Detective Agency of Chicago, were serving the wholly legitimate public purposes: solving crime, protecting private property, and assisting the police – and that they were doing this not just for mining companies, but for cattlemen.[37] Thus, at all three conventions, there were strenuous defenses of citizens' legitimate rights to protect their property and demands for assurance that the right to self-defense would remain if these provisions were adopted.[38]

Moreover, there is evidence that in Montana the 1889 constitution was not universally understood to forbid purely private importations (i.e., without deputization). Importations continued in Montana for many years thereafter, apparently without any suggestion that they were unconstitutional. One author, Joan Bishop, has detailed how men from the Pinkerton agency were used to check Montana cattle rustling from 1885 until at least 1920.[39] Hers is not the only report.[40] One Pinkerton detective, Frank Lavigne, received enough public and positive recognition for his work to be appointed as chief

---

36. Montana 1889 Convention, *supra* note 27, at 130 (emphasis added).

37. This point was made obliquely at least twice at the Montana convention. Montana Convention, *supra* note 27, at 129, 131. It also was made at the Idaho Convention. 2 I.W. Hart, ed., PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF IDAHO OF 1889, at 1413 (1912) [hereinafter Idaho Convention]. *See also* Bishop, *supra* note 36.

38. Montana 1889 Convention, *supra* note 27, at 129 (Delegate Warren), 131 (Delegate Hogan); Wyoming Convention, *supra* note 29, at 402 (Delegate Brown). The following colloquy occurred at the Idaho convention:

> Delegate Ainslie: I move the adoption of that amendment, and I believe in it. We have had enough of Pinkerton's private squads of men ranging through the west. I see Montana has adopted the same thing, and I think it is a good thing.

But then a quick clarification by the Chairman:

> I will call attention to the words, "private detective agency." If the gentleman from Boise will examine the amendment and see that it cuts off the employment of private detectives for the detection of individual crime. I don't think it was the desire of the gentleman from Logan to include that.

With that clarification the measure was passed. Idaho Convention, *supra* note 38, at 1413.

39. Bishop, *supra* note 36, at 2.

40. *See, e.g.,* K. ROSS TOOLE, TWENTIETH CENTURY MONTANA: A STATE OF EXTREMES 148 (Norman ed., University of Oklahoma Press 1972) (mass use of company detectives in 1914).

detective of the Montana State Board of Stock Commissioners.[41]

2. The policies behind the constitutional provisions

The policies that motivated adoption of Article II, Section 33 and the other quadruplets can add insight into their scope. The Montana, Idaho, and Wyoming convention transcripts reveal two principal policies.

One of these was, as Delegate Maginnis said, to preserve the territorial integrity of the state.[42] The other, which is perhaps of more interest today, was to prevent clashes and contention between local citizens and unsympathetic out-of-staters.

Both policies are part of a long American constitutional tradition. The first policy – protection of the state's territorial integrity – is desirable because territorial invasion of a state can disrupt republican government. Accordingly, the United States Constitution specifies that the federal government will protect the states against it.[43] The latter policy embodies the value that the founding generation at the time of ratification of the U.S. Constitution called *sympathy.*

The term "sympathy" is omnipresent in the grand constitutional debate of 1787-89.[44] It meant identity of interest, values, and "fellow-feeling" between governmental decision makers, including the police, and the citizenry at large. Although a closer modern word might be "empathy," in this essay I shall employ "sympathy" as a term of art because of its strong historical connections.

The value of "sympathy" between governors and governed underlies such well-known state and constitutional features as the large numbers and small districts that characterize lower houses of the legislature, jury trial by local citizens,

---

41. Bishop, *supra* note 36, at 12.

42. *E.g.* Montana 1889 Convention, *supra* note 27, at 130 (Delegate Maginnis).

43. U.S. CONST. art. IV, § 4. ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion. . .").

44. *See, e.g., Virginia Ratifying Convention Debates,* 3 JONATHAN ELLIOTT (ED.), THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 395 & 536 (James Madison), 576 (Edmund Randolph); 590 (Patrick Henry). *See also,* THE FEDERALIST PAPERS No. 35, at 216 (Alexander Hamilton), Nos. 45, at 290, 52, at 327 (James Madison) (Clinton Rossiter ed., 1961). *See also,* THE ANTI-FEDERALIST PAPERS Nos. 55 ("A Georgian") & 63 ("The Federal Farmer" [likely Richard Henry Lee]), available at http://www.constitution.org (last visited Nov. 26, 2001).

