

National Defense

NOTE

The provision of the Constitution authorizing Congress 'to raise and support armies'¹ has always been held by the Federal courts to mean that in the furtherance of this power Congress may determine how and under what circumstances such armies shall be raised. Since this grant appears in a clause which is entirely separate from that bestowing upon Congress the power to declare war, it follows that either in the presence or in the absence of a state of war the authority to raise armies is vested in the national legislative body. While the raising of armies is associated in most minds with the existence of hostilities, a state of war is nevertheless not an essential condition to the exercise of this power. This is plainly evident in the enactment by Congress of the Selective Training and Service Act of 13 September 1940² almost fifteen months before the United States entered World War II.

Compared with many of the other enumerated powers, the power to raise and support armies has not evoked much doctrinal conflict. What dispute there has been over the proper scope of this power has centered upon the power of Congress to prescribe the *mode* of raising such armies, and it has become established that the enactment of conscription laws is an appropriate mode.

The vividness of wartime experience during the immediate past makes it unnecessary to examine here the constitutional aspects of our most recent legislation in this field; it should be emphasized, however, that the Act of 1940 was the first instance in American history of military conscription in peacetime. The executive and legislative branches relied heavily for guidance at that time upon the conscription legislation of World War I, which, in turn, had been based in large part upon the experiences of the Civil War period. These precedents and a considerable amount of legal opinion supplementing the explicit grants of authority in the Constitution were sufficient to enable the Supreme Court unanimously to uphold the constitutionality of conscription in the *Selective Draft Law Cases* of 1918.

During the American Revolution some of the states filled their quotas for the Continental Army by conscription, but the Congress embarked upon no such program. In the War of 1812 Congress debated the advisability of raising an army through the draft, but no act of this nature was passed. During the War with Mexico in 1846 the army was recruited entirely by voluntary enlistment.

The Civil War confronted both President and Congress with an urgent need for military forces on a grand scale. President Lincoln promptly called the militia

¹ Art. I, sec. 8.

² 54 Stat. 885.

into the service of the United States and, wholly without Congressional authorization, issued a call for volunteers.³ As the war continued the pressing need for more and more troops made it imperative to increase the military forces beyond the number attainable through the militia and voluntary enlistment. Consequently, steps were taken to augment the existing supply of manpower through compulsory military conscription. An approximation to a draft was enacted by Congress on 17 July 1862;⁴ the President was therein empowered to regulate the raising of the states' militia for Federal duty. It proved to be insufficient, however, so in a second Act,⁵ passed the following year on March 3rd, Congress gave authority to the President to conscript men directly into the Union army.⁶

Opposition to this first American draft law quickly came from many quarters and took varied forms. Constitutional arguments were arrayed against it; 'peace advocates' attacked it; enterprises appeared for the purpose of establishing mental or physical disability; draft riots broke out in many cities. The most violent of the riots took place in New York City and raged unabated for three days during July, 1863.⁷ Less violent, but no less indignant, were the attacks levelled against the Act's 'three hundred dollar clause'; by paying this commutation sum one could escape military service.

President Lincoln made no public defense of the Act; he continued to exercise the power it conferred upon him and confided his defense of the measure to private papers which were not published for some time thereafter. His position was that 'The Constitution provides that the Congress shall have power to raise and support armies; and by this act the Congress has exercised the power to raise and support armies. . . The Constitution gives Congress the power, but it does not prescribe the mode, or expressly declare who shall prescribe it. In such case Congress must prescribe the mode, or relinquish the power. There is no alternative. . . The power is given fully, completely, unconditionally.'⁸

At no time did the Supreme Court of the United States review the constitutionality of this Civil War conscription act, but an exhaustive opinion upholding it was delivered by the highest court of Pennsylvania in *Kneedler v. Lane*⁹ which anticipated most of the subsequent arguments used in behalf of conscription in the *Selective Draft Law Cases* of 1918. The Pennsylvania court declared: 'That the United States are a nation, and sovereign in the powers granted to them, is not denied. . . We cannot conceive of a nation without the inherent power to carry on war. . . The power to declare war necessarily implies the power to carry it on, and this implies the means . . . all the means in possession of the nation.

