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Harrop A. Freeman

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THE CONSTITUTIONALITY OF PEACETIME CONSCRIPTION.*

THERE has been much written, pro and con, concerning the federal government's constitutional power to conscript men or women for training and service in the armed forces. Both sides have been guilty of quoting judicial statements completely out of their context and citing cases for propositions not in fact decided. Extreme advocates of military power have gone so far as to claim that the Constitution is inoperative in war time and that the government may do anything necessary to "wage war successfully."¹ On the other hand, such a constitutional authority as Daniel Webster employed language in opposition to

*A professor of law at the College attended by Jefferson, who publishes his article at the School founded by that great proponent of people's rights against government, need not apologize for giving attention to the single greatest challenge to those rights to-day. A great deal more research is needed in this field which remains to be pioneered. The pertinency of the question is further attested by the pending May Bill, H. R. 3947 and Guernsey-Wadsworth Bill, S. 701, H. R. 1806 for which the President is urging passage in January, 1945. I shall not discuss the constitutionality of President Roosevelt's suggestion of one year of non-military service (like the C. C. C.). There is even less justification in the Constitution for such an act.

1. RANDALL, *CONSTITUTIONAL PROBLEMS UNDER LINCOLN* (1926) 30; H. R. REP. No. 2124, 77th Cong. 2nd Sess. (1942) 147; HUGHES, *WAR POWERS UNDER THE CONSTITUTION* (1936) 42 A. B. A. Rep. 232, 238; HATCHER, *MARTIAL LAW AND HABEAS CORPUS* (1940) 46 W. VA. L. Q. 187; CORWIN, *AMERICAN GOVERNMENT IN WARTIME* (1943) 37 AM. POL. SCI. REV. 18 ff.

That all these assertions go too far can be seen from George Washington's letter transmitting the Constitution to Congress:

"The friends of our country have long seen and desired that the power of making war, peace, and treaties; that of levying money and regulating commerce; and the correspondent executive and judicial authorities, shall be fully and effectually vested in the general government of the Union. But the impropriety of delegating such extensive trust to one body of men is evident. Thence results the necessity of a different organization."

1 ELLIOT'S *DEBATES* 305 (References herein are to the 1876 edition—a more convenient form is the 1941 edition, the first three volumes being included in new volume I and 4 and 5 in II).

In short the Convention is saying: Many people may have desired unlimited federal power in a given area—this Constitution is a compromise (and wisely so) based on limited power.

military conscription which would have rendered impossible any compulsory service, including jury or road maintenance duty.²

We must eschew this kind of analysis. It is clear that there are limits on the war power as there are on every federal power. We must try, as the Court did in the *Second Flag Salute* case,³ to find sound constitutional rules to "translate the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century." Since this article is of interest to laymen as well as to lawyers, I shall seek to avoid being narrowly legalistic. I shall not, however, attempt to advance our discussion by those "oversimplifications, handy in political debate", but lacking "the precision necessary to * * * judicial reasoning" as the government did in the flag case in urging broad governmental powers on the basis of Lincoln's dilemma: "Must a government of necessity be too *strong* for the liberties of its people, or too *weak* to maintain its own existence?"—the use of which called forth the Supreme Court censure.^{3a}

I shall state several broad avenues of judicial approach down which we must go in facing the issue of conscription, with which approaches most constitutional lawyers would readily agree. I shall then attempt to work out a sound delimitation of federal power, from the Constitution and cases. These approaches and the conclusions reached are first stated in outline form and are then more fully developed and annotated in separate paragraphs.

Outline.

A. General Approach.

1. *Dicta*, i. e., incidental remarks not necessary to a decision are no authority in later cases.

2. 14 WRITINGS AND SPEECHES OF DANIEL WEBSTER (1903 ed.) 55-69. Yet such services have been enforced: *Butler v. Perry*, 240 U. S. 328, 36 Sup. Ct. 258 (1916); *Crews v. Lundquist*, 361 Ill. 193, 197 N. E. 768 (1935).

3. *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 636, 639, 63 Sup. Ct. 1178, 1184, 1186 (1943).

3a. Fairman, *The Law of Martial Rule and the National Emergency* (1942) 35 HARV. L. REV. 1253, 1278, makes use of another of Lincoln's expressions to advance the military argument: "by general law, life and limb must be protected, yet often a limb must be amputated to save a life; but life is never given to save a limb."

2. Even past decisions of the Supreme Court must be re-examined as to their constitutional soundness. Previous decisions have been reversed by the court.
3. There is a strong and growing recognition by the Court that the civil rights of individuals must be carefully protected against government encroachment—even though the government is thereby incommoded.
4. In our plan of government the civil must always be supreme over the military.
5. No emergency, not even war, suspends the Constitution.
6. The federal government has only those powers granted it by the Constitution; it has no "inherent" power and must keep within the powers given.
7. A variety of rules of construction must be harmonized so as to discover the true spirit of the Constitution, leaving every part fully operative within its own proper sphere.

B. *Constitutional Provisions and Court Decisions.*

1. The only powers conferred on the federal government, important to this discussion, are in these words:

Art. 1, Sec. 8. "The Congress shall have 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 provide and maintain a Navy;

"To make Rules for the Government and Regulation of the land and naval Forces;

"To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

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

"To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers. * * *

Art. II, Sec. 2. "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; * * *

Amendment II.

- A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.
2. There is no court decision wherein it was necessary to uphold peacetime conscription; no court decision authorizing conscription into military service of women or those religiously opposed to war; there are two decisions fully reasoning the constitutional validity of wartime conscription. All decisions or dicta concerning conscription may have to be re-evaluated in the light of the tendencies discussed in the General Approach, above, and in view of the conditions of modern war.

C. *A Constitutionally Sound Military System.*1. *In Peacetime.*

- (a) The federal government cannot conscript for training the general manpower of the country. The adult manpower constitutes the *militia*, which is a State organization existing without conscription. These men can only be trained by the states as a militia, i. e., at home, "civilians primarily (shopkeepers, doctors, lawyers); soldiers on occasion."
- (b) Women are not part of the militia and cannot be conscripted and trained for military service by either the State or Federal government.
- (c) Those conscientiously opposed to bearing arms cannot be conscripted or trained in the militia for military service.
- (d) It was intended that the federal government should have a small standing army of volunteers. The States were to maintain no troops.

2. *In Wartime.*

- (a) War is a factual condition and may exist without formal declaration, thus bringing into play the war powers.
- (b) There is no limit on the size of the federal volunteer army or upon its use.
- (c) When attacked the federal government may call, by draft or other fair method, any or all of the state militia (the general manpower) into the national service until the attack has been repulsed.

The federal government may use these men abroad, for "repel" includes to "drive back". The attack may occur at any one of our possessions, or perhaps even to one of our ships or nationals.

- (d) Under modern war conditions it may be that direct conscription of general manpower into a federal "wartime army" is proper.
- (e) The protection of religious freedom and similar exists in wartime as in peacetime, and persons conscientiously opposed to war cannot be conscripted for military service or compelled to fight.

Dicta Is No Authority.

It would normally not be necessary to cite this rule to lawyers. Yet the frequency with which exponents of peacetime conscription have relied solely on dicta compels the reference. Typical of the military's attempt to sustain compulsory conscription is the article of Major Claude B. Mickelwait of the Judge Advocate General's Office.^{3b} He quotes from *Tarbles* case,⁴ *Jacobsen v. Massachusetts*,⁵ *In re Grimley*⁶ and *U. S. v. Williams*⁷ as his sole authorities for upholding peacetime conscription. Not only do these cases not involve peacetime conscription; they do not involve conscription—peacetime or wartime. *Tarble* was a minor who volunteered without his parents' consent; *U. S. v. Williams* upheld the enlistment of a minor though his parents attempted to attach conditions to their consent. *Grimley* was another enlistee who sought discharge from the army on the ground that he was over age when he volunteered. The *Jacobsen* case involved compulsory vaccination of civilians. Major Mickelwait could cite no authorities since there were none—there had not been a federal peacetime conscription law prior to 1940. As discussed elsewhere in this article, no cases subsequent to 1940 and prior to Pearl Harbor squarely ruled on the constitutionality of peacetime conscription.

3b. (1940) 26 A. B. A. Jour. 701.

4. 13 Wall. 397, 408 (U. S. 1871).

5. 197 U. S. 11, 29, 25 Sup. Ct. 358, 374 (1904).

6. 137 U. S. 147, 153, 11 Sup. Ct. 54, 59 (1890).

7. 302 U. S. 46, 48, 58 Sup. Ct. 81, 83 (1937).

Tendency of the Supreme Court to Reverse Previous Extremely Nationalistic Decisions.

A list of cases in which the Supreme Court has reversed itself when mature judgment proved that its prior position was wrong are found in *Helvering v. Griffiths*.⁸ Nearly everyone knows that the "white primary" case, *Grovey v. Townsend*,⁹ which had held that negroes could be barred from party primaries without violation of the federal constitution, was reversed in April 1944, the Court saying: "when convinced of former error, this Court has never felt constrained to follow precedent."¹⁰

But it is to reversals or reversals in effect, which are more specifically related to conscription that we must turn. *Gilbert v. Minnesota*¹¹ had held, during the last war, that a man could be found guilty of the crime of causing disaffection in the armed services under a state anti-espionage statute, for saying:

"Have you had anything to say as to whether we would go into this war? You know you have not. If this is such a great democracy, for Heaven's sake why should we not vote on conscription of men. We were stampeded into this war by newspaper rot to pull England's chestnuts out of the fire for her. I tell you if they conscripted wealth like they have conscripted men, this war would not last over forty-eight hours."

Under a somewhat similar Mississippi statute the Court recently held¹² that a person could not constitutionally be found guilty of a crime for stating:

"that it was wrong for our President to send our boys across in uniform to fight our enemies; that it was wrong to fight our enemies; that these boys were being shot down for no purpose at all; * * * that the quicker people here quit bowing down and worshipping and saluting our flag and Government the sooner we would have peace."

or for passing out literature, which read in part:

8. 318 U. S. 371, 401, 63 Sup. Ct. 636, 652 (1943). See also the list in 88 L. Ed. (adv.) 701, 709 (1944).

9. 295 U. S. 45, 55 Sup. Ct. 622 (1934).

10. *Allwright v. Smith*, 88 L. Ed. (adv.) 701, 709 (1944). See Cushman, *The Texas "White Primary" Case—Smith v. Allwright* (1944) 30 CORN. L. Q. 66.

11. 254 U. S. 325, 41 Sup. Ct. 125 (1919).

12. *Taylor v. Mississippi*, 319 U. S. 583, 63 Sup. Ct. 1200 (1943).

