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THE CONSTITUTIONALITY OF DIRECT FEDERAL MILITARY CONSCRIPTION

HARROP A. FREEMAN†

At no time in American history has so much attention been focused upon military and war making powers. A large part of the last session of Congress has centered on congressional versus presidential power in areas concerning the need for a formal declaration of war before war powers become effective, the limitation of military expenditures, the impropriety of the Southeast Asian conflict, and the need of an all-volunteer military establishment. Massachusetts and several other states have either adopted or proposed laws to prevent use of their citizens abroad in "undeclared" or "unconstitutional" wars; the Massachusetts case was recently rejected by the Supreme Court.¹ That Court has heretofore avoided these constitutional issues, though lower courts feel they should be resolved.²

In 1944, as World War II drew to a close, the author published

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1. MASS. ANN. LAWS ch. 174, special law (Supp. 1970). The United States Supreme Court has denied Massachusetts leave to file a bill of complaint. *Mass. v. Laird*, 400 U.S. 886 (1970).

Many similar provisions have stood in the original states from the time of the adoption of the Constitution. *E.g.*, N.Y. CIV. RIGHTS LAW § 5 (McKinney 1948) (formerly New York Bill of Rights 1787):

No citizen of this state can be constrained to arm himself, or to go out of this state, or to find soldiers or men of arms, either horsemen or footmen, without the grant and consent of the people of this state, by their representatives in senate and assembly, except in the cases specially provided for by the constitution of the United States.

Further examples may be found in CONN. GEN. STAT. REV. §§ 27-13, -16 (1961); DEL. CODE ANN. tit. 20, § 308 (1953); MD. ANN. CODE art. 65, § 308 (1957); MASS. ANN. LAWS ch. 33, §§ 3, 39, 40; N.H. REV. STAT. ANN. §§ 110-a:5, -14, 111:13 (1964); and VA. CODE ANN. §§ 44.1-85 to 87.

Typical of the extensive control of the militia (state manpower) are N.Y. CONST. art. XII, §§ 1, 2, 6; N.Y. MIL. LAW §§ 1, 2, 5, 6a, 7, 22-3 (McKinney 1953).

Fox v. Brown, 402 F.2d 837 (2d Cir. 1968), *cert. denied*, 394 U.S. 938 (1969), may be taken as typical of cases raising the issue of the place of and rules controlling the National Guard in the military establishment.

2. The Supreme Court's avoidance of the question here posed may be seen in *Holmes v. United States*, 387 F.2d 781 (2d Cir. 1967), *cert. denied*, 391 U.S. 936 (1968); *United States v. O'Brien*, 391 U.S. 367, *reh. denied*, 393 U.S. 900 (1968). Typical of the lower court cases suggesting that the issues are serious and should be faced include, *United States v. Crocker*, 420 F.2d 307 (8th Cir. 1970), *cert. denied*, 397 U.S. 1011 (1970).

For a historical survey of intriguing draft law cases see the following: *Arver v. United States*, 245 U.S. 366 (1917); *Cox v. Wood*, 247 U.S. 3 (1917); *Fox v. Brown*, 402 F.2d 837 (2d Cir. 1968), *cert. denied*, 394 U.S. 938 (1969); *United States v. Crocker*, 420 F.2d 307 (8th Cir. 1970), *cert. denied*, 397 U.S. 1011 (1970).

"The Constitutionality of Peacetime Conscription."³ The argument in that article was historically accurate but relatively unsophisticated in establishing the distinction between "war" and "peace." In the twenty five years that have since followed we have nominally been at peace. While engaging in undeclared foreign "wars" and "U.N. actions," we have had some form of military conscription in order to meet these commitments. Inherent in my 1944 presentation was the thesis that except for "calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions,"⁴ the intendment of the Constitution was that the "army" should be raised only by voluntary enlistment. Thus, I did not conceive that a peacetime conscription could be constitutional. Today we need a much more sophisticated approach, but not necessarily resting on a war-peace dichotomy. An approach which sets forth civil and military priorities in light of various constitutional provisions and which is justified by our theory of government is therefore needed. This article does not deal with the constitutionality of Vietnam as an undeclared war and like issues having some bearing on present conscription. Others have written on these issues.⁵

Consequently, this article must reflect the relation of the "militia" and "raise army" clauses of the Constitution, the constitutionality of conscription for an undeclared "war" or for conflict brought about without an attack upon the United States and conducted outside the United States' territory, the proper extent of presidential power, the extent of state control over its own military manpower, and the necessity of a congressional declaration of war before any "war" powers come into operation. The author proposes that the following "rule" should be adopted:

a) Except by using the Militia clauses, Congress may raise an army and naval force only by voluntary enlistment; b) Congress can "draft," "conscript" or "call forth" any of the militia of the states for only three purposes: to execute the laws, suppress insurrection and repel invasion. In the event that this occurs, restrictions would be placed on the use of draftees

3. 31 VA. L. REV. 40 (1944).