This list is merely a small sampling.

proscriptions on conflicts of interest – including bans on executive branch officials in the legislature,[45] frequent elections, and term limits.[46]

At an early date, Americans became attached to the value of sympathy in law enforcement. British importation of Hessian mercenaries to suppress the American Revolution was a topic of particular abhorrence, and was cited as one of the grievances in the Declaration of Independence.[47] As made clear earlier, in the 19th century public opinion reacted strongly against the practice of local authorities granting law enforcement powers to armed men brought in from other states.[48] The United States has been one of the few nations that has declined to establish a national police force, preferring to rely on community and state law enforcement. Quartering of troops on homeowners in peacetime is constitutionally prohibited.[49] Use of the military for internal policing is, in general, forbidden by law.[50] Lest anyone think that this policy of "sympathy" in law enforcement is anachronistic, he need only reflect on the serious recent attention given to training and disciplining local police so as to maintain an identity of feeling and interest with local citizenry.[51]

---

45. *E.g.* MONT. CONST. art. V, § 9.

46. *See* Robert G. Natelson, *A Reminder: The Constitutional Values of Sympathy and Independence* (forthcoming).

47. THE DECLARATION OF INDEPENDENCE para. 28 (U.S. 1776).

48. The lack of "sympathy" between those men and local inhabitants was noted in the Wyoming Constitutional Convention:

> That is what this section is intended to prevent; that is that armed men shall be brought in from the slums of Chicago, and that they shall be clothed with authority of law. . . . Wyoming Convention, *supra* note 29, at 402 (1893).
>
> Some of these men were convicts who had been pardoned not ten days from the Lincoln penitentiary in Nebraska; that was the kind of men that were sent here. . . .

Id. at 403.

See also the cutting reference to Chicago in Montana 1889 Convention, *supra* note 27, at 130 (Delegate Breen), as well as the general hostility toward out-of-state enforcers in the discussion.

49. U.S. CONST. amend. III. *See also* MONT. CONST. art. II, § 32.

50. By the so-called "Posse Comitatus Act." *See, e.g.,* 10 U.S.C.A. § 375 (1998).

51. This is called *community policing. See, e.g.,* Community Policing Consortium, *About Community Policing,* at http://www.communitypolicing.org/about2.html (last visited Aug. 30, 2001) (among the elements of the philosophy: "Law enforcement has long recognized the need for cooperation with the community it serves. Officers speak to neighborhood groups, participate in business and civic events, consult with social agencies and take part in education programs for school children. Foot, bike and horse patrols bring police closer to the community" and "Community policing allows law enforcement to get back to the principles upon which it was founded, to integrate itself

Article II, Section 33 promotes the policy of "sympathy" by making importation administratively inconvenient – that is, by requiring two-tiered deliberation in advance. Before an importation, both local and state authorities must agree on its necessity. The statewide officials to whom the local officials must apply are, first, the legislature – the branch most "sympathetic" to the people – and, if that is impractical, the governor, who commands the militia and is the statewide official most visibly responsive to the people. In the course of this process, the legislature or governor may decide that there are less risky alternatives, such as using the militia or police from other communities within Montana.

Sadly, some consequences of disregarding the constitutional policy were illustrated in the Missoula incident referred to above: A documented lack of "sympathy" between citizens and police that was aggravated, justifiably or not, by the presence of out-of-state police officers.[52] Now that mass invasion of Montana by purely private forces is unlikely, the promotion of sympathy between law enforcement and citizens may be this section's primary usefulness.[53]

The policies underlying Article II, Section 33 are best served by its application to both public and private importers. The territorial integrity of the state could be threatened by invasion sponsored either by another government or by private parties. Either kind of invasion could have local government collaborators; that is one reason the section provides that the legislature or governor must approve the importation. The policy of sympathy is most applicable to public importers, especially of law enforcement personnel. However, even the private use of out-of-state security guards, for example, can cause ill-will, disrespect for the law, or even violence.