"Almighty God commands that they (true Christians) must remain entirely neutral in the controversy * * * the so-called democracies hold out no hope of peace, security, life or happiness * * * if there is a conflict between state law and what Jehovah's witnesses conceive to be Jehovah's law, the state law should not be obeyed * * *"

At a later point in this article the extent to which the Schneiderman communist case has overruled the two conscientious objector cases of Macintosh and Schwimmer is discussed.

In the *Gobitis* case¹³ in 1941 the Court had held that a child of the Jehovah's Witness faith could be compelled to salute the American flag as a necessary part of achieving the patriotic solidarity which it was believed could alone carry forward the war. In June of 1943, in *West Virginia State Board of Education v. Barnette*,¹⁴ the Court reversed its position on the ground that religious and similar liberties "are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect * * *" Justice Jackson went on to say:

"The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual * * * The sole conflict is between authority and rights of the individual. * * *

"Government of limited power need not be anemic government. Assurance that rights are secure tends to diminish fear and jealousy of strong government, and by making us feel safe to live under it makes for its better support. Without promise of a limiting Bill of Rights it is doubtful if our Constitution could have mustered enough strength to enable its ratification. To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end * * *

"Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

"It seems trite but necessary to say that the First Amendment

13. *Minersville School District v. Gobitis*, 310 U. S. 586, 60 Sup. Ct. 1010 (1939).

14. 319 U. S. 624, 63 Sup. Ct. 1178 (1943).

to our Constitution was designed to avoid these ends by avoiding these beginnings. * * *

"The action of Congress in making flag observance voluntary and respecting the conscience of the objector in a matter so vital as raising the Army contrasts sharply with these local regulations. * * *

"But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

The trend away from extreme nationalism and particularly away from coerced national unity is obvious. It cannot be lightly disposed of in considering peacetime conscription, a form of coerced unity, to which there will be much more violent opposition than to wartime drafts.

Increased Protection of Individual Civil Rights.

One has only to read the six civil liberties cases decided by the United States Supreme Court at the October 1918 term¹⁵ and compare these with the most recent civil rights decisions of 1943-44 to sense the increased emphasis on protection of individual freedom even at some considerable risk to society. The steps by which this has been achieved can be traced: A liberal construction of the Bill of Rights in favor of the individual was first recognized.¹⁶ Then the power to abridge personal liberties became considered "the exception rather than the rule."¹⁷ Next the

15. See *Abrams v. United States*, 250 U. S. 616, 40 Sup. Ct. 17 (1919); *Schenck v. United States*, 249 U. S. 47, 39 Sup. Ct. 247 (1919); *Baer v. United States*, 249 U. S. 47, 39 Sup. Ct. 247 (1919); *Sugarman v. United States*, 249 U. S. 182, 39 Sup. Ct. 191 (1918); *Frohwerk v. United States*, 249 U. S. 204, 39 Sup. Ct. 249 (1918); *Debs v. United States*, 249 U. S. 211, 39 Sup. Ct. 252 (1918).

16. *Sgro v. United States*, 287 U. S. 206, 53 Sup. Ct. 138 (1932); *Grau v. United States*, 287 U. S. 124, 53 Sup. Ct. 38 (1932); *United States v. Lefkowitz*, 285 U. S. 452, 52 Sup. Ct. 420 (1931), and *Go-Bart Importing Co. v. United States*, 282 U. S. 344, 51 Sup. Ct. 153 (1930).

17. *Herndon v. Lowry*, 301 U. S. 242, 57 Sup. Ct. 732, 739 (1936);

Court accepted the position that there is no presumption of constitutionality of an act claimed to infringe civil liberties.¹⁸ The Court rejected the test of "threatened danger in its incipency"¹⁹ and definitely required a "clear and present danger" before civil liberties could be restricted.²⁰ Such limitation on the *military* had always been the rule;²¹ here it was extended to the civil. Government was compelled to undergo some inconvenience or

DeJonge v. Oregon, 299 U. S. 353, 57 Sup. Ct. 255 (1936); and Lovell v. Griffin, 303 U. S. 444, 58 Sup. Ct. 666 (1937) and cases cited therein.

18. United States v. Carolene Products Co., 304 U. S. 144, 152, 58 Sup. Ct. 778, 783 (1937); Schneider v. Irvington, 308 U. S. 147, 161, 60 Sup. Ct. 146, 150 (1939); (1940) 40 Col. L. Rev. 531, 532.

19. Gitlow v. New York, 268 U. S. 652, 45 Sup. Ct. 625 (1924).

20. Herndon v. Lowry, 301 U. S. 242, 57 Sup. Ct. 732 (1936). There are those who find a clear return to this rule as early as *Fiske v. Kansas*, 274 U. S. 380, 47 Sup. Ct. 655 (1927); *Whitney v. California*, 274 U. S. 357, 47 Sup. Ct. 641 (1927); and *Near v. Minnesota*, 283 U. S. 697, 51 Sup. Ct. 625 (1931).

21. Two cases involving the taking of property in time of war, on the claim that it was necessary in order to prevent its falling into the hands of the enemy, serve as illustrations. In *United States v. Russell*, 13 Wall. 623, 627-8 (U. S. 1871), the rule was stated as, "the public danger must be immediate, imminent, and impending, and the emergency in the public service must be extreme and imperative, and such as will not admit of delay or a resort to any other source of supply." In *Mitchell v. Harmony*, 13 How. 115 (U. S. 1851) since the evidence showed that the seizure was for the purpose of using the property in a forthcoming campaign, rather than to prevent the property coming into the enemy's possession, the plaintiff was allowed to recover against the military officer. The Court's language is very clear: "But in every such case the danger must be present or impending, and the necessity such as does not admit of delay or the intervention of the civil authority to provide the requisite means * * * he must also prove what the nature of the emergency was, or what he had reasonable grounds to believe it to be; and it will then be for the court and jury to say whether it was so pressing as to justify an invasion of private right." *Sterling v. Constantin*, 287 U. S. 378, 53 Sup. Ct. 190 (1932). "The absence of necessity for military order of the Governor * * * is established by showing that there was no actual uprising or showing of violence or anything more than threats of violence, breaches of the peace against oil producers, and that there was no closure of the courts or failure of civil authorities." *Miller v. United States*, 11 Wall. 268 (U. S. 1870); *Ex parte Merryman*, 17 Fed. Cas. 144, No. 9,487 (1861); *Ex parte Vallandigham*, 1 Wall. 243 (U. S. 1863); *Ex parte Milligan*, 4 Wall. 2 (U. S. 1866); 2 Black 635 (U. S. 1862). The majority, in the *Milligan* case, in a dictum denied Congress power to establish "martial law" except in case of actual, present invasion. The minority believed that Congress had the power in cases of "imminent public danger," "where ordinary law no longer adequately secures public safety and private rights."

inefficiency and undertake some danger and certain risks rather than cut down civil liberties.²² Religious freedom was given "every possible leeway."²³ Until finally, in the midst of this war, persons have been protected in their right to refuse to salute the flag, to criticize the government in its undertaking or waging the war.²⁴ This development has occurred *since* the Selective Draft Law Cases of 1917 and constitutes a restriction on those

22. *Schneider v. New Jersey*, 308 U. S. 147, 162-4, 60 Sup. Ct. 146, 152, 157 (1939) " * * * the public convenience * * * does not justify an exertion of the police power which invades the free communication of information and opinion secured by the Constitution." " * * * If it is said that these means are less efficient and convenient * * * the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press." See also: *Mountain Timber Co. v. Washington*, 243 U. S. 219, 37 Sup. Ct. 260 (1925); *Weaver v. Palmer Brothers*, 270 U. S. 402, 46 Sup. Ct. 320 (1925); *Carlson v. California*, 310 U. S. 106, 60 Sup. Ct. 746 (1939); *Hague v. C. I. O.*, 307 U. S. 496, 59 Sup. Ct. 954 (1939); *Jehovah's Witness* cases of 1943, including *West Virginia State Bd. of Education v. Barnette*, 319 U. S. 624, 63 Sup. Ct. 1178 (1943) and *Martin v. City of Struthers*, 319 U. S. 141, 63 Sup. Ct. 862 (1943); *Carlson v. California*, 310 U. S. 106, 60 Sup. Ct. 746 (1939); *Hague v. C. I. O.*, 307 U. S. 496, 59 Sup. Ct. 954 (1939) (Note that this approach stems back to earlier dissenting opinions); *Burns Baking Co. et al. v. Bryan*, 264 U. S. 504, 517, 520, 44 Sup. Ct. 412, 415, 416 (1924); and *Adams v. Tanner*, 244 U. S. 590, 597, 600, 37 Sup. Ct. 662, 665, 666 (1916). In *Thornhill v. Alabama*, 310 U. S. 88, 102, 60 Sup. Ct. 736, 744 (1939), although the Court recognized a present danger, it balanced the value of labor organization against internal order and employer's rights and found certain risks worth taking "in the circumstances of our times * * * [to preserve] the area of free discussion that is guaranteed by the Constitution." And in *Lovell v. City of Griffin*, 303 U. S. 444, 58 Sup. Ct. 666 (1937); *Schneider v. New Jersey* (and companion cases), 308 U. S. 147, 60 Sup. Ct. 146 (1939); *DeJonge v. Oregon*, 299 U. S. 353, 57 Sup. Ct. 255 (1936); *Hague v. C. I. O.*, 307 U. S. 496, 59 Sup. Ct. 954 (1939); *Cantwell v. Connecticut*, 310 U. S. 296, 60 Sup. Ct. 900 (1939) though it was clear that some "danger" or risk was present, the Court permitted free discussion to prevail. See also: *Bridges v. State of California*, 314 U. S. 252, 62 Sup. Ct. 190 (1941) and *Times-Mirror Co. v. Superior Court*, 314 U. S. 252, 62 Sup. Ct. 190 (1941).

See review of cases in Reisman, *Civil Liberties in a Period of Transition* (1942) 3 Public Policy 33-96.

23. *Minersville School District v. Gobitis*, 310 U. S. 586, 60 Sup. Ct. 1010 (1939). See *United States v. Ballard*, 88 L. Ed. (Adv.) 800 (1947), as an example of the extent of such protection, also note 24 *infra*.

24. *Taylor v. Mississippi*, 319 U. S. 583, 63 Sup. Ct. 1200 (1943); *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 63 Sup. Ct. 1178 (1943).

decisions rather than an expansion in the direction of upholding peacetime conscription.

Civil Power Is Supreme over Military.