4. U.S. CONST. art. I, § 8.

5. There have been several excellent articles touching upon this problem. See Friedman, "Conscription and the Constitution: The Original Understanding, 67 MICH. L. REV. 1493 (1969); see also Velvel, *War in Vietnam: Unconstitutional, Justiciable, and Jurisdictionally Attackable*, 16 KAN. L. REV. 449 (1968); The Amendment to End the War: The Constitutional Question, submitted by Senators McGovern, Hatfield, Goodell, Cranston and Hughes on H.R. Doc. No. 17123, 91st Cong., 1st Sess. 1 (1970); F. WORMUTH, *THE VIETNAM WAR: THE PRESIDENT VERSUS THE CONSTITUTION* (1968).

and the applicability of military law; c) The President may repel sudden attack, but only Congress can declare war or commit conscripted troops to a war abroad; d) The military is always subordinate to civil authority; e) Only Congress has control of the military purse.

It is this author's contention that the Supreme Court should examine the issues raised by the above rule. In doing so it should give primary attention to the intendment of the constitutional provisions, giving proper effect to each power. Where manpower is used in an undeclared foreign war in which no possible reliance on the militia clause can be used, it is essential that the issue of conscription be resolved. The present situation calls for a clearer statement of the interrelation of all of the constitutional powers as they involve various types of conflict. The history and discussion herein presented serve as a contribution to such an analysis and as a justification for the proposed rule.

Source of Militia and Army Clauses: The English Experience

Proposals in the British Parliament to conscript for the regular army were defeated in 1704, 1707, 1756, 1757, 1778, 1779. The British militia was organized by the militia law of 1757 and, consistent with our concept, it was to be used only for the purposes of enforcing laws, suppressing insurrection and repelling invasion: the militia was not to serve abroad.⁶ We may also note that the English Bill of Rights requiring yearly applications to the legislature to maintain an army suggests the

6. Freeman, *supra* note 3, at 68-69; 29 Geo. 2, c.4 (1756); 30 Geo. 2, c.8 (1757); 18 Geo. 3, c.53 (1778); 19 Geo. 3, c.10 (1779). J.R. WESTERN, *THE ENGLISH MILITIA IN THE EIGHTEENTH CENTURY* 250 ff. (1965).

The Agreement of the People enacted by the House of Commons in 1648 and still part of the British Constitution when we adopted our Constitution provided:

We do not empower them [Parliament] to impress or constrain any person to serve in foreign war, either by sea or land, nor for any military service within the kingdom; save that they may take order for the forming, training, and exercising of the people in a military way, to be in readiness for resisting of foreign invasions, suppressing of sudden insurrections, or for assisting in execution of the laws; and may take order for the employing and conducting of them for those ends; provided, that, even in such cases, none be compellable to go out of the country he lives in, if he procure another to serve in his room. S. GARDINER, *THE CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION 1625-1660*, at 368-69 (3rd ed. 1899).

It takes little reading to see the complete similarity of the provisions to our Constitution:

"forming, training, exercising"=*our* "training" left to the States
 "employing and conducting"=*our* "calling forth," "governing," and "employed"
 "resisting of foreign invasions, suppressing of sudden insurrections, or assisting in execution of the laws" = *our* "to execute the laws of the Union, suppress insurrection, and repel invasions."

restriction we adopted on raising and maintaining an army: appropriations should not be for more than two years.⁷

One of Blackstone's treatises provides further insight by drawing a clear distinction between "armies" and "militia."⁸ The King's "armies" were provided by feudal knights who rendered forty days of military service each year in consideration of the "fees" or plots of land granted by the King. The first assize of arms,⁹ and subsequently the Statute of Winchester,¹⁰ required citizens to keep and bear arms for "militia" service. The "militia" was used for local defense, and could not be used outside their shires.¹¹

Several commentators have viewed the "impressment" into the English army of vagabonds, paupers and unemployed as a forerunner to conscription. However, these people were not considered "free men." All free men belonged to the "militia" and were protected by its provisions. Non-free men were compelled by law to work, and if they found no other work they were given work as mercenaries in the "army."¹²

Source of Militia and Army Clauses: The Colonial Experience

The colonial period possessed the following features:¹³ All colonies provided for a militia and most of them also had "armies" composed of volunteers and mercenaries. The militia was confined to the borders of the colony and could only be used to repel invasions. The Continental Congress did not attempt to conscript manpower into the Continental Army. Rather, the army was composed of volunteers and "draftees" from the militia. However, it was understood that only the individual colonies could exercise the power to conscript. These forces, the volunteers and "draftees," constituted the "Continental Line," with the militia element always kept separate.¹⁴

7. See E. RIDGES, CONSTITUTIONAL LAW 246 (8th ed. 1950); THE FEDERALIST, No. 26, at 166 (J. Cooke ed. 1961).

8. 1 BLACKSTONE, COMMENTARIES * 409.