3. 1971-72 Constitutional Convention

The 1971-72 Montana convention transcripts, although not copious on this subject, support the conclusion that the Article

---

once again into the fabric of the community so that the people come to the police for counsel and help before a serious problem arises, not after the fact.").

52. *See, e.g.*, Report, *supra* note 2, at 6-13.

53. Unfortunately, this point seems to have been missed in Elison and Snyder's discussion of the Montana Constitution, which discusses instead isolated instances of tax-protestors and the like, and concludes that, "In practice, the section is probably without significant value . . . ." LARRY M. ELISON & FRITZ SNYDER, THE MONTANA STATE CONSTITUTION 86 (2001).

II, Section 33 applies to both public and private importations. Although some have interpreted references to "strikebreakers" at the convention as a limitation on the Section,[54] examination of the 1971-72 transcript actually suggests that the provision has a very broad sweep indeed.

The primary discussion of Article II, Section 33 at the convention was an oral report from the Bill of Rights Committee. Based on that oral report, the section was read and approved. The entire report is as follows:

> **DELEGATE FOSTER**: Mr. Chairman, I move that when this committee does arise and report, having had under consideration Section 33 of the Bill of Rights Proposal Number 8, it recommends that the same be adopted.
>
> Mr. Chairman. Article III, Section 31 [of the 1889 constitution] remains unchanged. The protection, *initially established to prevent the importation of strikebreakers,* is thought to be an adequate safeguard against *any body of armed men coming into the state.* No delegate proposals were received on this provision. This particular section was reviewed in somewhat similar light as to the one previous to it. The thinking of the committee on this question was the same. It does have some history to it, and *there is a possibility that in the case of an unruly situation that someone might be inclined to bring armed men into the state.* And we felt that it was a good safeguard, and the committee felt it was important that this be retained as a safeguard to the people of the State of Montana. Thank you, Mr. President [Chairman].[55]

It is evident from a reading of this passage, which is echoed in the Bill of Rights Committee's formal comments,[56] that the committee's, and by extension the convention's, intent was for the normal rule of interpretation – a clear, general clause is not limited to the historical events that produced it. In the words of Delegate Foster, whatever the reason this section was "initially established," it was now a "safeguard against *any* body of men

---

54. This is likely a basis for the conclusion in Report, *supra* note 2, at 14.

55. 6 VERBATIM TRANSCRIPT, MONTANA CONSTITUTIONAL CONVENTION 1971-1972, at 1832 (emphasis added).

56. *See* MONTANA CONSTITUTIONAL CONVENTION 1971-72, BILL OF RIGHTS COMMITTEE PROPOSAL:

> The committee voted unanimously that the former Article III, section 31 remain unchanged. The protection, *initially established to prevent the importation of strike-breakers,* is thought to be an adequate safeguard against *any body of armed men coming into the state.* No delegate proposals were received on this provision. (emphasis added).

coming into the state" because of the "possibility that in the case of an unruly situation [such as a Hell's Angels' visit - ed.] that someone might be inclined to bring armed men into the state." There is no suggestion that the section be read in a historically restrictive way, or that "any body of men" was to be limited to either public or private importations.[57]

In other words, Article II, Section 33 means what it says.

4. Implications of history for the identity of importers

The history of Article II, Section 33 supports the conclusions from facial analysis that the provision restricts governmental importations and creates a citizen right to be protected from them unless the state complies special procedures. The transcripts of the various constitutional conventions discuss publicly-sanctioned importations, and such coverage is necessary to implement the underlying policies of "sympathy" and territorial integrity.

Facial analysis revealed a lack of certainty as to whether purely private importations were covered. There is some historical evidence that they are not: Delegates expressed reservations against reducing the right of self-defense, and in Montana, in particular, private importations continued for many years without constitutional challenge. Although I am not without reservations on the question, it does seem to me that the weight of the historical evidence is that Article II, Section 33 also restricts purely private importations. This conclusion is supported by strong statements, both at the 1889 and 1971-72 conventions, in favor of broad coverage. It also is supported by the fact that restricting private importations furthers the twin policies of territorial integrity and "sympathy."