Dean Roscoe Pound in a recent address, lists "five characteristics of our Anglo-American law * * * (1) * * * supremacy of law * * * (2) *subordination of the military to the civil power* * * * (3) * * * emergencies do not suspend the constitution * * * (4) there are fundamental individual rights, guaranteed and protected by the constitutions * * * (5) * * * the constitutions set up and the courts maintain a separation of powers."²⁵ We need not go back to English precedent, though persuasive authority may also there be found. Our Declaration of Independence stated the eleventh justification for overthrowing a "government * * * destructive of these ends" for which "governments are instituted among men" as "he (it) has affected to render the military independent of, and superior to the civil power." It was "Lord Dunmore's proclamation declaring his intention to execute martial law in that province" (Virginia) which caused the first representative government to be created in this country.²⁶ The change of wording in the proposed Constitution from "*make war*" to "*declare war*" was expressly for the purpose of "clogging rather than facilitating war; but for facilitating peace."²⁷ The provision that no appropriation for military expenses should be for a longer period than two years was added to the constitution so that "the military shall always be subordinate to the civil power."²⁸ The debates in the constitutional convention reflected this attitude²⁹ and nearly every state in ratifying the constitution

25. Pound, *War and the Law* (1943) 14 PA. BAR ASS'N Q. 110, 112-113.

26. 1 ELLIOT'S DEBATES (1876) 52.

27. DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA (1894-1905) 553, 554; 1 ELLIOT'S DEBATES (1876) 246; 5 *Ibid.* 443.

28. 1 ELLIOT'S DEBATES (1876) 249; 5 *Ibid.* 445; WARREN, THE MAKING OF THE CONSTITUTION (1928) 504-505.

29. Note 27 *supra*; 5 ELLIOT'S DEBATES (1876) 343, 443, 445, 447, 467, 511, 544-5; 1 *Ibid.* 248-9, and 2 FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787 (1937) 334, 341.

placed the same interpretation on the constitutional plan.³⁰ The New York ratification contains a typical statement: "at all times the military should be under strict subordination to the civil power."³¹ From the earliest times, both in England³² and in the United States,³³ the courts refused to accept the decision of the military and insisted on making an independent decision of the necessity for any military action infringing individual liberties and consistently refused to permit military law and military authority to be applied where civil law and civil authority was still operating.³⁴

Other Rules of Interpretation.

The Supreme Court has so often repeated the rule that war does not abolish constitutional protections and that emergency

30. Rhode Island in its ratification declared: "at all times the military should be under strict subordination to the civil power." 1 WARREN, *op. cit. supra* note 28, at 336. The whole history of the ratification of the Constitution is one of insistence upon the inclusion of a Bill of Rights, the fear that central government would be too strong, the release of the *militia* from martial law except in time of war. Any opposition to these protections was not based on their undesirability but on the assertion that under our system of *delegated* powers no supremacy of the military, no infringement of basic rights, no usurpation of power could occur. 1 ELLIOT'S DEBATES (1876) 325, 327, 334 ff.; 2 *Ibid.* 32, 80, 123, 220, 251, 269, 316, 359, 398, 429, 435, 449, 455, 545 ff.; 3 *Ibid.* 32, 317, 445, 449, 502, 649, 651, 660, are typical examples. See Madison's remarks, 1st Cong., 1st Sess., June 8, 1789; also WARREN, *op. cit. supra* note 28, at 508, 769. See also quoted statements in Cong. Record, appendix, vol. 86, pt. 17, pp. 5206 ff. by Lawyers Committee to Keep the United States out of War. CHAFEE, FREE SPEECH IN THE UNITED STATES (1941) 30; "The first ten amendments were drafted by men who had just been through a war." Randall in CONSTITUTIONAL PROBLEMS UNDER LINCOLN (1926) 26: "The law of military necessity, however, is not the typical American principle. To say that military force is not to be restrained by the superior power of law, is to quote the militaristic view as against that which has always prevailed here."

Many of the state constitutions contain provisions assuring the supremacy of the civil power.

31. 1 Warren, *op. cit. supra* note 28, 237.

32. The case of the Bristol Rights (S. T. U. S. III, 2-56), 1932, cited in 3 WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES (2d ed. 1929) 1591.

33. Mitchell v. Harmony, 13 How. 115 (U. S. 1851). See also note 21 *supra*.

34. See note 21 *supra* and the recent case of Hammond v. Squier, 51 F. Supp. 227 (W. D. Wash., 1943).

cannot create power, that the question should by now be foreclosed from debate.³⁵

Although we could trace from the very beginnings of our government the unflinching adherence to the rule that the federal government has no inherent but only delegated powers and must function within those delegated, it is only necessary to cite four recent decisions.³⁶

35. *Ex parte* Quirin, 317 U. S. 1, 63 Sup. Ct. 1 (1942); *Schechter v. United States*, 295 U. S. 495, 528, 55 Sup. Ct. 837, 842 (1934); *Home Building and Loan Association v. Blaisdell*, 290 U. S. 398, 54 Sup. Ct. 231 (1933); *Highland v. Russell Car Co.*, 279 U. S. 253, 261, 49 Sup. Ct. 314, 316 (1928); *United States v. Cohen Grocery Co.*, 255 U. S. 81, 88, 41 Sup. Ct. 298, 299 (1920); *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 155, 40 Sup. Ct. 106, 108 (1919); *Ex parte* Milligan, 4 Wall. 2 (U. S. 1866).

36. In *United States v. Butler*, 297 U. S. 1, 56 Sup. Ct. 312 (1936), the court said:

"From the accepted doctrine that the United States is a government of delegated powers, it follows that those not expressly granted, or reasonably to be implied from such as are conferred, are reserved to the states or to the people. To forestall any suggestion to the contrary, the Tenth Amendment was adopted. The same proposition, otherwise stated, is that powers not granted are prohibited."

Carter v. Carter Coal Co., 298 U. S. 238, 291, 56 Sup. Ct. 855 (1936):

"The proposition, often advanced and as often discredited, that the power of the federal government inherently extends to purposes affecting the nation as a whole with which the states severally cannot deal or cannot adequately deal, and the related notion that Congress, entirely apart from those powers delegated by the Constitution, may enact laws to promote the general welfare, have never been accepted but always definitely rejected by this court."

Schechter Poultry Corp. v. United States, 295 U. S. 495, 528, 55 Sup. Ct. 837 (1934):

"Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary."

Home Bldg. & L. Ass'n v. Blaisdell, 290 U. S. 398, 425, 54 Sup. Ct. 231 (1934):

"Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions which have always been, and always will be, the subject of close examination under our constitutional system."

The nearest the Supreme Court has ever come to recognizing "inherent" power is *U. S. v. Curtiss-Wright Export Corporation*, 299 U. S. 304, 57 Sup. Ct. 216 (1936), and that is a "delegated" and "incidental" power case. See

Other general principles of constitutional construction to be applied are fairly well agreed upon: the court attempts to place itself as nearly as possible in the position of the men who framed the instrument and to define powers in accordance with underlying principles and purposes.³⁷ To this end, references to the *Federalist*, the debates in the constitutional convention, the ratifications in the several states are helpful.³⁸ But any particular person's view in debate is not of great moment, nor is any proposed amendment, not ratified, unless it be clear that more than a personal or minority point of view is represented.³⁹ Where no exceptions to a general power are stated in the Constitution none will be found by mere implication or construction. Yet constitutional provisions are of equal dignity; none must be disregarded and none must be so enforced as to nullify or substantially impair other provisions.⁴⁰ Whether the framers of the Constitution were or were not familiar with a certain subject matter is not determinative of the application of constitutional provisions thereto.⁴¹

Patterson, *In re the United States v. Curtis Wright Corporation* (1944) 22 TEX. L. REV. 286; Quarles, *Federal Government: as to Foreign Affairs, Are Its Powers Inherent as Distinguished from Delegated?* (1944) 32 GEO. L. J. 375; BEARD, *THE REPUBLIC* (1943) 273 for severe criticisms of the "inherent power" dictum of this case.

37. *Re Bain*, 121 U. S. 1, 7 Sup. Ct. 781 (1886); *Prigg v. Pennsylvania*, 16 Pet. 539 (U. S. 1842); *M'Culloch v. Maryland*, 4 Wheat. 316 (U. S. 1819); *Craig v. Missouri*, 4 Pet. 410 (U. S. 1830); *United States v. Lefkowitz*, 285 U. S. 452, 52 Sup. Ct. 420 (1931); *Fairbank v. United States*, 181 U. S. 283, 21 Sup. Ct. 648 (1900).

38. *Cohen v. Virginia*, 6 Wheat. 264 (U. S. 1821); *Wheeling, P. & C. Transp. Co. v. Wheeling*, 99 U. S. 273 (1878); *Ex parte Grossman*, 267 U. S. 87, 45 Sup. Ct. 332 (1924); *Dartmouth College v. Woodward*, 4 Wheat. 518 (U. S. 1819); Justice Frankfurter in *United States v. Monia*, 317 U. S. 424, 431, 63 Sup. Ct. 409, 412 (1943).

39. *Maxwell v. Dow*, 176 U. S. 581, 20 Sup. Ct. 448 (1899); *United States v. Wong Kim Ark*, 169 U. S. 649, 18 Sup. Ct. 456 (1897).

40. *Gibbons v. Ogden*, 9 Wheat. 1 (U. S. 1824); *Rhode Island v. Massachusetts*, 12 Pet. 657 (U. S. 1838); *Myers v. United States*, 272 U. S. 52, 47 Sup. Ct. 21 (1926); *United States v. Butler*, 297 U. S. 1, 56 Sup. Ct. 312 (1935); *Wright v. United States*, 302 U. S. 583, 58 Sup. Ct. 395 (1937); *Dick v. United States*, 208 U. S. 340, 28 Sup. Ct. 399 (1907); *Marbury v. Madison*, 1 Cranch 137 (U. S. 1803).

41. *United States v. Classic*, 313 U. S. 299, 61 Sup. Ct. 1031 (1940).

Cases on Conscription.

The two cases which specifically upheld the constitutionality of wartime conscription are *Kneedler v. Lane*,⁴² a Pennsylvania case decided during the War between the States and the *Selective Draft Law Cases*⁴³ of World War I. Other cases merely follow these; largely without reexamination of the issues and arguments. In the *Kneedler* case on the first hearing (temporary injunction) the court by a vote of 3 to 2 held conscription unconstitutional. The basis of the decision was: the federal government is a government of delegated powers; the Constitution must be taken as a whole and effect be given to every part; to grant power of general conscription under the 13th clause of Art. I, Sec. 8, "to raise and support armies," would destroy the 16th and 17th clauses which prescribed when the militia could be called out and how they were to be trained; the background of the constitutional convention showed an intention to limit "the power to raise armies to (by) the ordinary English mode of voluntary enlistments"; it could not be claimed that the power "to provide and maintain a Navy" authorized the "press-gang"; the claimed power was contrary to the whole "nature or genius of the government which the constitution formed"; if the power was "proper" it was not "necessary", under the necessary and proper clause, for the militia had not been called out and voluntary enlistments had not been exhausted. These propositions had previously been forcefully stated by Daniel Webster in opposition to and defeat of an earlier plan of limited wartime conscription.⁴⁴

On a second hearing, the constituency of the court having been changed by the election of Judge Agnew to replace Chief Justice Lowrie, the law was sustained, 3 to 2. Since Judge Agnew's

42. 45 Pa. St. 238 (1863).