9. 27 Henry II (1181).

10. 13 Edw. 1, c.6 (1285).

11. When Henry VIII began to supervise the militia, Parliament denied that the King had any such power. Moreover, the keeping of "armies" and attempts to regulate the militia were recognized in THE FEDERALIST as a principal grievance to the Glorious Revolution in 1688. THE FEDERALIST No. 26 (A. Hamilton); S. GARDINER, THE CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION 1625-1660, at 334 (3rd ed. 1899).

12. 4 Anne c.10 (1704); 29 Geo. II c.4 (1756); 30 Geo. II c.8 (1757); 30 Geo. II c.25 (1757); 18 Geo. III c.53 (1778); 19 Geo. III c.10 (1779).

13. For a more thorough analysis see Freeman, *supra* note 3; Friedman, *supra* note 5.

14. Shy, *A New Look at the Colonial Militia*, 20 Wm. & MARY L. REV. 175, 182 (1963); R. WEIGLEY, HISTORY OF THE UNITED STATES ARMY (1967); 2 A. VOLLMER, BACKGROUNDS OF SELECTIVE SERVICE (Selective Service Monograph No. 1, 1947) [here-

Consequently, the general opinion as expressed in the Constitutional Convention and the state debates, was that the colonial-British militia system was desired and was, therefore, carried into the new Constitution.¹⁵ The only failure of the Continental system intended to be remedied was the inability of Congress to tax for the common defense and to call the militia into federal service.¹⁶ In summary, at the time of the Convention “[t]he only type of standing army known to the Framers was a mercenary, volunteer force, and the only compulsory type of military service known to them was service in the militia which was confined to limited and local purposes as it has been in medieval England. . . .”¹⁷

*Meaning of the Militia and Army Clauses:
The Constitutional Convention*

Drafts¹⁸ of the military-militia clauses coming out of the Com-

inafter cited as *Background*]; Friedman, *supra* note 5, at 1504-06; Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181 (1940); Hollander, *The President and Congress—Operational Control of the Armed Forces*, 27 MIL. L. REV. 49, 52 (1965); 2 PAPERS OF THOMAS JEFFERSON 18 (J. Boyd ed. 1950).

For the constitutional provisions of the colonies see F. THORPE, *AMERICAN CHARTERS, CONSTITUTIONS, AND ORGANIC LAWS* (1909).

On the “Continental Line” during the American Revolution, see J. HILL, *MINUTE MAN IN PEACE AND WAR* (1964); ARTICLES OF CONFEDERATION, arts. II, IX; THE FEDERALIST No. 22 (A. Hamilton). See *Journals of the Continental Congress* (1907), [hereinafter cited as *Journals*]. Of special interest are: 7 *Journals* 262-263 (1777); 10 *Journals* 199-200 (1778); 13 *Journals* 299 (1779).

As common background for public interpretation of the constitutional provisions it needs to be stated that the dictionaries of the period clearly defined an “army” as raised by voluntary enlistment and paid, whereas “militia” meant “the whole body of men declared by law amenable to service, without enlistment.” See Murray’s *New English Dictionary on Historical Principles* (1933); Webster’s *American Dictionary of the English Language* (1828).

15. See, e.g., arguments of Livingston and Hamilton in New York and Wilson and McKean in Pennsylvania, 2 ELLIOT’S DEBATES 278-9, 352, 468, 537 (2d ed. 1836).

16. U.S. CONST. art. I, § 8, clauses 1, 12.

17. E. CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* 71 (1965).

18. 2 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, 131 (2d ed. 1937) [hereinafter cited as FARRAND]: Comm. of Detail I:

“That the Legislature of the United States ought to possess the legislative Rights vested in Congress by the Confederation.”

2 FARRAND 135-6: Comm. of Detail III:

“9 . . . Militia . . . to be disciplined etc. according to the Regulations of the U.S. . . . 19. S & H.D. in C. as shall regulate the Militia thro’ the U.S.”

2 FARRAND 143-144: Comm. of Detail IV: 5. To make war <:(and)>raise armies. <and equip Fleets.>

12. (To draw forth the) <make Laws for calling forth the Aid of> the militia, (or any part, or to authorize the Executive to embody them) <to execute the Laws of the Union, to repel Invasion, to inforce Treaties, suppress internal Comms.>

mittee of Detail¹⁹ at the Constitutional Convention in 1789 evidence the following: First, raising an army and calling forth the militia was at all times distinguished. Second, the militia was recognized as a state rather than a federal organization which was to be used solely for the purposes of executing laws, suppressing insurrection and repelling invasion. Finally, only Congress was authorized to "make" war.