C. An Unresolved (and Perhaps Unresolvable) Problem: Judicial Review of Private Importation Cases

It is with mixed feelings that I conclude that Article II, Section 33, unlike most other provisions in the Montana

57. N.B. the wording in the oral Bill of Rights Committee report: "This particular section was reviewed in somewhat similar light as the one previous to it." The one previous to it was the ban on the quartering of soldiers in homes and the superiority of the civil to the military power. Discussion at the convention reveals that the provision was retained (1) because of an unwillingness to remove rights already enjoyed by the people and (2) because future circumstances could once again threaten the right. *See* 6 VERBATIM TRANSCRIPT, MONTANA CONSTITUTIONAL CONVENTION 1971-1972, at 1829-31.

Declaration of Rights, creates a right against private parties. In general, I favor the traditional view that constitutions ought to limit themselves to protecting "negative rights" against government rather than rights against private parties or positive guarantees from government. Construing Article II, Section 33 creates a knotty interpretative question of the kind that arises when constitution-makers depart from that principle. The question is this: By what standard should a court review a purely private importation?

The Montana Supreme Court opinion in *Montana Environmental Information Center v. Department of Environmental Quality*[58] included dicta concerning another state constitutional right against private parties – the right to a clean and healthy environment vis-a-vis other private citizens.[59] Because of that provision's close connection with the environmental right against government in the Article II Declaration of Rights,[60] the court opined that it was a fundamental right, and that therefore violations by *private citizens* must be justified by showing a compelling *state* interest.[61] *A fortiori,* this reasoning applies to Article II, Section 33, which is itself in the Declaration of Rights: A private importer of armed personnel can justify an unauthorized importation only by showing a compelling state interest.

The problem, however, is that this standard is internally inconsistent, and therefore – quite literally – impossible to apply.

A private actor accused of violating another's fundamental right is often, perhaps usually, proceeding in accordance with one or more of his own fundamental rights. The dicta in *Montana Environmental Information Center*, for example, spoke of one's right to be protected against a private actor whose acts "implicate" the environment. The court makes it clear that a plaintiff can defend against a private actor's "implication" even if that "implication" does not cause injury to the plaintiff in the traditional sense.[62] Hence, if A decides to cut timber on his own

58. 1999 MT 248, 296 Mont. 207, 988 P.2d 1236.

59. MONT. CONST. art. IX, § 1.

60. MONT. CONST. art. II, § 3.

61. *See supra* note 57, at ¶ 63.

62. Because the right to property generally includes the right to use it in a way that does not create a nuisance, the standard in *Montana Environmental Information Center* also may entail some federal constitutional difficulties. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Palazzolo v. Rhode Island, ___ U.S. ___, 121 S.Ct. 2448 (2001).

land in a way that does not hurt B in a traditional sense — that is, A does not create a nuisance — but B nevertheless convinces a court that A's cut "implicates" the environment, then A cannot proceed unless he proves that the cut furthers a compelling state interest. However, A's right to cut timber without harm to others (in the traditional sense) is part of his right to property. The right to property also is in the Declaration of Rights,[63] and therefore fundamental. It cannot be infringed without a compelling state interest.[64]

The upshot of all this is that if both sides can show a compelling state interest or if neither side can show a compelling state interest, then the cut must be simultaneously permitted and prohibited. I doubt if even the *Montana Environmental Information Center* majority could find a way to do that.

In a private importation case, if the importation is to protect the importer's life, liberty or property, it cannot be *infringed* without a compelling state interest.[65] But if private importing is barred by Article II, Section 33, then, under the dicta in *Montana Environmental Information Center*, it cannot be *permitted* without a compelling state interest. If there is no compelling state interest either way or if there is a compelling state interest on both sides, the importation must be simultaneously permitted and prohibited.

The quandary demonstrates more than a problem with the *Montana Environmental Information Center* case. It illustrates the almost insuperable juristic snafus that courts get into when faced with constitutional guarantees against private parties rather than against the state.[66] So perhaps, given the uncertain

---

63. *See* MONT. CONST. art. II, § 3.

64. The inherent conflict here has been suggested by Justice Rice. *See* Cape-France Enter. v. Estate of Peel, 2001 MT 139, ¶ 61, 305 Mont. 513, ¶ 61, 29 P.3d 1011, ¶ 61 (Rice, J., dissenting).

65. *See* MONT. CONST. art. II, § 3.