43. 245 U. S. 366, 38 Sup. Ct. 159 (1917). I am not analyzing either *Sugar v. U. S.*, 252 Fed. 74 (C. C. A. 6th, 1918), which contains a good consideration of the same law or *U. S. v. Olsen*, 253 Fed. 233 (W. D. Wash., 1917), a less satisfactory analysis.

44. 14 WRITINGS AND SPEECHES OF DANIEL WEBSTER 55-69. See also Chief Justice Chaney's opinion of the unconstitutionality of conscription, published by Philip G. Auchampaugh, University of Nevada in *Tyler's Quarterly Historical and Genealogical Magazine* (1936), vol. XVIII, pp. 72-87; Rep. Chandler and others speaking on the amendment of the Conscription Act in 1865; 37th Cong. 3rd Sess.

opinion was the deciding one his arguments should be examined. His reasoning runs thus: (1) there is a presumption of constitutionality; (2) the power to "declare" war presupposes the right to "make" war which is an *inherent* power of all sovereign nations and this "inherently carries with it the power to coerce or draft"; (3) the clause, "to raise and support armies" is unlimited; (4) power to draft must lie either in the Federal government or the State and since the State cannot use it for national purposes it must belong to the United States; (5) the militia power is an additional power subsidiary to the power to raise armies. But we have seen that there is no presumption of constitutionality of this type of law which cuts down individual civil liberties; the word "declare" was specifically substituted for "make" war in order to restrict the military power; even if we concede that in international law sovereign nations have the inherent power to raise armies by any means,⁴⁵ yet we are considering the extent of the power of the state and of the federal government *under a specific Constitution* which deprives the federal government of all inherent power. As can thus be seen from other portions of this article, the judicial soundness of most of the propositions relied upon is open to considerable question and there is basis for saying that Lincoln thought of his action as calling out the militia.⁴⁶

It appears from the *Kneedler* case that the Pennsylvania court desired to have the case decided by the United States Supreme Court but that the government studiously avoided this.^{46a} A more closely reasoned case was decided under the Constitution of the Confederacy in 1862, *Jeffers v. Fair*.^{46b} Although this cannot be an authoritative interpretation of the federal constitution, the provisions considered are the same as in the United States Constitution. The Court placed almost its entire reliance on the fact that "to raise and support armies was unqualified" and therefore, at least in wartime, was unrestricted by the militia clause.

45. 3 VATTEL, *THE LAW OF NATIONS*, c. 2, secs. 8 & 9 (1916); BURLAMAQUI, *THE PRINCIPLES OF POLITICAL LAW* (Ed. 1791) Part IV, c. 1, Sec. XII.

46. See notes 18, 27, 36, *supra*.

46a. Perhaps because of Chief Justice Chaney's opinion referred to *supra*, note 44.

46b. 33 Ga. 347 (1862).

The *Selective Draft Law* cases, although referring to the *Kneedler* case as controlling authority, completely reexamined the issue.⁴⁷ There are some who find in the court's opinion the attitude which Shakespeare made famous in the words: "The lady doth protest too much, methinks." For the court's argument is constantly advanced by this type of wording: "cannot conceive", "too frivolous for further notice", "so devoid of foundation", "not even a shadow of ground", "to do more than state the proposition is absolutely unnecessary", "unnecessary to follow", "wholly unnecessary to explore", "cannot be the slightest doubt", "it is indisputable", "fallacy of the argument", etc. Whether this be true or not, it is true that the court does not work out a consistent interrelation of the various military powers set forth in the Constitution. The Court's reasoning may be outlined as follows: The colonies had the right to enforce military service; the states enforced military service; one of the reasons for calling the Constitutional Convention was the inadequacy under the Confederation of depending on the states to fill military quotas; a state citizen can't volunteer for the federal army if he cannot also be drafted; the relation between the militia clause and the clause "to raise and support armies" was "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;" "the power granted to Congress to raise armies in its potentiality was susceptible of narrowing the area over which the militia clause operated," and that the obligation of the citizens to the federal government was direct rather than through the states by virtue of the 14th amendment.^{47a}

Neither of these cases do, nor could they, pass on the peace-

47. Perhaps the court did not have to pass on the broad constitutional question, since the charge was refusal to register and it has been pointed out that a person may be required to register whether or not he could be conscripted: *Stone v. Christensen*, 36 F. Supp. 739, D. Ore. (1940); *U. S. v. Rapoport*, 36 F. Supp. 915 S. D. N. Y. (1941), *affd.* 120 F. (2d) 236 (C. C. A. 2d, 1941).

47a. 245 U. S. 366, 378-383, 38 Sup. Ct. 159, 161-163 (1918). The question whether a new "United States citizenship" was created by the 14th amendment is a study in itself which will not be attempted here. Suffice it to say, I find nothing in the amendment, congressional debates, or decisions, to show an intention to create a federal militia power.

time conscription by the federal government of men, the drafting of women, or the drafting of conscientious objectors. This last point was incidentally raised by the defendants in the *Selective Draft Law* cases, none of whom were conscientious objectors, by asserting that discriminatory preference was granted to objectors. The government urged that the exemption was in furtherance of the right of religious freedom and apparently the court accepted this position:

"The law neither establishes a religion nor prohibits its free exercise. Section 4 contains nothing respecting the establishment of religion; on the contrary, it goes so far as to aid in the free exercise of those religions which forbid participation in war. * * *

"Exemptions were allowed by every compulsory service law passed by the States. Quakers and conscientious objectors were frequently exempted in the Revolutionary War. (Citing many acts of the States)." ^{47b}

The 1940 selective service law might be considered (prior to Pearl Harbor) as peacetime conscription, though there is strong authority in International Law that we were at war prior to October 1940, due to the acts of the President.⁴⁸ Few cases arose prior to Pearl Harbor. Eight Union Theological students refused to register, pleaded guilty, did not challenge the act and were each sentenced to a year and a day.⁴⁹ Later five young men refused to register, filed demurrers attacking the act's constitutionality, were tried and sentenced to eighteen months to two years each.⁵⁰ Several other cases followed. In all of the reported cases, the courts, in upholding the conviction of persons for refusing to register, either held that war existed though there

47b. 245 U. S. at 374 (1918).

48. Wright, *When Does War Exist?*, (1932) 26 Am. Jour. of Int. Law 362; McNair, *The Legal Meaning of War*, (1926) 11 Grotius Soc. Trans. 29; Brierly, *International Law and Resort to Armed Force*, (1932) 4 Camb. L. J. 308; 1 Hackworth, *Digest on International Law*, State Dept., (1941), 660-663; 6 *Id.* 489-503; 7 *Ibid.* 390-396, 425-430, 488-503, 687-693, 703-5.

49. N. Y. Times, Nov. 15, 1940, p. 1.

50. N. Y. Times, Feb. 12, 1941, pp. 14, 15; N. Y. Herald Tribune, December 4, 1940; Philadelphia Record, December 12, 1940; *United States v. Rapoport*, 36 F. Supp. 915 (S. D. N. Y., 1941), *affd.* 120 F. (2d) 236 (C. C. A. 2d, 1941).

was no "formal declaration of war"⁵¹ or they held that the case involved only refusal to register, which could be compelled as a census in time of peace or war.⁵² Those cases in which the charge was refusal to report for induction occurred after Pearl Harbor.⁵³ Therefore, none of these cases had to pass on the Constitutionality of peacetime conscription; yet, nearly every case contained an assertion of the validity of such conscription. We have pointed out elsewhere other dicta to the same effect.

The Supreme Court has been careful in some cases upholding the broadest military powers in wartime, to caution that its words should not be extended to peacetime.⁵⁴

It would seem that the right to use, in time of war or after attack, federal troops—volunteer or conscript—abroad has been foreclosed by the courts. In *Cox v. Wood*,⁵⁵ "petitioner, after affirming the validity of said Conscription Act of May 18, 1917, pleads what he calls his constitutional immunity from mili-

51. *United States v. Rappeport*, *supra* note 50; *United States v. Lambert*, 123 F. (2d) 395 (C. C. A. 3d, 1941); *United States v. Cornell*, 36 F. Supp. 81 (D. Idaho 1940).

52. *United States v. Rappeport*, *supra* note 50; *Stone v. Christensen*, *supra* note 47; *United States v. Garst*, 39 F. Supp. 367 (E. D. Pa., 1941). "Congress undoubtedly has the power to seek information through registration or otherwise in peacetime in order to be prepared for the intelligent exercise of its power to raise armies by conscription even if its power to conscript can be exercised only in time of war." 36 F. Supp. at 917 (S. D. N. Y. 1941).

53. See Annotation, 147 A. L. R. 1185, 1313ff and subsequent annotations.

54. Justice Cardozo, *Hamilton v. Bd. of Regents*, 293 U. S. 245, 55 Sup. Ct. 197 (1934): "There is no occasion at this time to mark the limits of governmental power in the exaction of military service when the nation is at peace."

United States v. Macintosh, 283 U. S. 605, 622, 51 Sup. Ct. 570, 574 (1931): "other drastic powers, wholly inadmissible in time of peace, exercised to meet the emergencies of war."

55. 247 U. S. 3, 4, 6, 38 Sup. Ct. 421, 422 (1917). This position continues to be asserted, however; see record and brief, *Pacman v. U. S.*, 144 F. (2d) 562 (C. C. A. 9th, 1944), *cert. filed* U. S. Supreme Court, October 1944. A distinction has been recognized between the *emergency preceding war* when service is restricted within the United States and possessions, 50 U. S. C. A. § 303 (e) (Supp. 1943) and *war* when territorial restrictions are abolished, 50 U. S. C. A. § 731 (Supp. 1943). Also the right to "drive back" as part of "repel" was early advanced, 4 ELLIOT'S DEBATES (1876) 459: "If it became necessary for the executive to call out the militia to repel invasion, he thought they might pursue the enemy beyond the limits, until the invaders were effectively dispersed."

tary service beyond the territorial limits of the United States." The Court held that there was no such immunity. In so holding it stated that the power "to compel military service * * * derived from the authority * * * to declare war and to raise armies" which was "not qualified or restricted by the provisions of the militia clause." Whether this reasoning is sound or not, the court could also have upheld service abroad under the provisions of the militia clause on the ground that "to repel" includes to "drive back" and that "invasion" included attack upon our ships which international law recognizes as "floating islands." These cases, then, constitute the United States Supreme Court's present outline of the powers of conscription.