Tracing these provisions through the constitutional debates, the following trends and positions developed. First, the words "make war" were changed to "declare war" expressly for the purpose of "clogging rather than facilitating war."²⁰ Second, the original Pinckney draft for a constitution contained the language: "militia of the United States." Since the delegates conceived that there was no federal militia but only state militia, the phrase "militia of the United States" was dropped. Thus, "militia" always referred to that of a state; no concept of a general federal manpower was ever envisioned by the Committee of Detail or the Delegates.²¹

Another development centered around the power to raise and support armies. There was general fear of a standing army. The Federalists wanted to give the Union a small standing army, whereas the anti-

2 FARRAND 158-9: Comm. of Detail VII:

"The Legislature of the U.S. shall have the exclusive Power—of raising a military Land Force—of equipping a Navy"

"The Legislature of the U.S. shall possess the exclusive Right of establishing the Government and Discipline of the Militia of—and of ordering the Militia of any State to any Place within the U.S."

2 FARRAND 167-8: Comm. of Detail IX:

"The Legislature of the United States shall have the Power . . . to regulate the Discipline of the Militia of the several States; to subdue a Rebellion in any State, on the Application of its Legislature; to make War; to raise Armies; to build and equip Fleets, to (make laws for) call(ing) forth the Aid of the Militia, in order to execute the Laws of the Union, (to) enforce Treaties, (to) suppress Insurrections, and repel invasions"

2 FARRAND 181-182: Report of Comm. of Detail to Convention:

"The Legislature of the United States shall have the power . . .

To make war;

To raise armies;

To build and equip fleets;

To call forth the aid of the militia, in order to execute the laws of the Union, enforce treaties, suppress insurrections, and repel invasions;" (also essentially current provision on organizing and disciplining. See also 2 FARRAND 353, 381-2, 391, 388, 576, 595, 656).

19. The Committee of Detail was the drafting committee.

20. DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES 553-4 (1894-1905); 1 ELLIOT'S DEBATES 246 (1876); 5 *Id.* 443; 2 FARRAND 318-19.

21. 5 ELLIOT'S DEBATES 130 (1876); 1 FARRAND 23; 2 *Id.* 135-36.

Federalists opposed even this. Moreover, several delegates proposed an absolute prohibition of a standing army in time of peace while others urged that the peacetime army be limited in number.²² Ultimately it was decided that since the Union had to pay men to enlist them in an army, the most effective control was through the purse. At no time was it suggested that this clause gave power to create an army by means other than through voluntary enlistment.²³

At the Convention in addition to attempting to prevent a large standing army, allowing for enlistments and controlling the army through the purse, the delegates made the existing militia system, with one major change, the core of the United States defense system. They believed that "who can judge so well of the discharge of military duties for protection and security of the people, as the people themselves."²⁴ Washington wrote Congress and various friends that defense could not be successfully conducted "while the powers of Congress are only recommendatory," but he still believed that "a well-regulated militia" should be the American plan and was "the Palladium of our security."²⁵ Washington's remarks did result in two original drafts for a Constitution empowering Congress "to call forth" the militia and authorizing some uniformity of "arming, organizing and disciplining the militia."²⁶ In the debates it became clear that there was not to be a United States militia, rather the militia was to be that of the states and under major control by the states. Even a resolution to give the federal government power to "make laws for the regulation and discipline of the militia of the several states, reserving to the states the appointment of the officers" was unacceptable.²⁷ Furthermore, a proposal reserving to the states only the right to appoint "officers under the rank of general officers" brought forth a blistering attack as "absolutely inadmissible." As a consequence, the resolution was not even

22. The suggested maximum figure was approximately 3,000.

23. See, 1 FARRAND 19, 25, 351; 2 *Id.* 323, 329, 333, 335, 341, 505, 508, 509, 563, 617. See, Friedman, *supra* note 5, at 1516; Freeman, *supra* note 3, at 60-3, 67-9; Wells, *The Draft and the Militia Clauses of the Constitution: A Layman's View*, 1969 GUILD PRACTITIONER 27, 28.

24. 2 FARRAND 53.

25. 7 SPARK'S WRITINGS OF WASHINGTON 442 (1833-37); VILES, GEORGE WASHINGTON, LETTERS AND ADDRESSES 215 (1909); Circular letter from George Washington to State Governors, June 8, 1783, in 26 WRITINGS OF WASHINGTON 483, 494 (1938); WASHINGTON, *Sentiments on a Peace Establishment*, in 26 WRITINGS OF GEORGE WASHINGTON 374-98 (1938).