³ An earlier call, that of 15 April 1861, for 75,000 men had been authorized, but this call of 3 May 1861 was made *in anticipation* of Congressional authority, which was given later in a short special session during the same year.

⁴ 12 Stat. 597.

⁵ 12 Stat. 731.

⁶ See Randall, James G., *Constitutional Problems Under Lincoln*, New York, 1926, ch. XI.

⁷ A vivid description of the killing, burning, pillaging, and other assorted forms of violence that took place on this occasion appears in Sandburg, Carl, *Abraham Lincoln, The War Years*, New York, 1939, II, p. 360 ff.

⁸ *Works*, ed. by Nicolay, James G., and Hay, John, New York, 1890, VII, pp. 51-2.

⁹ 45 Pa. 238 (1863).

[In war,] as there is no limit to the necessity, there can be no limit to the force to be used to meet it. The power of war, without the essential means, is really no power; it is a solecism. Voluntary enlistment is founded in contract. A power to command differs essentially from a power to contract. The former flows from authority; the latter from assent. . . It is clear, therefore, that the power to make war, without the power to command troops into the field, is no government power, because it lacks the authority to execute itself.¹⁰

The Selective Draft Law of 18 May 1917¹¹ was tested for its constitutionality in a number of lower Federal courts before it reached the Supreme Court; each time it was upheld.

SELECTIVE DRAFT LAW CASES

245 U.S. 366 (1918)

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

We are here concerned with some of the provisions of the Act of May 18, 1917, c. 15, 40 Stat. 76, entitled, 'An Act to authorize the President to increase temporarily the Military Establishment of the United States.' The law, as its opening sentence declares, was intended to supply temporarily the increased military force which was required by the existing emergency, the war then and now flagrant. The clauses we must pass upon and those which will throw light on their significance are briefly summarized:

The act proposed to raise a national army, first, by increasing the regular force to its maximum strength and there maintaining it; second, by incorporating into such army the members of the National Guard and National Guard Reserve already in the service of the United States (Act of Congress of June 3, 1916, c. 134, 39 Stat. 211) and maintaining their organizations to their full strength; third, by giving the President power in his discretion to organize by volunteer enlistment four divisions of infantry; fourth, by subjecting all male citizens between the ages of twenty-one and thirty to duty in the national army for the period of the existing emergency after the proclamation

of the President announcing the necessity for their service; and fifth, by providing for selecting from the body so called, on the further proclamation of the President, 500,000 enlisted men, and a second body of the same number should the President in his discretion deem it necessary. To carry out its purposes the act made it the duty of those liable to the call to present themselves for registration on the proclamation of the President so as to subject themselves to the terms of the act and provided full federal means for carrying out the selective draft. It gave the President in his discretion power to create local boards to consider claims for exemption for physical disability or otherwise made by those called. The act exempted from subjection to the draft designated United States and state officials as well as those already in the military or naval service of the United States, regular or duly ordained ministers of religion and theological students under the conditions provided for, and, while relieving from military service in the strict sense the members of religious sects as enumerated whose tenets excluded the moral right to engage in war, nevertheless subjected such persons to the performance of service of a non-combatant character to be defined by the President.

The proclamation of the President call-

¹⁰ *Ibid.* 312.

¹¹ 40 Stat. 76.

ing the persons designated within the ages described in the statute was made, and the plaintiffs in error, who were in the class and under the statute were obliged to present themselves to the law, failed to do so and were prosecuted under the statute for the penalties for which it provided. They all defended by denying that there had been conferred by the Constitution upon Congress the power to compel military service by a selective draft, and asserted that even if such power had been given by the Constitution to Congress, the terms of the particular act for various reasons caused it to be beyond the power and repugnant to the Constitution. The cases are here for review because of the constitutional questions thus raised, convictions having resulted from instructions of the courts that the legal defences were without merit and that the statute was constitutional.