Background of the Constitutional Provisions.

At the beginning of this article we set forth the constitutional provisions from which federal authority or lack of authority to compel peacetime conscription must be found. One misapprehension, entertained by far too many people, should be dispelled—that is that the words: "to provide for the common defense and general welfare of the United States" constitute a granting of a *power* to the federal government.⁵⁶ These words are found only in the Preamble and in Art. I, Sec. 8, cl. 1 which grants federal taxing and spending powers. The cases are clear, and constitutional authorities are agreed that the Preamble creates no power and these words in Article I constitute *limitations* on the government's money raising and spending power, not grants.⁵⁷

We have pointed out that in our system of government the civil is supreme over the military, that our Constitution sought to clog war "making" and that we must determine the meaning and interrelation of all the provisions in the Constitution relating to war and the military.

56. Even the Lawyers Committee to Keep the United States out of War cited this as a source of Congressional war power. See 86 Cong. Rec. (March, 1940) appendix, pt. 17, 5206 ff.

57. *United States v. Butler*, 297 U. S. 1, 56 Sup. Ct. 12 (1936); *Helvering v. Davis*, 301 U. S. 619, 57 Sup. Ct. 904 (1937); *United States v. Boyer*, 85 Fed. 425, 432 (W. D. Mo., 1898), quoting Story on the Constitution. See the excellent specific discussion by Madison, FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION* (1937) 483-494; *Gebelein, Inc. v. Milbcurne*, 12 F. Supp. 105 (D. Md. 1935); *The Federalist* No. XLI.

(a) Standing Armies.

One of the grievances set forth in our Declaration of Independence as a justification for overthrowing government was: "He has kept among us, in times of peace, standing armies * * *" In England there had been a long opposition to standing armies. They were condemned in the Petition of Right in 1628 and the Bill of Rights; they were branded as dangerous and contrary to the theory of government in Blackstone's Commentaries on the Laws of England. Parliament had developed the militia system and disbanded in peacetime the whole King's army.⁵⁸ We inherited and carried on this opposition in the United States. The continental army of 10,000 was furloughed by Congress within two months after the war ended, even though a British army was still in the country and it had already violated the treaty of peace.⁵⁹ In the Constitutional Convention no voice was raised to defend a large standing army; even those who spoke for greater military power merely desired a small volunteer army or a well organized militia. Madison, in urging the states to federate and not to fall apart, did so on the basis that it would prevent large standing armies:

"In time of actual war, great discretionary powers are constantly given to the Executive Magistrate. Constant apprehension of War, has the same tendency to render the head too large for the body. A standing military force, with an overgrown Executive will not long be safe companions to liberty. The means of defence agst. foreign danger, have been always the instruments of tyranny at home. Among the Romans it was a standing maxim to excite a war, whenever a revolt was apprehended. Throughout all Europe, the armies kept up under the pretext of defending, have enslaved the people."⁶⁰

Several attempts were made to limit the standing army to *two*

58. 1 BLACKSTONE, COMMENTARIES (15th ed., 1809) 408 ff.; 3 MAY, CONSTITUTIONAL HISTORY OF ENGLAND (1912 ed.) 281; 1 LECKY, HISTORY OF ENGLAND IN THE 18TH CENTURY (5th ed., 1891) 508.

59. 5 ELLIOT'S DEBATES (1876) 87, 89, 90. Congress was quick to put an end to enlistments as soon as the Massachusetts "rebellion" was ended. *Ibid.* 94, 99.

60. 1 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION (1937) 465.

thousand.⁶¹ The first voice heard upon the discussion of the military power was Mr. Gerry's "against standing armies in time of peace * * * The people were jealous on this head."⁶² The last voices to speak on the military power, Col. Mason, Mr. Randolph, Mr. Madison, were:

"sensible that an absolute prohibition of standing armies in time of peace might be unsafe, and wish (ed), at the same time, to insert something pointing out and guarding against the danger of them."⁶³

At this time a provision to preface the militia clause (Art. I, Sec. 8) reading "and that the liberties of the people may be better secured against the danger of standing armies in time of peace," was rejected "as setting a dishonorable mark of distinction on the military class of citizens."

Although there was general agreement with the basic plan for a small army, it was recognized that "a standing force of some sort may * * * become unavoidable," and that "limiting the appropriation of revenue (might be) the best guard in this case."⁶⁴ This was an acceptance of the point of view of Mr. Pinckney who introduced a resolution that "no troops shall be kept up in time of peace, but by consent of the Legislature"⁶⁵ and that of Hamilton, strongly stated in the *Federalist*, that the protection against peacetime standing armies had been and could be best lodged in the legislature.⁶⁶

It appears therefore that, while this did not meet the whole

61. 5 ELLIOT'S DEBATES (1876) 443. Other limitations proposed but rejected will be found in 2 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION (1937) 323, 329, 330, 333, 563, 616, 617, 640, 4 *Ibid.* 59.

62. 5 ELLIOT'S DEBATES (1876) 443.

63. 5 *Ibid.* 442-4.

64. 5 *Ibid.* 544, 545. And "Madison was in favor of it. It did not restrain Congress from establishing a military force in time of peace, if found necessary; and as armies in time of peace are allowed, on all hands, to be an evil, it is well to discountenance them by the Constitution, as far as will consist with the essential power of the government on that head."

65. 2 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION (1937) 341.

66. The *Federalist*, No. XXVI, No. XXIV. Hamilton, the most consistent advocate of strong federal powers, favored "a certain portion of military force" yet seemed to fear too much use of "a federal standing army." 1 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION (1937) 285; 2 ELLIOT'S DEBATES (1876) 232-3.

opposition of all members, the provision "but no appropriation of money to that use shall be for a longer term than two years" was added to the phrase "to raise and support armies" as some "restriction on the number and continuance of an army in time of peace."⁶⁷

When the Constitution was submitted to the states for ratification each convention recorded its opposition to any interpretation which would permit large federal standing armies.⁶⁸ Nearly every state attached interpretations or conditions to their ratification of the Constitution to prevent large standing armies and some even demanded amendment.⁶⁹ Mr. Randolph addressed the House of Representatives on January 5, 1800 and obtained a reduction of the standing army (which was not over 3000 men).

"I suppose the establishment of a standing army in the country not only a useless and enormous expense, but, upon the

67. 5 ELLIOT'S DEBATES (1876) 510-11; 2 FARRAND, *op. cit. supra* note 29, 509.

68. Typical expressions from the State Debates are collected in Cong. Rec. appendix, vol. 86, pt. 17, pp. 5206 ff.

Massachusetts: *General Thompson*, "Keep your militia in order—we don't want standing armies."

Mr. Nason: "Suffer me, Sir, to say a few words on the fatal effects of standing armies, that bane of republican governments. * * *"

Virginia: *George Mason*, "But when once a standing army is established in any country the people lose their liberty."

Madison: "A standing army is one of the greatest mischiefs that can possibly happen."

Governor Randolph: "With respect to a standing army, I believe there was not a member in the federal convention who did not feel indignation at such an institution."

Similar remarks were made by Patrick Henry, Mr. Dawson and others.

69. Cong. Rec. appendix, vol. 86, pt. 17, pp. 5206 ff.

New Hampshire: "no standing army shall be kept up in time of peace, unless with the consent of three-fourths of the members of each branch of Congress. * * *"

New York: "standing armies in time of peace, are dangerous to liberty, and ought not to be kept up, except in cases of necessity. * * *"

North Carolina: "no standing army or regular troops shall be raised or kept up, in time of peace without the consent of two-thirds of the Senators and Representatives."

Rhode Island: "standing armies, in time of peace, are dangerous to liberty, and ought not to be kept up, except in cases of necessity."

Most State Constitutions contained provisions against standing armies. These generally left the protection to the legislatures. The Federalist No. XXIV, footnote.

ground of the Constitution, the spirit of that instrument and the genius of a free people are equally hostile to this dangerous institution, which ought to be resorted to (if at all) only in extreme cases of difficulty and danger, * * *⁷⁰

From the foregoing it is clear that it cannot be contended that there is a constitutional proscription of standing armies or even that there is a specific constitutional limitation on their size. The people entrusted their protection against large standing armies in time of peace to their legislature with as strong *instructions* as could be made that the legislators should use the power of the purse to keep the army small. If therefore the legislature should authorize too large a peacetime standing army, this would not be a specific constitutional breach but at most a violation by the legislators of their oath. (Constitution, Art. VI) How large is a "small" army? There were 10,000 troops at the close of the Revolution—these were practically all furloughed and later discharged. In 1898 the army was composed of 25,000 men; in 1910 the regular army numbered 83,000; in 1920 about 298,000; in 1930 approximately 130,750; in 1940, *existing* 255,000—to be built to 375,000—plus 230,000 national guard. These compare with standing armies in Germany (1937) 556,000; Russia (1932) 562,000, and Japan (1936) 260,000.⁷¹

(b) The State Militia.

Our forefathers did more than face the problem of standing armies and record their opposition thereto; they attempted to work out alternatives.

The history of the Continental Congress and of the Confederation and the reason which dictated a change of form are so well known as to require no citation. Congress had no authority to compel the furnishing of troops or money. It could fix quotas for the colonies or States and request that they fill these. That the States had not done. It was therefore proposed to give the federal government some additional power in those fields. On

70. 4 ELLIOT'S DEBATES (1876) 441.

71. Reliance has been placed on *League of Nations Armament Yearbook*; BOND, OUR MILITARY POLICY (1932); WALDROP, MACARTHUR ON WAR (1942); CHAMBERLIN, SOVIET RUSSIA (1930). There is at present no statutory limitation on the size of the Army: 50 U. S. C. A. § 762 (Supp. 1942).