26. 5 ELLIOT'S DEBATES 130; 1 FARRAND 21, 293, 301; 2 FARRAND 323, 326, 381, 385, 387-88, 617.

27. 5 ELLIOT'S DEBATES 443; 2 FARRAND 326, 330-32, 352, 368, 377, 380-88, 422, 426.

seconded.²⁸

Although all agreed that the states should not surrender control of the militia, it was recognized that some uniformity of organization was desirable.²⁹ Thus, a compromise was reached which gave the states the power of conscription and the federal government the power to arm, organize and discipline. The debates further illustrate that the only place it was deemed necessary to protect the general citizenry as to compulsory military service was in regard to the militia clauses, not under the "armies" clause because those who volunteered had no right to protection. Thus, all discussion of exemption of conscientious objectors related only to the militia clauses.³⁰ The last development that should be noted is that throughout the debates there was a clear distinction between "armies" and "militias."³¹

*Congressional Action Operating under the "Army"
and "Militia" Provisions*

In December, 1790, when Congress considered the first militia bill it was conceded that the states necessarily had major control since the

28. 5 ELLIOT'S DEBATES 466; 2 FARRAND 388. DOCUMENTS, 564, 569, 571, 580, 598-604, 621.

29. 5 ELLIOT'S DEBATES 443-445; 2 FARRAND 326, 331, 332, 381, 387, 388.

30. 4 ELLIOT'S DEBATES 424; Freeman, *supra* note 3, at 80 ff; Friedman, *supra* note 5, at 1532 ff. The same was true of the discussions concerning courts martial. 1 ELLIOT'S DEBATES 371; 2 *Id.* 552; 3 *Id.* 660; Friedman, *supra* note 5, at 1530 ff.

31. DOCUMENTS, 115, 567, 666, 725, 924; 3 ELLIOT'S DEBATES 425; Friedman, *supra* note 5, at 1512-13. The above propositions are further supported by the following commentators:

John C. Wells states that in all of the early debates on compulsory military service, the clauses of the Constitution which were under discussion were those—and only those—pertaining to the militia. 1969 GUILD PRACTITIONER 27, 29.

Leon Friedman states that the manner in which the militias were organized confirms the idea that the body of state militias consisting of the citizens at large, and not a national professional standing army, was intended to be the main military force of the United States. The debate over the organization of the militia again points out how unthinkable it was to the framers that the central government could have any direct power to draft individual citizens into the general army. Only with the greatest reluctance did the delegates allow the central government to call the militia into service for specific purposes. The reason was obvious—a tyrannical central government with a large army would be able to destroy the hard-won liberties of the people. On the other hand, some central control was necessary to mobilize the militia for defense purposes and to compel obedience to the laws. But all the restrictions which the Convention imposed on this power, the fact that the states would be able to appoint the officers and train the militia, and the fact that the general government could control the militia only for the purpose of executing the laws of the Union, suppressing insurrections, and repelling invasions indicate that the framers were quite concerned about the danger of the central government using its military forces to suppress the freedoms of the people.

After circumscribing the central government's power to draw the militia into federal service with such careful restrictions, the delegates could not possibly have allowed the federal government to exercise direct control over the citizens by permitting a draft into the regular army. Friedman, *supra* note 5, at 1516-19.

militia was a creature of the states.³² When the Militia Act was passed in 1792 it therefore provided for "exemptions as the legislatures of the several states shall provide."³³ Subsequent statutes likewise recognized the militia as a state organization, composed of the male citizens "of the respective States."³⁴ Remaining in force until 1903, the Act contained a further limitation that the President could not call forth the militia without certification of need by either a Supreme Court Justice or district court judge. The call-up was to be for only ninety days.³⁵

The first proposal of a federal conscription law in 1815 not only called forth Daniel Webster's famous attack on its constitutionality resulting in the defeat of the bill, but it also brought representatives from various states together at the Hartford Convention where it was declared that for the federal government to conscript the state manpower was unconstitutional as circumventing the Militia provisions of the Constitution.³⁶

The first congressional Act provided only for calling forth "the militia of the State, or states . . . to repel . . . invasion."³⁷ An examination of the events surrounding the War of 1812 is most instructive. Secretary of War Monroe proposed that all men between the ages of 18 and 45 be formed into classes of 100 men each. When men were needed for the army, volunteers from each class would fill the quota. If the quota was not met then men could be drafted. Moreover, a draftee could provide a substitute. Monroe's proposal was not reported out of the Military

32. 4 ELLIOT'S DEBATES 422-4, 438 (1876).

33. 1 Stat. 271 (1792).