The possession of authority to enact the statute must be found in the clauses of the Constitution giving Congress power 'to declare war; . . . to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; . . . to make rules for the government and regulation of the land and naval forces.' Article I, § 8. And of course the powers conferred by these provisions like all other powers given carry with them as provided by the Constitution the authority 'to make all laws which shall be necessary and proper for carrying into execution the foregoing powers.' Article I, § 8.

As the mind cannot conceive an army without the men to compose it, on the face of the Constitution the objection that it does not give power to provide for such men would seem to be too frivolous for further notice. It is said, however, that since under the Constitution as originally framed state citizenship was primary and United States citizenship but derivative and dependent thereon, therefore the power conferred upon Congress to raise

armies was only coterminous with United States citizenship and could not be exerted so as to cause that citizenship to lose its dependent character and dominate state citizenship. But the proposition simply denies to Congress the power to raise armies which the Constitution gives. That power by the very terms of the Constitution, being delegated, is supreme. Article VI. In truth the contention simply assails the wisdom of the framers of the Constitution in conferring authority on Congress and in not retaining it as it was under the Confederation in the several States. Further it is said, the right to provide is not denied by calling for volunteer enlistments, but it does not and cannot include the power to exact enforced military duty by the citizen. This however but challenges the existence of all power, for a governmental power which has no sanction to it and which therefore can only be exercised provided the citizen consents to its exertion is in no substantial sense a power. It is argued, however, that although this is absolutely true, it is not concretely so because as compelled military service is repugnant to a free government and in conflict with all the great guarantees of the Constitution as to individual liberty, it must be assumed that the authority to raise armies was intended to be limited to the right to call an army into existence counting alone upon the willingness of the citizen to do his duty in time of public need, that is, in time of war. But the premise of this proposition is so devoid of foundation that it leaves not even a shadow of ground upon which to base the conclusion. Let us see if this is not at once demonstrable. It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it. Vattel, *Law of Nations*, Book III, c. 1 & 2. To do more than state the proposition is absolutely unnecessary in view of the prac-

tical illustration afforded by the almost universal legislation to that effect now in force. In England it is certain that before the Norman Conquest the duty of the great militant body of the citizens was recognized and enforceable. Blackstone, Book 1, c. 13. It is unnecessary to follow the long controversy between Crown and Parliament as to the branch of the government in which the power resided, since there never was any doubt that it somewhere resided. So also it is wholly unnecessary to explore the situation for the purpose of fixing the sources whence in England it came to be understood that the citizen or the force organized from the militia as such could not without their consent be compelled to render service in a foreign country, since there is no room to contend that such principle ever rested upon any challenge of the right of Parliament to impose compulsory duty upon the citizen to perform military duty wherever the public exigency exacted, whether at home or abroad. This is exemplified by the present English Service Act.

In the Colonies before the separation from England there cannot be the slightest doubt that the right to enforce military service was unquestioned and that practical effect was given to the power in many cases. Indeed the brief of the Government contains a list of Colonial acts manifesting the power and its enforcement in more than two hundred cases. And this exact situation existed also after the separation. Under the Articles of Confederation it is true Congress had no such power, as its authority was absolutely limited to making calls upon the States for the military forces needed to create and maintain the army, each State being bound for its quota as called. But it is indisputable that the States in response to the calls made upon them met the situation when they deemed it necessary by directing enforced military service on the part of the citizens. In fact the duty of the citizen to render military service and the power to compel

him against his consent to do so was expressly sanctioned by the constitutions of at least nine of the States, an illustration being afforded by the following provision of the Pennsylvania constitution of 1776. 'That every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expense of that protection, and yield his personal service when necessary, or an equivalent thereto.' Art. 8, (Thorpe, *American Charters, Constitutions and Organic Laws*, vol. 5, pp. 3081, 3083.) While it is true that the States were sometimes slow in exerting the power in order to fill their quotas—a condition shown by resolutions of Congress calling upon them to comply by exerting their compulsory power to draft and by earnest requests by Washington to Congress that a demand be made upon the States to resort to drafts to fill their quotas—that fact serves to demonstrate instead of to challenge the existence of the authority. A default in exercising a duty may not be resorted to as a reason for denying its existence.