August 20, 1870, General Washington wrote the President of Congress strongly pointing out that the existing plan had provided an inadequate supply of men and materials.⁷² In 1781 he wrote to John Park Curtis (Virginia):⁷³

"The great business of war can never be well conducted, if it can be conducted at all, while the powers of Congress are only recommendatory; while one State yields obedience and another refuses it, while a third mutilates and adopts the measure in part only, and all vary in time and manner, * * *

The first plan submitted, May 29, 1787, the "Randolph Resolutions" contained this reference:

"that the National Legislature ought to be impowered * * * to call forth the forces of the Union agst. any member of the Union failing to fulfill its duty under the articles thereof." ⁷⁴

This was followed by the Pinckney plan. As submitted to the convention it authorized the legislature:

"To raise armies; To build and equip fleets; To pass laws for arming, organizing, and disciplining the militia of the *United States*," and "To call forth the aid of the militia to execute the laws of the Union, enforce treaties, suppress insurrection and repel invasion." ⁷⁵

Had these provisions been adopted rather than those later embodied in the Constitution, and had the provision "to *make* war" remained, and had no qualification been placed alongside "to raise armies," it might have been clear that the federal government had authority to call forth (draft, conscript) the *federal* militia (complete United States manpower) and place them in armies. For, by definition, the creation of a *federal* militia would have made all American citizens liable to federal military service. But even then it would have been extremely difficult to argue that the right could be exercised for other than the four enumerated purposes or that the men could be trained other than as a "militia." A constitutionally consistent plan under the

72. VILES, GEORGE WASHINGTON, LETTERS AND ADDRESSES (1909) 215.

73. 7 SPARK'S, WRITINGS OF WASHINGTON (1833-1837) 442.

74. 1 FARRAND, *op. cit. supra* note 29, 21.

75. 5 ELLIOT'S DEBATES (1876) 130.

Pinckney proposal would have had to interpret the power "to raise armies" and the power to organize and call forth "the militia of the United States" together. This could only have been done by recognizing three rules:

- (1) All able bodied men, not exempt, are liable to federal military training and service (definition of militia).
- (2) These men could be *compelled* to serve only for the four stated purposes.
- (3) But armies could be raised *by any other method than compulsion*, and used for the four stated purposes *or otherwise*.

It is of paramount importance to examine the Convention record to determine whether this first proposal for federal power was extended or restricted.

No one knew better than Washington, who had urged broad federal powers, that the power had been definitely restricted. In the letter, approved by the Convention, by which Washington transmitted the Constitution as finally adopted, he said:

"The friends of our country have long seen and desired that the power of *making war*, peace, and treaties; that of levying money and regulating commerce; and the correspondent executive and judicial authorities, shall be fully and effectually vested in the general government of the Union. But the impropriety of delegating such extensive trust to one body of men is evident. *Thence results the necessity of a different organization.*"⁷⁶

At no point was this change more marked than with regard to the military powers, and particularly the militia. In the long debates it became clear that there was not and was not to be such a thing as a *United States* militia (general manpower obligated to military service); that the militia was to be that of the states and under major control by the states.⁷⁷ Even a resolution to

76. 1 ELLIOT'S DEBATES (1876) 305; the changes can even be seen by comparing the amendments in the Committee on Detail: 2 FARRAND, *op. cit. supra* note 29, 135, 143-45, 158-9, 167-9, 3 *Ibid.* 607.

77. U. S. CONST. Art. I, Sec. 8, cl. 17; U. S. CONST. Art. II, Sec. 2, "The President shall be Commander in Chief * * * of the *Militia of the several States*, when called into the actual Service of the United States." This is recognized in R. O. T. C. Manual, 2nd year advanced, Vol. IV, c. 1921-26. George Washington continued to refer to "the militia of the U. S." in a com-

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" "went too far."⁷⁸ A proposal reserving to the states only the right to appoint "officers under the rank of *general officers*" called forth a blistering attack as "absolutely inadmissible" so that the resolution was not even seconded.⁷⁹ All reference to a United States militia was dropped and the militia was definitely referred to as that of the states.

Although all agreed that the states would not surrender up the militia, it was recognized that some uniformity of organization and arms was desirable.⁸⁰ When the present provision was submitted to the Convention by the committee of eleven, Madison urged this militia plan: "as the greatest danger to liberty is from standing armies, it is best to prevent them by an effective provision for a good militia."⁸¹ Immediately following this the present constitutional provision was adopted, but only after Mr. King, a member of the committee, had set down on the record the intended extent of the federal authority:

"by way of explanation, said, that by *organizing*, the committee meant, proportioning the officers and men—by *arming*, specifying the kind, size, and calibre of arms—and by *disciplining*, prescribing the manual exercise; evolutions, &c."

munication to Congress, August 7, 1789; 30 SPARKS, WRITINGS OF GEORGE WASHINGTON (1833-1837) 372. And General Marshall seems to fall into the same error as Washington in justification for conscription. (82 *Army & Navy Journal* 32.)

78. 5 ELLIOT'S DEBATES (1876) 443.

79. *Ibid.* 466.

80. *Ibid.* 443-445; 2 FARRAND, *op. cit. supra* note 29, 324, 326, 331, 332.

81. 5 ELLIOT'S DEBATES (1876) 466-7. Governor Randolph made even clearer the importance of the state militia as a compromise between no defence and the creation of large federal armies:

"With respect to a standing army, I believe there was not a member in the federal convention who did not feel indignation at such an institution. What remedy then could be provided?—Leave the country defenceless? In order to provide for our defence, and exclude the dangers of a standing army, the general defence is left to those who are the objects of defence. It is left to the militia who will suffer if they become the instruments of tyranny. The general government must have power to call them forth when the general defence requires it. In order to produce greater security, the state governments are to appoint the officers." 3 FARRAND, *op. cit. supra* n. 29, 319. See WALDROP, MACARTHUR ON WAR (1942) 91-92.

"added to his former explanation, that *arming* meant not only to provide for uniformity of arms, but included the authority to regulate the modes of furnishing, either by the militia themselves, the state governments, or the national treasury; that *laws* for disciplining must involve penalties and every thing necessary for enforcing penalties."⁸²

It therefore appears that the first rule which we stated as deducible from the Pinckney proposal was denied to the federal government and recognized in the states:

1. Only to the states do the able-bodied men owe the obligation of military training and service (militia) except as they are called into the federal service for the three purposes enumerated.

(a) The Phrase, "To Raise * * * Armies"

Leaving out of account the relation of the power to the militia provisions, there is some evidence that the authority "to raise and support armies" was considered to be unrestricted (at least as to numbers); other evidence points to the power being limited to recruitment by voluntary enlistment (except as the militia could be called). Hamilton, strongest advocate of unlimited federal power, in the *Federalist*, No. XXIII said: "These powers (including raising armies) ought to exist without limitation." He went on, in the same paper, to interpret the provision as authorizing raising armies "in the customary and ordinary modes practised in other governments." There is strong implication in the *Federalist* No. XXVI that in time of peace Hamilton did not have in mind anything but volunteers for he said:

"an army, so large as seriously to menace those liberties, could only be formed by progressive augmentations."

Since, if conscription is possible, the army could be raised to any size at one time, his argument assumes progressive enlistment controlled by successive Congresses' power of purse. At another point Hamilton seems to speak for an indefinite power to raise troops in war or peace, yet immediately follows it by a condemnation of a large army which "may be fatal."^{82a}

82. 5 ELLIOT'S DEBATES (1876) 464-5.

82a. The *Federalist*, No. XLI.

There is no reference, either in the debates or in the writings of those who urged an unlimited interpretation of the power "to raise armies" to suggest that they had in mind or intended to urge conscription. Nor is there any clear cut reference to restricting the power to voluntary enlistments. But it is reasonably certain from a thorough reading that they were urging only two points: that the power should apply in peace as well as war; that there should be no specific limitation of numbers to be enlisted.⁸³

Hamilton's suggestion that the power embraced "the customary and ordinary modes practised, in other governments" is worth considering. The question arises: practiced when? At the time the words were included in the Constitution or when the exercise of the power is later challenged? In 1787 or in 1944? By 1917 nearly all countries employed wartime conscription; ⁸⁴ by 1939 about one-half the countries had peacetime conscription, though none of the Anglo-American democracies employed it.⁸⁵ I think it would be generally agreed that we are trying to discover the practice in 1787 so as to discover the meaning attached by the framers of the Constitution. The authority on conscription, Captain Elbridge Colby, points out that conscription did not exist in 1787:

"We must look upon conscription * * * as something characteristically modern * * * occurred for the first time in France * * * September 5, 1798."⁸⁶

He distinguishes conscription from the old feudal levies, the French "milice" and the British and American militia. In 1704

83. The Federalist XXIII, XXVI, XLI. Pinckney's speech, which appeared in pamphlet form, was never fully delivered and cannot be considered to reflect the views of delegates; 3 Farrand, *op. cit. supra* note 29, 106, 116, 118-9. Mr. Martin's report to the Maryland legislature is often referred to as proving unlimited federal power: "Congress have also the power given them to raise and support armies, without any limitation as to numbers, and without any restriction in time of peace." (*Ibid.* 207.) This is part of an impassioned speech to get Maryland to reject the Constitution.

84. See list in Selective Draft Law Cases at p. 378, *op. cit., supra*, note 43.

85. Great Britain, Australia, Canada, Ireland, New Zealand, United States; see *League of Nations, Armament Year Book*, 1938 and 1939-40.

86. "Conscription in Modern Form," *The Infantry Journal*, June 1929. See also his articles in the Encyclopedia of the Social Sciences and the Encyclopedia Britannica.

and 1707 attempts to compel military service were rejected by the British Parliament as unconstitutional. In 1756, 1757, 1778, 1779 criminals, "idle and disorderly persons" were pressed into British service as punishment.⁸⁷ Even these acts were severely criticised in England and were objected to in our Declaration of Independence.⁸⁸ "When voluntary enlistments fell short of the proposed numbers (during the American Revolution), the deficiencies were, by the laws of the several states, to be made up by draft or lots from the militia."⁸⁹ It would therefore appear that the plan adopted by the constitutional convention was not standing armies, not conscript or impressed armies but the distinctly Anglo-American militia system (in the United States, State-militia system).

The only Supreme Court case to consider fully the militia and its relation to the army, *United States v. Miller*,⁹⁰ states:

"The Militia which the States were expected to maintain and train is set in contrast with Troops which they were forbidden to keep without the consent of Congress. The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia—civilians primarily, soldiers on occasion.

"The signification attributed to the term Militia appears from the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators. These show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense. 'A body of citizens enrolled for military discipline.' And further, that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time."

Federal legislation has always drawn a distinction between

87. 4 Anne. Ch. 10; 29 Geo. 2, Ch. 4; 30 Geo. 2, Ch. 8; 18 Geo. 3, Ch. 53; 19 Geo. 3, ch. 10.

88. Declaration of Independence; 1 LECKY, HISTORY OF ENGLAND IN THE 18TH CENTURY (1891) 500 ff.

89. 2 RAMSEY'S LIFE OF WASHINGTON (1807) 246; other authorities are found in *United States v. Miller*, 307 U. S. 174, 59 Sup. Ct. 816 (1938) and the briefs filed therein.

90. 307 U. S. 174, 179, 59 Sup. Ct. 816, 818 (1938).

"armies" (volunteers under the power to raise armies) and "national forces" or militia (all able bodied citizens)—see footnote 102.