34. Act of April 18, 1814, c. 80, 3 Stat. 134; Act of April 20, 1816, c. 64, 3 Stat. 295; Act of May 12, 1820, c. 97, 3 Stat. 557; Act of Mar. 19, 1836, c. 44, 5 Stat. 7; Act of July 29, 1861, c.25, 12 Stat. 279; Act of Mar. 2, 1867, c. 145, 14 Stat. 434; Act of Jan. 21, 1903, c. 196, 32 Stat. 775.

35. 1 Stat. 264 (1792); 1 Stat. 424 (1795).

36. "The power of compelling the militia and other citizens of the United States, by a forceable draft or conscription, to serve in the regular armies, as proposed in a late official letter of the secretary of war, is not delegated to Congress by the constitution, and the exercise of it would be not less dangerous to their liberties than hostile to the sovereignty of the states. The effort to deduce this power from the right of raising armies is a flagrant attempt to pervert the sense of the clause in the constitution, which confers that right and is incompatible with other provisions in that instrument. The armies of the United States have always been raised by contract, never by conscription, and nothing more can be wanting to a government possessing the power thus claimed, to enable it to usurp the entire control of the militia, in derogation of the authority of the state, and to convert it by impressment into a standing army." (7 Niles's Reg. 307).

37. This was the form used until 1863. Act of Feb. 28, 1795, c. 36, 1 Stat. 424. *See also*: Act of May 9, 1794, c.27, 1 Stat. 367; Act of June 24, 1797, c. 4, 1 Stat. 522; Act of Mar. 3, 1803, c.32, 2 Stat. 241; Act of April 18, 1806, c. 32, 2 Stat. 383; Act of Mar. 30, 1808, c. 39, 2 Stat. 478; Act of April 10, 1812, c. 55, 2 Stat. 705; Act of July 17, 1862, c. 201, 12 Stat. 597.

Affairs Committee. Rather, the Committee proposed the Troupe Bill: there would be twenty-five classes of citizens, each to provide one volunteer; otherwise it would be taxed.³⁸ The Troupe Bill was abandoned and the Giles Bill considered. This Bill proposed calling the state militia-men up for two years. While still respecting state rights to appoint officers and restricting the use of the men to their state's borders, the Bill undertook to make the militia part of the national army. This proposal precipitated an extensive debate. It was argued that the proposal eliminated the distinction between "armies" and "militia," that it eliminated the constitutional limitations on the use of the militia, and that it eliminated the requirement that armies could be composed only of volunteers. Thus it was characterized as an "abominable doctrine" with "no foundation in the Constitution."³⁹ The proposed bill caused the states at the Hartford Convention to seriously consider secession. Finally, the House rejected the Bill and the Senate postponed debate until after adjournment.⁴⁰

In the Mexican War the militia was deemed constitutionally unavailable for fighting in Mexico since it would neither repel invasion nor suppress insurrection.⁴¹ In the Civil War the militia was first used to suppress insurrection, with the states restricting service to three months. The federal government first increased the federal army by volunteers and then by a combined call for the militia and a federal draft "to constitute the national forces . . . to suppress insurrection and rebellion."⁴² Lincoln, recognizing that this action prior to congressional approval might be unconstitutional as an invasion of congressional or state power, had the assurance of Congress and the states that they would ratify his action, which they did.⁴³

In the Spanish-American War it was deemed unconstitutional to call out the militia to serve in Puerto Rico, Cuba, and the Philippines. The federal government used only those volunteering for the specific

38. J. LEACH, CONSCRIPTION IN THE UNITED STATES: HISTORICAL BACKGROUND (1952); *Jeffers v. Fair*, 33 Ga. 345, 369-71 (1862).

39. L. SCHLISSEL, CONSCIENCE IN AMERICA 64 ff. (1968).

40. 28 ANNALS OF CONG. col. 89ff. (1814); LEACH, *supra* note 38, at 110.

41. Act of May 13, 1846, 9 Stat. 9; Act of June 18, 1846, 9 Stat. 17; Act of June 26, 1846, 9 Stat. 20; J. SMITH, THE WAR WITH MEXICO 75 (1919).