66. The relative success of the U.S. Constitution is attributable partly because it avoids creating rights against private parties or positive guarantees against the state. Positive guarantees also involve juristic quandaries, and almost inevitably draw the courts into the legislative sphere, as the history of the Montana school funding litigation amply shows. *See, e.g.*, Helena Elementary School District No. 1 v. State of Montana, 236 Mont. 44, 769 P.2d 684 (1989). This, in turn, removes policy questions from the more democratic branches (legislature and executive) and lodges it in the judiciary – an essentially unrepublican result. *See* Robert G. Natelson, *"A Republic, Not a Democracy?" Initiative, Referendum and the Constitution's Guarantee Clause,* 81 TEX. L. REV. (forthcoming February 2002). (as determined by the founding generation, one of the three "core" requirements of republicanism is rule, either directly or through

nature of the facial and historical evidence, we might breathe easier if the state supreme court did not read the historical evidence quite as I do, and declined to apply Article II, Section 33 to private importers.

III. COMPLIANCE WITH THE MUTUAL AID ACT DOES NOT SATISFY ARTICLE II, SECTION 33

The Montana Interstate Law Enforcement Mutual Aid Act[67] purports to authorize the importation of police officers from outside Montana pursuant to mutual aid agreements approved by the attorney general. The City of Missoula relied on the Act for its importation in July, 2000. Although the citizens' committee investigating citizen-police clashes stated that compliance with the Act represented the necessary legislative approval under Article II, Section 33,[68] it is difficult to square that conclusion with the clear wording and underlying policy of that section.

Article II, Section 33 prescribes the procedures under which the ban on importation can be waived.[69] Particular procedures must be followed – specifically:

1. Application (request for the importation) by the legislature, if the legislature can be convened.

---

representatives, by citizen majorities or pluralities).

In the federal constitution, there is one positive guarantee – U.S. CONST. art. IV, § 4, by which the United States guarantees each state a "republican form of government." The federal courts have avoided entering this legal thicket by declaring the clause a matter for Congress, and non-justiciable. On the Guarantee Clause, see generally WILLIAM M. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION (1972). For more recent treatments, see Natelson, *supra,* and sources cited therein.

67. MONT. CODE ANN. §§ 44-11-301 to -312 (2001).

68. Report, *supra* note 2, at 14 ("More importantly, the Legislature expressly authorized mutual aid agreements with out-of-state law enforcement agencies when it passed the Interstate Law Enforcement Mutual Aid Act in 1983.").

Interestingly enough, at the time of the Missoula importations of July, 2000, the Act actually had not been complied with because, for unknown reasons the attorney general had approved the mutual agreements only "as to form" rather than under the full panoply of standards mandated by the Act. *See* ROBERT G. NATELSON, REPORT ON THE STATE CONSTITUTIONALITY OF IMPORTATION OF OUT-OF-STATE POLICE OFFICERS TO MISSOULA, MONTANA IN JULY, 2000 16-18 (2001) (on file with Montana Law Review).

69. *Cf.* LARRY M. ELISON & FRITZ SNYDER, THE MONTANA STATE CONSTITUTION 85 (2001) ("This section prohibits bringing armed men into the state except upon official government request.") If the quoted words mean *any* official request, they are mistaken.

2. If the legislature cannot be convened,[70] application by the governor.

The literal wording of Article II, Section 33 contemplates waiver neither by local law enforcement nor by any official agency other than those designated. As the various convention transcripts show, the delegates deemed only the legislature and, in unusual cases the Governor, worthy of the waiver power.[71]

In addition to creating rights in the citizenry, therefore, this section is in the nature of a "check" amid the larger constitutional system of checks and balances – analogous to the right of the senate to approve gubernatorial appointments[72] or of the governor to veto bills.[73] The reasons for the check are discussed below.