When the Constitution came to be formed it may not be disputed that one of the recognized necessities for its adoption was the want of power in Congress to raise an army and the dependence upon the States for their quotas. In supplying the power it was manifestly intended to give it all and leave none to the States, since besides the delegation to Congress of authority to raise armies the Constitution prohibited the States, without the consent of Congress, from keeping troops in time of peace or engaging in war. Article 1, § 10.

To argue that as the state authority over the militia prior to the Constitution embraced every citizen, the right of Congress to raise an army should not be considered as granting authority to compel the citizen's service in the army, is but to express in a different form the denial of the right to call any citizen to the army.

Nor is this met by saying that it does not exclude the right of Congress to organize an army by voluntary enlistments, that is, by the consent of the citizens, for if the proposition be true, the right of the citizen to give consent would be controlled by the same prohibition which would deprive Congress of the right to compel unless it can be said that although Congress had not the right to call because of state authority, the citizen had a right to obey the call and set aside state authority if he pleased to do so. And a like conclusion demonstrates the want of foundation for the contention that, although it be within the power to call the citizen into the army without his consent, the army into which he enters after the call is to be limited in some respects to services for which the militia it is assumed may only be used, since this admits the appropriateness of the call to military service in the army and the power to make it and yet destroys the purpose for which the call is authorized—the raising of armies to be under the control of the United States.

The fallacy of the argument results from confounding the constitutional provisions concerning the militia with that conferring upon Congress the power to raise armies. It treats them as one while they are different. This is the militia clause:

“The Congress shall have power . . . 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.” Article I, § 8.

The line which separates it from the army power is not only inherently plainly marked by the text of the two clauses, but

will stand out in bolder relief by considering the condition before the Constitution was adopted and the remedy which it provided for the military situation with which it dealt. The right on the one hand of Congress under the Confederation to call on the States for forces and the duty on the other of the States to furnish when called, embraced the complete power of government over the subject. When the two were combined and were delegated to Congress all governmental power on that subject was conferred, a result manifested not only by the grant made but by the limitation expressly put upon the States on the subject. The army sphere therefore embraces such complete authority. But the duty of exerting the power thus conferred in all its plenitude was not made at once obligatory but wisely left to depend upon the discretion of Congress as to the arising of the exigencies which would call it in part or in whole into play. There was left therefore under the sway of the States undelegated the control of the militia to the extent that such control was not taken away by the exercise by Congress of its power to raise armies. This did not diminish the military power or curb the full potentiality of the right to exert it but left an area of authority requiring to be provided for (the militia area) unless and until by the exertion of the military power of Congress that area had been circumscribed or totally disappeared. This, therefore, is what was dealt with by the militia provision. It diminished the occasion for the exertion by Congress of its military power beyond the strict necessities for its exercise by giving the power to Congress to direct the organization and training of the militia (evidently to prepare such militia in the event of the exercise of the army power) although leaving the carrying out of such command to the States. It further conduced to the same result by delegating to Congress the right to call on occasions which were specified for the militia force,

thus again obviating the necessity for exercising the army power to the extent of being ready for every conceivable contingency. This purpose is made manifest by the provision preserving the organization of the militia so far as formed when called for such special purposes although subjecting the militia when so called to the paramount authority of the United States. *Tarble's Case*, 13 Wallace, 397, 408. But because under the express regulations the power was given to call for specified purposes without exerting the army power, it cannot follow that the latter power when exerted was not complete to the extent of its exertion and dominant. Because the power of Congress to raise armies was not required to be exerted to its full limit but only as in the discretion of Congress it was deemed the public interest required, furnishes no ground for supposing that the complete power was lost by its partial exertion. Because, moreover, the power granted to Congress to raise armies in its potentiality was susceptible of narrowing the area over which the militia clause operated, affords no ground for confounding the two areas which were distinct and separate to the end of confusing both the powers and thus weakening or destroying both.