42. Act of July 17, 1862, 12 Stat. 731; Act of March 3, 1863, 12 Stat. 731.

43. Act of Aug. 6, 1861, 12 Stat. 326; *Note*: 2,500,000 troops were volunteers, 255,000 were "conscripted" of whom only 56,000 served. Large numbers of true militia served, as at First Bull Run and Gettysburg. E. UPTON, THE MILITARY POLICY OF THE UNITED STATES 227-31 (1917); O. SPALDING, THE UNITED STATES ARMY IN WAR AND PEACE 249, 235 (1937); Presidential Proclamation, June 15, 1863, 13 Stat. 733; Message from President Lincoln to Congress, July 4, 1861, 12 Stat. 326; E. CORWIN, THE PRESIDENT, OFFICE AND POWERS (1957); White, *The War Powers of the President*, 1943 WISC. L. REV. 203, 211.

campaign in service abroad.⁴⁴ From 1903 to 1908, attempts were made to provide for an "organized" militia. Known as a "National Guard," it was composed of volunteers. Yet, it could be called out for only nine months, and considerable state control was provided.⁴⁵ In 1908 the War Department tried by "agreement" to expand the National Guard's length of service and its availability for all military purposes "either within or without the territory of the United States."⁴⁶ However, when there was a plan to use this organized militia in Mexico both the Attorney General of the United States and Judge Advocate General of the Army rendered a "well-considered opinion that there was no constitutional warrant for such general Federal use of the Militia beyond the territory of the United States."⁴⁷ In 1916, the National Guard was "federalized." Members signed an oath agreeing to be drafted into federal service and to serve abroad.⁴⁸ Support for this arrangement was based on the theory that since anyone could volunteer for service abroad, no inroad was made on the "militia," general manpower or states rights.⁴⁹

World War I and II

The Selective Service Act of the First World War was declared constitutional.⁵⁰ That opinion is of doubtful validity and is based on an erroneous reading of American history and of the Constitution.⁵¹ However, the draft could have been upheld on the basis of the "militia" clauses as necessary to repel invasion because of the submarine attacks

44. O. SPALDING, *supra* note 43, at 379; W. MILLIS, *THE MARTIAL SPIRIT* 158-60 (1931); Act of April 22, 1898, ch. 187, 30 Stat. 361; Proclamation of April 23, 1898, 30 Stat. 1770; Proclamation of May 25, 1898, 30 Stat. 1772; Act of March 2, 1899, 30 Stat. 977.

45. Act of Jan. 21, 1903, 32 Stat. 775; Sen. Rep. No. 2129, 57th Cong., 2d Sess. 1-3 (1902) and H.R. Rep. No. 1094, 57th Cong., 1st Sess. 1-38 (1902), which recognized:

The Constitution distinctly enumerates the three exclusive purposes for which the militia may be called into the service of the United States These three occasions, representing the necessities of a strictly domestic character, plainly indicate that the services required of the militia can be rendered only upon the soil of the United States or of its Territories It was the hereditary fear of standing armies, as a menace to liberty in time of peace, which led the framers of the Constitution to provide that the militia should always remain a militia of the States. It was never designed to be a militia of the United States, nor under the control of the President, except when called into actual service under some one of the above-mentioned contingencies. *Id.* 22-3.

The report also recognized the propriety of the N.Y. militia refusing to cross the Niagara River in 1812.

46. Act of May 27, 1908, 35 Stat. 399.

47. See Ansell, *Status of State Militia under the Hay Bill*, 30 HARV. L. REV. 712, 713 (1917).

48. Act of June 3, 1916, 39 Stat. 166.

49. Note, *The Status of State Militia under the Hay Bill*, 30 HARV. L. REV. 176, 178 (1916).

50. *Arver v. United States*, 245 U.S. 366 (1917).

51. See Friedman, *supra* note 5, at 1494-1552.

on ships of the American flag and because of formal Congressional declaration of war.⁵²

The idea of a peacetime draft was overwhelmingly rejected in the 1920's and 1930's.⁵³ In 1940 German submarines were in our adjacent seas and threats of attack were rife. An emergency selective service system was established, but only after extensive opposition on the ground of its unconstitutionality. Service was limited to the Western hemisphere on the ground of repelling invasion, and conscription was deemed appropriate only in times of war.⁵⁴ Once the Japanese attacked Pearl Harbor, conscription for World War II could rely not on the "raise armies" clause but could claim full support from the "militia" clauses as necessary to repel invasion. However, the cases upholding the Act failed to draw this distinction.⁵⁵

Undeclared Wars Abroad

The Korean, and more importantly, the Vietnam (Indo-china) conflict raise several constitutional questions concerning foreign "wars." These questions relate not only to the war itself, but also to the use of conscripted men to serve in such a war. With respect to the constitutionality of the war,⁵⁶ the Supreme Court has consistently held that only Congress can declare war.⁵⁷ In 1966 the State Department issued a

52. See note 33 *supra* and accompanying text.

53. 3 Special Monograph No. 2, 224, 232, 237 (Selective Service System, 1954).

54. Three members of the Senate Foreign Relations Committee viewed it as peacetime conscription and, therefore, dissented from a favorable report. Former Secretary of War Woodring spoke against it. Senator Vandenburg was "opposed to tearing up 150 years of American history and tradition, in which none but volunteers have entered the peacetime Armies and Navies of the United States." The vote was 47 to 25 in the Senate, 232 to 124 in the House. The law was limited to one year, no more than 900,000 could be drafted and they could not be sent outside the Western Hemisphere. An extension of the draft in 1941 passed the House by a single vote 203 to 202. See Gillam, *The Peacetime Draft*, 62 YALE L.J. 498 (1968).