Because the Act permits the attorney general to determine whether an importation will take place, it could be argued that the Act is a valid delegation of legislative power to the attorney general. There is no question that in the usual case the legislature has the constitutional authority to delegate power to executive agencies if certain requirements are met. Among other requirements, the grant must be "sufficiently clear, definite and certain to enable the agencies to know their respective rights and obligations."[74] The terms of the Act do provide significant guidance to the attorney general on approval of mutual aid agreements. The attorney general has a fair amount of discretionary authority as well, because he must approve the content of a mutual aid agreement, including the level of precision required[75] and undefined "necessary and

---

70. The meaning of "when the legislature cannot be convened" is uncertain, although resolving the uncertainty is not necessary to this discussion. Since MONT. CONST. art. VI, § 11 states, "Whenever the governor considers it in the public interest, he may convene the legislature," it cannot be the same as being already in session. *Cf.* KY. CONST. § 225 (reproduced at text accompanying note 24, *supra*). Presumably, therefore, the language means that the legislature decides the question if either (i) it is then in session or (ii) the emergency is not so serious and time so short that the legislature cannot be brought into session.

71. *E.g.*, Montana 1889 Convention, *supra* note 21, at 129 (Delegate Courtney – the governor) & 130 (Delegate Maginnis – legislator and governor).

72. *See* MONT. CONST. art. VI, § 8, cl. 2.

73. *See* MONT. CONST. art. VI, § 10.

74. Grossman v. State, 209 Mont. 427, 460, 682 P.2d 1319, 1336 (1984); Bacus v. Lake County, 138 Mont. 69, 79, 354 P.2d 1056, 1061 (1960). *See also* Huber v. Groff, 171 Mont. 442, 458, 558 P.2d 1124, 1133 (1976); Mont. Milk Control Bd. v. Rehberg, 141 Mont. 149, 161, 376 P.2d 509, 514 (1962).

75. MONT. CODE ANN. § 44-11-305(2), (12) (2001).

proper matters."[76] The discretionary authority in the Act is certainly within normal limits.

There are, however, certain problems in classifying this with more typical delegation cases. The typical delegation case is a bestowal of a limited portion of the general legislative power granted by Article V, Section 1 of the Montana Constitution. The power exercised under Article II, Section 33 is not a general legislative power at all – it is a specific function lodged alternatively in legislators and the governor. Besides serving as a protection for the citizenry, it also is, as previously noted, a "check" amid the constitutional system of checks and balances. Delegating it to the attorney general is rather as if the state senate tried to delegate to the attorney general its right to confirm gubernatorial nominations[77] or if the governor had sought to abdicate to him the right to veto bills.[78]

Moreover, the underlying constitutional policy of "sympathy" is sabotaged if governor and legislature abandon the Article II, Section 33 power to the attorney general. I previously noted that the drafters' selection of the legislature and governor reflects the popular position of those two agencies. The attorney general, although directly elected, seems a less responsive figure: He is the state's chief law enforcement officer, required to be a lawyer,[79] less visible, the "legal officer of the state"[80] and tied intimately to law enforcement in a way that may render him less impartial in weighing the requests of law enforcement officials. Additionally, there is a possibility of conflict between the approval power and the attorney general's other duties.[81]

Once again, the approval portion of Article II, Section 33 provides that

> No . . . armed body of men shall be brought into this state . . . *except upon the application of the legislature, or of the governor*

76. MONT. CODE ANN. § 44-11-305(13) (2001).

77. MONT. CONST. art. VI, § 8.

78. MONT. CONST. art. VI, § 10. *Cf.* State ex rel. Judge v. Legislative Fin. Comm., 168 Mont. 470, 543 P.2d 1317 (1975) (holding that the legislature must act on certain measures *qua* legislature, and could not delegate those functions to a particular committee). The court did authorize delegation to the executive in this particular case, but the broader principle is that a delegation is unconstitutional if it defeats the purpose of a constitutional grant of power to the delegating agency.

79. MONT. CONST. art. VI, § 3, cl. 2.

80. MONT. CONST. art. VI, § 4, cl. 4.

81. *See* ROBERT G. NATELSON, REPORT ON THE STATE CONSTITUTIONALITY OF IMPORTATION OF OUT-OF-STATE POLICE OFFICERS TO MISSOULA, MONTANA IN JULY, 2000 15 (2001) (on file with MONTANA LAW REVIEW).

when the legislature cannot be convened.

Delegation to the attorney general directly violates the wording of this section. We have now seen that it violates the spirit – the central purpose of promoting "sympathy" – as well.