History of State Militia—Federal Organizing, Arming, Disciplining.

The relationship of the states and the federal government to the militia was well understood. Both began acting in accordance with the theory of supremacy of the state and restriction of the federal supervision to the above stated matters. On April 4, 1786, New York enacted a law "That every able-bodied Male Person, being a Citizen of this State * * * (except such Persons as are hereinafter excepted)" should be a part of her militia, should furnish certain arms, etc. Massachusetts provided for the composition of her militia at the January Session in 1784. Virginia^{90a} did likewise in October 1785. These militia or compulsory military service laws granted exemptions to those who could not participate in war because of religious beliefs.⁹¹ The power of the States thus to compel military service, subject to these exemptions has been upheld.⁹²

In December 1790 Congress considered the first Militia bill. One of the questions was who had the real control of the militia and who could grant exemptions—all agreed that the states had major control because the militia belonged to the state.⁹³ When the Militia act was passed in 1792 it therefore provided for "exemptions as the legislatures of the several states shall provide."⁹⁴ Other similar statutes followed. All of these recognized the militia as a state organization, composed of the male citizens "of the respective States" with the exception of those persons "who are exempted by the laws of the respective States."⁹⁵

90a. 12 Hening's Statutes.

91. 245 U. S. 366, 375, 38 Sup. Ct. 159, 165 (1917).

92. *State v. Wheeler*, 141 N. Car. 773, 53 S. E. 358 (1906); *Peo. ex rel. German Ins. Co. v. Williams*, 145 Ill. 573, 33 N. E. 849 (1893); *Lanahan v. Birge*, 30 Conn. 438 (1862); *In re Dassler*, 35 Kan. 678, 12 Pac. 130 (1886).

93. 4 ELLIOT'S DEBATES (1876) 422-4, 438.

94. 1 STAT. 271 (1792).

95. Act of Apr. 30, 1810, c. 37; Act of Apr. 18, 1814, c. 80; Act of Apr. 20, 1816, c. 64; Act of May 12, 1820, c. 97; Act of Mar. 19, 1836, c. 44; Act

When Secretary of War Knox, on January 18 and 21, 1790, proposed a federal militia on the theory that all men owed a "military duty for the defense of the state"⁹⁶ his plan was not only rejected in Congress, but Rhode Island, which had not yet ratified the constitution, recommended an amendment: "that no person shall be compelled to do military duty, otherwise than by voluntary enlistment, except in case of general invasion * * *"⁹⁷ The first proposal of a conscription law in 1815 not only called forth Daniel Webster's attack resulting in the defeat of the bill, to which reference has been made, but it also brought representatives from various states together in the Hartford Convention where it was declared:

"The power of compelling the militia and other citizens of the United States, by a forcible 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."⁹⁸

Gradually the states abandoned the enrollment of militiamen and did not enforce their compulsory service laws. New York in 1846 exempted everyone from service on payment of a fee. The states had come to believe that the organized militia (national guard), supported solely by voluntary enlistment, was sufficient. This "breakdown" of the militia system and the inability to induct the organized militia into the federal forces are

of July 29, 1861, c. 25; Act of Mar. 2, 1867, c. 145; Rev. Stat. of 1878, Ch. XVI; Act of Jan. 21, 1903, c. 196, 32 Stat. L. 775.

96. 7 NILES'S REG. 296.

97. 1 ELLIOT'S DEBATES (1876) 372.

98. 7 NILES'S REG. 307.

given by Adjutant General Louis Stotesbury as the reasons for the federal selective service legislation.⁹⁹ But this abandonment of enrollment and use of volunteering by the states could not extend federal powers. In fact this very situation was foreseen in the Constitutional Convention and one of the proposals rejected read: "when states neglect to provide regulations for militia, it should be regulated and established by the legislature of the United States."¹⁰⁰ It may be that the United States, under its power of organizing, arming and disciplining could provide that regular registrations be made, and that a certain amount of drill in a certain manual of arms be given.

History—Calling Forth the State Militia.

From the beginning, a second type of law was also enacted by Congress, not under its power to organize the militia, but under its power to call out the militia, for the purpose of enforcing law, suppressing insurrection, repelling invasion. The act of February 28, 1795, provided: "That whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the President of the United States to call forth such number of the *militia of the state, or states* * * * as he may judge necessary to repel such invasion."¹⁰¹ This was the form of authorization used even during the War Between the States until the act of March 3, 1863, c. 75 which was hermaphroditic: expressed to be in fulfillment of "the duty of the government to suppress insurrection and rebellion", thus fitting into the power to call forth the militia, but containing a new provision that all citizens between twenty and forty-five "are hereby declared to constitute the national forces and shall be liable to perform military duty in the service of the United States when called by the President."¹⁰² A similar provision was enacted in 1898 and

99. N. Y. Times, p. 14, July 15, 1940.

100. 5 ELLIOT'S DEBATES (1876) 443, 465.

101. Act of Feb. 28, 1795, c. 36, 1 STAT. 424. See also: Act of May 9, 1794, c. 27; Act of June 24, 1797, c. 4; Act of Mar. 3, 1803, c. 32; Act of Apr. 18, 1806, c. 32; Act of Mar. 30, 1808, c. 39; Act of Apr. 10, 1812, c. 55; Act of July 17, 1862, c. 201.

102. Under this statute men were conscripted during the latter part of the

remains in force today.¹⁰³ These provisions would seem to attempt to create a federal "militia" in direct opposition to the decision reached in 1787 that there was to be no such militia.¹⁰⁴ No authoritative case has passed upon their constitutionality since the only question which has come before the courts is the power to compel military service in wartime. In 1863 the provisions drafting men for military service were a part of this type of statute, in 1917 and 1940 they were completely separate.¹⁰⁵

History—Raising and Regulating the Army.

As we have seen, there are three interrelated federal powers: (1) providing for organizing, arming and disciplining the state militia, (2) calling out the militia and (3) raising and regulating the Army and Navy. We have discussed elsewhere the restrictions on the power to raise armies. It is now only important to examine the expanding concept of "armies", as appears from federal laws, and to determine the extent to which the federal government has maintained the distinction between "armies" and "national forces" or "militia."¹⁰⁶ It can be seen from the statutes

civil war and this power was upheld (footnote 42). The draft riots and general opposition to the Act are well known. Its inefficiency is attested by the fact that 2,435,028 union troops were volunteers, only 255,373 were conscripted and of these only 50,663 personally served.

103. Act of Apr. 22, 1898, c. 187, 30 STAT. 361; 10 U. S. C. A. § 1 (1927); 32 U. S. C. A. § 1 (1928); see footnote 106.

104. See *supra* notes 69-75. Note that if all these provisions operate every adult male is (1) a part of the state militia (Act of Jan. 21, 1903, c. 196, 32 STAT. L. 775) and (2) of the federal militia (32 U. S. C. A. 1) and (3) of the national forces (Act of Apr. 22, 1898, c. 187, 30 STAT. 361 and 10 U. S. C. A. 1). Note also that a distinction is drawn between "armies" and "national forces" (militia)—10 U. S. C. A. secs. 1 and 2; 32 U. S. C. A. sec. 1.

There is some evidence of a *deliberate* attempt to eliminate state control of the militia. See EDMUNDS, *THE MILITARIZATION OF THE UNITED STATES*, 10-12.

105. Act of May 18, 1917, c. 15, 40 STAT. 76; Act of Sept. 16, 1940, c. 720, 54 STAT. 885.

106. Act of Sept. 29, 1789, c. 25: the military establishment created the year before "is hereby recognized to be the establishment for the troops in the service of the United States."

Act of May 28, 1798, c. 47: authorized the President "in the event of a declaration of war against the United States, or of actual invasion of their territory, by a foreign power, or of imminent danger of such invasion * * *

set forth in the footnote, constituting as they do a quick outline of the federal law, that the term "army" did not originally, and has not even now come to include the process by which the general manpower of the country are subjected to military duty. But the provisions prescribing general military service duty do attempt to create a federal militia in contravention of the intentment of the Constitution.

The Conscientious Objector and the Draft.

One final point remains—to analyze the constitutional relation of "conscience" to the drafting of men for military service and training.¹⁰⁷ It has been stated in several dicta, both by the Su-

to cause *to be enlisted*, and to call into actual service, a number of troops, not exceeding ten thousand non-commissioned officers, musicians and privates. * * *

Act of Feb. 2, 1901, c. 192, 31 STAT. 748; by this time it was provided: "That from and after the approval of this Act the Army of the United States, including the existing organizations shall consist of * * *" (here follows enumeration of regiments and their description).

Act of June 3, 1916, c. 134: "The Army of the United States shall consist of the Regular Army, the Volunteer Army, the Officers' Reserve Corps, the Enlisted Reserve Corps, the National Guard while in the service of the United States, and such other land forces as are now or may hereafter be authorized by law."

Act of June 4, 1920, c. 227, 41 STAT. 759: "The Army of the United States shall consist of the Regular Army, the National Guard while in the service of the United States, and the Organized Reserves, including the Officers' Reserve Corps and the Enlisted Reserve Corps."

Compare the existing provisions: 10 U. S. C. A. §§ 1 & 2, 3-5 (Supp. 1943), and 32 U. S. C. A. (Supp. 1943) 1:

"All able-bodied male citizens of the United States, * * * between the ages of eighteen and forty-five years, are hereby declared to constitute the national forces, and, with such exceptions and under such conditions as may be prescribed by law, shall be liable to perform military duty in the service of the United States." (10 U. S. C. A. 1.)

"The Army of the United States shall consist of the Regular Army, the National Guard of the United States, the National Guard while in the service of the United States, the Officers' Reserve Corps, the Organized Reserves, and the Enlisted Reserve Corps, and shall include persons inducted into the land forces of the United States under sections 301-318 of Appendix to Title 50." (10 U. S. C. A. 2.)

"The militia of the United States shall consist of all able-bodied male citizens of the United States * * * who shall be more than eighteen years of age and, except as hereinafter provided, not more than forty-five years of age, and said militia shall be divided into three classes, the National Guard, the Naval Militia and the Unorganized Militia." (32 U. S. C. A. 1.)