55. See *United States v. Herling*, 120 F.2d 236 (2nd Cir. 1941); *Tatum v. United States*, 146 F.2d 406 (9th Cir. 1944); Cf. reasoning on peacetime "registration" in *Stone v. Christensen*, 36 F. Supp. 739 (D.C. Ore. 1940).

56. For a more extensive analysis of this issue see the following: The Amendment to End the War: The Constitutional Question (McGovern, Hatfield, Goodell, Cranston, Hughes), H.R. Doc. No. 7123, 91st Cong., 1st Sess. 1 (1970); Velvel, *War in Vietnam: Unconstitutional, Justiciable, and Jurisdictionally Attackable*, 16 KAN. L. REV. 449 (1968); Faulkner, *War in Vietnam: Is It Constitutional?*, 56 GEO. L.J. 1132 (1968); Schick, *Some Reflections On the Legal Controversies Concerning America's Involvement in Vietnam*, 17 INT'L AND COMP. L.Q. 953 (1968); Schwartz, *Justiciability of Legal Objections to the American Military Effort in Vietnam*, 46 TEX. L. REV. 1033 (1968); Malawar, *Vietnam War Under the Constitution*, 31 U. PITT. L. REV. 205 (1969); Revelley, *Presidential War-Making: Constitutional Prerogative or Usurpation?*, 5 VA. L. REV. 1243 (1969); *Legality of the United States' Involvement in Vietnam—A Pragmatic Approach*, 23 U. MIAMI L. REV. 792 (1969).

57. *The Amelia*, 5 U.S. (1 Cranch) 1, 28 (1801): "The whole powers of war being,

"White Paper"⁵⁸ supporting the President's action in Vietnam. It asserted that in approximately one hundred twenty-five cases the President has used military force abroad without prior congressional declaration of war or authorization. While commentators take issue with this report, we are not here developing this argument.⁵⁹ Our focus is on the war-making power as it relates to the power to conscript.

The Constitution draws the following distinctions relating to the functions of the President and Congress.

Article II, §2 makes the President the "Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States." Article I, §8 grants to Congress the power "to declare War" and the power to call forth the militia "to execute the Laws of the Union, suppress insurrections and repel Invasions." It can therefore be seen that the Constitution does not give the President power to declare war. Although the President, without congressional aid, may be able to use the *standing army* abroad or to repel invasion, suppress insurrection or execute laws, he has been given no power to so call up and use the *militia*: only Congress can call forth the militia. In the Constitutional Convention, when a suggestion was made to give the President the power to make war, Eldridge Gerry voiced the general feeling of the Convention that he "never expected to hear in a republic a motion to empower the executive alone to declare war."⁶⁰

It would thus appear that we are faced with the real necessity of defining the interrelation of *all* the military powers. This is partly due to the President's assertion of extensive power, of Congress' attempt to restrict the President and assert its own power, of state challenge to both, and of the opposition to the war by a large segment of society. It is proposed that the aforementioned rule effectively delineates the nature and scope of the military powers.

We restate the rule here :

by the constitution, vested in congress, the acts of that body can be resorted to as our guides in this inquiry."

The Prize Cases, 67 U.S. (2 Black) 635, 668 (1862): "By the Constitution, Congress alone has the power to declare a national or foreign war." See also *Youngstown Sheet & Tube Co v. Sawyer*, 343 U.S. 579 (1952).

58. See Congressional Record, No. 43 (1966), pp. 5274-5279.

59. See Wormuth, *The Vietnam War: The President Versus The Constitution*, CS DI, CALIF. (1968). Professor Wormuth examines each of the cases cited by the State Department and is able to distinguish the Vietnam War. And it may here be pointed out that SEATO and the Gulf of Tonkin Resolution throw the issue back by allowing action only "in accordance with its [U.S.] constitutional processes."

60. See 2 FARRAND 318. THE FEDERALIST No. 69 (A. Hamilton) echoed this same sentiment.

a) Except by using the Militia clauses, Congress may raise an army and naval force only by voluntary enlistment; b) Congress can "draft", "conscript" or "call forth" any of the militia of the states for only three purposes: to execute the laws, suppress insurrection and repel invasion. In the event that this occurs, restrictions would be placed on the use of draftees and the applicability of military law; c) The President may repel sudden attack, but only Congress can declare war or commit conscripted troops to a war abroad; d) The military is always subordinate to civil authority; e) Only Congress has control of the military purse.

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