A more technical issue with the Act's attempted delegation of power is that not all the Article II, Section 33 approval power is the legislature's to delegate. In the usual delegation case, lawmakers bestow legislative authority held either by the legislature alone (as when a law is passed without the governor's signature) or with the governor conjointly. As noted earlier in this Part, the Article II, Section 33 approval power is discretionary or administrative in nature, and it is divided differently. Here, the power is *alternative* rather than conjoint. One can question whether the legislature can delegate the governor's authority to approve or disapprove when the legislature cannot be convened.

Assuming, however, that the governor's signing the Act is interpreted as a bestowal of his alternative power as well, there is another issue: Usually, when the legislature delegates power to an executive branch agency, it does so in express terms. This was not done here. On the contrary, the record contains no evidence that the legislature understood it was delegating its special power under Article II, Section 33.

The Interstate Law Enforcement Mutual Aid Act was introduced into the 1983 legislature by multiple sponsors as House Bill 857. Significantly, the bill was requested by the Department of Justice, whose chief officer is the attorney general. As so often happens in Montana, no testimony was offered by or heard from members of the general public. Two of the three proponents were employees of the attorney general's office, and one was the chief administrator of the Highway Patrol. There were no opponents. After some amendment, it passed the senate unanimously and the house with only one dissenting vote.

The record contains no references to Article II, Section 33.[82] The Act does not mention it. The witnesses' testimony contained extensive citations to legal and constitutional authority, but they overlooked Article II, Section 33. The specific examples cited by the witnesses as to how the Act would

82. I am indebted to the State Law Library in Helena for providing to me the legislative materials pertaining to H.B. 857.

operate in practice involved responding to traffic emergencies in remote border areas, not the importation of armed men for peacekeeping purposes.[83] Under the circumstances, it is difficult to conclude that the legislature intended to delegate the special power given it by Article II, Section 33.

Still another factor that removes this from the usual legislative delegation category is Article II, Section 33's placement in the Montana Declaration of Rights. Because of that placement, it arguably creates in each citizen a fundamental constitutional right not to be subject to law enforcement officers from other states unless those officers have been imported with the approval of the citizen's statewide elected representatives. That means each citizen has standing to defend that right and that government infringements are subject to strict judicial scrutiny – they can be justified only by showing a compelling state interest mandating the violation.[84]

Realistically, it is hard to find any compelling state interest to justify transfer of waiver authority to the attorney general from the legislature or governor. Administrative convenience is not, of course, a compelling state interest. On the contrary, rights are established with full recognition that respecting them may render matters administratively inconvenient. In the case of Article II, Section 33, administrative inconveniences are deliberately inserted into the constitution to protect the right.[85]

Although the foregoing is not sufficient, in my view, to conclude definitively that the Act is unconstitutional, it is enough to raise a presumption that it is – and to suggest that state officials need to take remedial action.

IV. CONCLUSION

Whatever the objective merits and demerits of Article II, Section 33, the section was drafted as it was for definite policy reasons. It means what it says. Citizens of Montana have a constitutional right not to be subject to law enforcement from out-of-staters, unless the specific use has been approved by the

---

83. *See Authorizing Mutual Aid Agreements Among Law Enforcement Agencies, etc.: Hearing on H.B. 857 Before the House Comm. on the Judiciary*, 48th Leg. (Mont. 1983) (Testimony of Steve Johnson, Assistant Attorney Gen.); *Id.* (Testimony of Colonel R.W. Landon, Chief Adm'r, Highway Patrol).

84. *See supra* Part II.A.2.

85. *See supra* Part II.B.3. Arguably, moreover, review by the governor (commander in chief of the militia) is just as convenient as review by the attorney general.

legislature or, in rare cases, by the governor. This is certainly applicable to public authorities, and probably to private importers as well. Furthermore, this is a fundamental right. Although it is uncertain what implications "fundamental" status may have for private importers,[86] public agencies' importations are subject to "strict scrutiny" – they may import armed personnel only if there is a compelling state interest in doing so.

Compliance with the Interstate Law Enforcement Mutual Aid Act of 1983 is not sufficient to comply with Article II, Section 33. At the very least, there are sufficient doubts about the constitutionality of the Act to justify official remediation. To comply with the state constitution, law enforcement agencies seeking additional assistance from armed personnel should:

1. Use only in-state officers; or

2. Ask for prior legislative approval; or

3. If the legislature cannot be convened, obtain prior approval of the governor.

86. *See supra* Part II.C.