And upon this understanding of the two powers the legislative and executive authority has been exerted from the beginning. From the act of the first session of Congress carrying over the army of the Government under the Confederation to the United States under the Constitution (Act of September 29, 1789, c. 25, 1 Stat. 95) down to 1812 the authority to raise armies was regularly exerted as a distinct and substantive power, the force being raised and recruited by enlistment. Except for one act formulating a plan by which the entire body of citizens (the militia) subject to military duty was to be organized in every State (Act of May 8, 1792, c. 33, 1 Stat. 271) which was never carried into effect, Congress confined itself

to providing for the organization of a specified number distributed among the States according to their quota to be trained as directed by Congress and to be called by the President as need might require. When the War of 1812 came the result of these two forces composed the army to be relied upon by Congress to carry on the war. Either because it proved to be weak in numbers or because of insubordination developed among the forces called and manifested by their refusal to cross the border, the Government determined that the exercise of the power to organize an army by compulsory draft was necessary and Mr. Monroe, the Secretary of War, (Mr. Madison being President) in a letter to Congress recommended several plans of legislation on that subject. It suffices to say that by each of them it was proposed that the United States deal directly with the body of citizens subject to military duty and call a designated number out of the population between the ages of 18 and 45 for service in the army. The power which it was recommended be exerted was clearly an unmixed federal power dealing with the subject from the sphere of the authority given to Congress to raise armies and not from the sphere of the right to deal with the militia as such, whether organized or unorganized. A bill was introduced giving effect to the plan. Opposition developed, but we need not stop to consider it because it substantially rested upon the incompatibility of compulsory military service with free government, a subject which from what we have said has been disposed of. Peace came before the bill was enacted.

Down to the Mexican War the legislation exactly portrayed the same condition of mind which we have previously stated. In that war, however, no draft was suggested, because the army created by the United States immediately resulting from the exercise by Congress of its power to raise armies, that organized under its direction from the militia and the volunteer

commands which were furnished, proved adequate to carry the war to a successful conclusion.

So the course of legislation from that date to 1861 affords no ground for any other but the same conception of legislative power which we have already stated. In that year when the mutterings of the dread conflict which was to come began to be heard and the Proclamation of the President calling a force into existence was issued it was addressed to the body organized out of the militia and trained by the States in accordance with the previous acts of Congress. (Proclamation of April 15, 1861, 12 Stat. 1258.) That force being inadequate to meet the situation, an act was passed authorizing the acceptance of 500,000 volunteers by the President to be by him organized into a national army. (Act of July 22, 1861, c. 9, 12 Stat. 268.) This was soon followed by another act increasing the force of the militia to be organized by the States for the purpose of being drawn upon when trained under the direction of Congress (Act of July 29, 1861, c. 25, 12 Stat. 281), the two acts when considered together presenting in the clearest possible form the distinction between the power of Congress to raise armies and its authority under the militia clause. But it soon became manifest that more men were required. As a result the Act of March 3, 1863, c. 75, 12 Stat. 731, was adopted entitled 'An Act for enrolling and calling out the National Forces and for other purposes.' By that act which was clearly intended to directly exert upon all the citizens of the United States the national power which it had been proposed to exert in 1814 on the recommendation of the then Secretary of War, Mr. Monroe, every male citizen of the United States between the ages of twenty and forty-five was made subject by the direct action of Congress to be called by compulsory draft to service in a national army at such time and in such numbers as the President in his discretion might find nec-

essary. In that act, as in the one of 1814, and in this one, the means by which the act was to be enforced were directly federal and the force to be raised as a result of the draft was therefore typically national as distinct from the call into active service of the militia as such. And under the power thus exerted four separate calls for draft were made by the President and enforced, that of July, 1863, of February and March, 1864, of July and December, 1864, producing a force of about a quarter of a million men. It is undoubted that the men thus raised by draft were treated as subject to direct national authority and were used either in filling the gaps occasioned by the vicissitudes of war in the ranks of the existing national forces or for the purpose of organizing such new units as were deemed to be required. It would be childish to deny the value of the added strength which was thus afforded. Indeed in the official report of the Provost Marshal General . . . reviewing the whole subject it was stated that it was the efficient aid resulting from the forces created by the draft at a very critical moment of the civil strife which obviated a disaster which seemed impending and carried that struggle to a complete and successful conclusion.

Brevity prevents doing more than to call attention to the fact that the organized body of militia within the States as trained by the States under the direction of Congress became known as the National Guard (Act of January 21, 1903, c. 196, 32 Stat. 775; National Defense Act of June 3, 1916, c. 134, 39 Stat. 211). And to make further preparation from among the great body of the citizens, an additional number to be determined by the President was directed to be organized and trained by the States as the National Guard Reserve. (National Defense Act, *supra*.)

Thus sanctioned as is the act before us by the text of the Constitution, and by its significance as read in the light of the fundamental principles with which the

subject is concerned, by the power recognized and carried into effect in many civilized countries, by the authority and practice of the colonies before the Revolution, of the States under the Confederation and of the Government since the formation of the Constitution, the want of merit in the contentions that the act in the particulars which we have been previously called upon to consider was beyond the constitutional power of Congress, is manifest. Cogency, however, if possible, is added to the demonstration by pointing out that in the only case to which we have been referred where the constitutionality of the Act of 1863 was contemporaneously challenged on grounds akin to, if not absolutely identical with, those here urged, the validity of the act was maintained for reasons not different from those which control our judgment. (*Kneedler v. Lane*, 45 Pa. St. 238.) And as further evidence that the conclusion we reach is but the inevitable consequence of the provisions of the Constitution as effect follows cause, we briefly recur to events in another environment. The seceding States wrote into the constitution which was adopted to regulate the government which they sought to establish, in identical words the provisions of the Constitution of the United States which we here have under consideration. And when the right to enforce under that instrument a selective draft law which was enacted, not differing in principle from the one here in question, was challenged, its validity was upheld, evidently after great consideration, by the courts of Virginia, of Georgia, of Texas, of Alabama, of Mississippi and of North Carolina, the opinions in some of the cases copiously and critically reviewing the whole grounds which we have stated. . .

In reviewing the subject, we have hitherto considered it as it has been argued, from the point of view of the Constitution as it stood prior to the adoption of the Fourteenth Amendment. But to avoid

all misapprehension we briefly direct attention to that Amendment for the purpose of pointing out, as has been frequently done in the past, how completely it broadened the national scope of the Government under the Constitution by causing citizenship of the United States to be paramount and dominant instead of being subordinate and derivative, and therefore, operating as it does upon all the powers conferred by the Constitution, leaves no possible support for the contentions made, if their want of merit was otherwise not so clearly made manifest.

It remains only to consider contentions which, while not disputing power, challenge the act because of the repugnancy to the Constitution supposed to result from some of its provisions. First, we are of opinion that the contention that the act is void as a delegation of federal power to state officials because of some of its administrative features, is too wanting in merit to require further notice. Second, we think that the contention that the statute is void because vesting administrative officers with legislative discretion has been so completely adversely settled as to require reference only to some of the decided cases. *Field v. Clark*, 143 U.S. 649; *Buttfield v. Stranahan*, 192 U.S. 470; *Intermountain Rate Cases*, 234 U.S. 476; *First National Bank v. Union Trust Co.*, 244 U.S. 416. A like conclusion also adversely disposes of a similar claim concerning the conferring of judicial power. *Buttfield v. Stranahan*, 192 U.S. 470, 497; *West v. Hitchcock*, 205 U.S. 80; *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 338-340; *Zakonaité v. Wolf*, 226 U.S. 272, 275. And we pass without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the act to which we at the outset referred, because we think its unsoundness is too apparent to require us to do more.

Finally, as we are unable to conceive upon what theory the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation, as the result of a war declared by the great representative

body of the people, can be said to be the imposition of involuntary servitude in violation of the prohibitions of the Thirteenth Amendment, we are constrained to the conclusion that the contention to that effect is refuted by its mere statement.

Affirmed.