107. A good interpretation by a layman of the relation of conscience to the State is McCown, *Conscience v. The State*, (1944) 32 CALIF. L. REV. 1.

preme Court and the lower courts, that the right of a conscientious objector to be freed from military service is not a constitutional right, but is by congressional "grace", which can be granted or taken away at will.¹⁰⁸ Julian Cornell, an able attorney for conscientious objectors, seems to accept these statements as expressing the law.¹⁰⁹

In *United States v. Schwimmer*¹¹⁰ the Supreme Court majority denied naturalization to a highly educated woman who was an uncompromising pacifist, believing and teaching that persons should not defend the country by arms. Naturalization, they held, was a privilege which could be withheld or granted on condition. Although the right to be free from bearing arms was not involved—the applicant being a woman—the court seemed to state that conscientious objection was not a constitutional right, at least not one protected to an alien seeking citizenship. By another 5-4 decision, *United States v. Macintosh*,¹¹¹ naturalization was refused a professor who was not an absolute pacifist but felt unable to sign the naturalization oath to defend the Constitution "against all enemies, foreign and domestic * * *" since he would "not undertake to support 'my country, right or wrong'". The majority of the Court there said:

"The privilege of the native-born conscientious objector to avoid bearing arms comes not from the Constitution but from the acts of Congress."¹¹²

Three years later, in *Hamilton v. Regents*,¹¹³ two conscientious objector students refused to undergo compulsory military train-

108. *United States v. Newman*, 44 F. Supp. 817 (E. D. Ill., 1942); *Rase v. United States*, 129 F. (2d) 204 (C. C. A. 6th, 1942); cases hereafter discussed.

109. CORNELL, *THE CONSCIENTIOUS OBJECTOR AND THE LAW* (1943), and letter to the writer October 27, 1944: "It is well settled that exemptions from military service on religious or conscientious grounds is a matter of grace on the part of Congress. * * *"

110. 279 U. S. 644, 49 Sup. Ct. 448 (1929). Incidentally it is recognized that a woman is not subject to military service: "The fact that, by reason of sex, age, or other cause, they may be unfit to serve, does not lessen their purpose or power to influence others." 279 U. S. at 651; see also *supra* note 106.

111. 283 U. S. 605, 51 Sup. Ct. 570 (1931); see also *United States v. Bland*, 283 U. S. 636, 51 Sup. Ct. 569 (1931).

112. *Ibid.* at 624.

113. 293 U. S. 245, 55 Sup. Ct. 197 (1934).

ing at the University of California. Expelled, they brought action alleging that to compel them to take military training as a condition to their reinstatement was to deprive them of their constitutional right to religious freedom. Not so said the Court, for although the individual's constitutional right of religious freedom

"* * * does include the right to entertain the beliefs, to adhere to the principles and to teach the doctrines on which these students base their objections to the order prescribing military training."¹¹⁴

nevertheless, the student was seeking

"The '*privilege*' of attending the university as a student (which) comes not from federal sources but is given by the State. It is not within the asserted protection * * * California has not drafted or called them to attend the university."¹¹⁵

The same basis of decision was formulated by Justice Cardozo in his concurring opinion:

"The petitioners have not been required to bear arms for any hostile purpose, offensive or defensive, either now or in the future. They have not been required in any absolute or peremptory way to join in courses of instruction that will fit them to bear arms. If they elect to resort to an institution for higher education maintained with the state's moneys, then and only then they are commanded to follow courses of instruction believed by the state to be vital to its welfare."¹¹⁶

Justice Butler quoted from *United States v. Macintosh and Jacobson v. Massachusetts*¹¹⁷ and Justice Cardozo added:

"From the beginnings of our history Quakers and other conscientious objectors have been exempted as an act of grace from military service."¹¹⁸

These cases must be viewed in the light of more recent reference to them in Supreme Court opinions. First, it has been

114. *Ibid.* at 262.

115. *Ibid.* at 261, 262.

116. *Ibid.* at 265-6.

117. 197 U. S. 11, 25 Sup. Ct. 358 (1905).

118. 293 U. S. at 266, 55 Sup. Ct. at 206 (1934).

reiterated that the basis of these decisions was that the nation and state were not *making* an individual do an act contrary to his conscience, to which the court granted his constitutional right to adhere; they were merely attaching conditions to a *privilege* sought by the individual. Thus the Supreme Court in the second flag salute case said:

"This issue is not prejudiced by the Court's previous holding that where a State, without compelling attendance, extends college facilities to pupils who voluntarily enroll, it may prescribe military training as part of the course without offense to the Constitution. It was held that those who take advantage of its opportunities may not on ground of conscience refuse compliance with such conditions. *Hamilton v. University of California*, 293 US 245, 79 L. Ed. 343, 55 S. Ct. 197. *In the present case attendance is not optional.*"¹¹⁹

In *Schneiderman v. United States*¹²⁰ the Court referred to the *Macintosh* decision:

"The Constitution authorizes Congress 'to establish an uniform Rule of Naturalization' (Art. I, sec. 8, cl. 4), and we may assume that naturalization is a *privilege*, to be given or withheld on such conditions as Congress sees fit."

Second, the present Court has apparently accepted the minority view in the *Macintosh* and *Schwimmer* cases and might not now bar an alien from naturalization because of his conscientious scruples, much less prevent the exercise of freedom of conscience by a natural born citizen. In the *Schneiderman* case the Court denied the power of the government to revoke the naturalization of a communist because of his views as such communist. It referred no less than six times and "agreed to" the dissent of Chief Justice Hughes in the *Macintosh* and Justice Holmes in the *Schwimmer* case and cast doubt on the majority holdings therein:

"it was held that the statute created a test of belief * * *
We do not stop to reexamine this construction for even if it is accepted the result is not changed. As mentioned before, we agree with the statement of Chief Justice Hughes in dissent in *Macintosh's* case that the behavior requirement

119. *West Virginia St. Bd. of Ed. v. Barnette*, 319 U. S. 624, 63 Sup. Ct. 1178 (1943).

120. 320 U. S. 118, 131, 63 Sup. Ct. 1333, 1340 (1943).

is 'a general phrase which should be construed, not in opposition to, but in accord with the theory and practice of our government in relation to freedom of conscience.' 283 U. S. at page 635, 51 S. Ct. at page 579, 75 L. Ed. 1302. See, also, the dissenting opinion of Justice Holmes in the Schwimmer case, *supra*, 279 U. S. 653-655, 49 S. Ct. 451, 73 L. Ed. 889." ¹²¹

Nor can one read the recent expressions of the Supreme Court discussed elsewhere in this article ¹²² without sensing the intent of the Court to protect individuals in a constitutional right to freedom of conscience.

It is often urged that exemption from service has always been granted by statute, that those statutes usually impose conditions upon the exemption, and that this proves that the right derives from legislative grant rather than from constitutional provision. But this argument proves too much, for legislation may be declarative of or in reasonable regulation of constitutional rights as well as unrelated to them. "This is easily illustrated by the second flag salute case, *W. Virginia v. Barnette*,^{122a} wherein the court held that a child had a constitutional right based upon the child's religious belief to refuse to salute the flag. The Court had to find a constitutional right in order to grant protection to the child. It did not suggest that the Congressional act making the flag salute voluntary *and* granting conscientious objectors freedom from military service proved the rights to be matters of legislative grace. It implied that *both* were in furtherance of the Constitution:

"The action of Congress in making flag observance voluntary and respecting the conscience of the objector in a matter so vital as raising the Army contrasts sharply with these local regulations in matters relatively trivial to the welfare of the nation." ¹²³

A question can properly be raised whether the "free exercise (of) religion" guaranteed by the 1st amendment should include

¹²¹ 320 U. S. at 135, 63 Sup. Ct. at 1341 (1943).

¹²² See particularly section, *Tendency of Supreme Court to Reverse Previous Nationalistic Decisions*.

^{122a} *Supra*, note 3.

¹²³ 319 U. S. at 638, 63 Sup. Ct. at 1185 (1943).

the right to refuse to bear arms and the extent to which the federal government may regulate such right if it exists.

Certainly the framers of the Constitution knew of the religious claims of the dissident sects which refused to bear arms. The Convention met in Philadelphia, center of Quakerism. Two years earlier the Commonwealth of Virginia had led the way by granting full religious liberty.¹²⁴ "This act was brought about by the combined influence of the dissenters (Presbyterians, Baptists, Quakers, etc.), who formed at that time two thirds of the population, and the political school of Jefferson."¹²⁵ Washington had experience in the French wars with Quakers who "chose rather to be whipped to death than to bear arms, or lend us any assistance whatever upon the fort, or any thing for self-defense," until Washington finally had to release them.¹²⁶ Upon his inauguration Washington recognized the Quakers as most "exemplary and useful citizens" "except their declining to share with others the burthen of the common defence."¹²⁷ There is some evidence that a suggestion was made to include a conscience clause in the Constitution.¹²⁸ This was not adopted, apparently, as part of the well known decision to omit a bill of rights on the ground that it would be dangerous to attempt to define rights lest some be omitted and that there was no need to "reserve" rights from a government that had only *delegated* powers.¹²⁹ Religious tests for office were proscribed by the Constitution, and the right of affirmation instead of oath was inserted in deference to Quakers and similar sects who would not take oaths. So well understood

124. This, together with Jefferson's earlier Declaration of Rights, June 12, 1776, remain two of the great documents of American government and are the progenitors of all religious liberty provisions in the state and federal constitutions. See 14 HENING'S COLLECTION OF THE LAWS OF VIRGINIA 111; 1 Rev. Code (1819) 32, sec. 16; VA. CODE ANN. (Michie 1942) sec. 34, Virginia Constitution, sec. 58.

125. Schaff, *Church and State in the United States*, Am. Historical Assn., 28 (1888).

126. Letters to Gov. Dinwiddie, 2 SPARK'S WASHINGTON (1833-1837) 165, 169-70.

127. 12 SPARK'S WASHINGTON (1833-1837) 168-9; *George Washington, The Christian*, U. S. Geo. Washington Bicent. Comm. p. 13.

128. 3 FARRAND, *op. cit. supra* note 29, 290.

129. One of the best expressions of this is in The Federalist No. LXXXIV.

was this position that no discussion was necessary.¹³⁰ In the State debates which produced the 1st amendment specific reference to Quakers and similar sects was made.¹³¹ The states refused to ratify the Constitution unless a bill of rights was added; New York, Virginia, North Carolina, Rhode Island, New Hampshire, and the minority in Pennsylvania being especially insistent on the protection of religious freedom.¹³² Soon after the 1st amendment was adopted Aedanus Burke spoke strongly against the federal or state governments requiring conscientious objectors to pay a fee for exemption, because such legislation was "contrary to the Constitution."¹³³ The exemption of "persons conscientiously scrupulous of bearing arms" was referred to as a recognized principle in the first congressional debate on the militia bill¹³⁴ and some federal laws exempted religious objectors from any armed service.¹³⁵

The Supreme Court has taken judicial notice of Quaker's refusal to "doff hats," as an expression of their religious beliefs¹³⁶ and in the famous *Davis v. Beason* case¹³⁷ defined the intention of Article I:

"to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker *and the duties they impose*, as may be approved by his judgment and conscience, *and to exhibit his sentiments* in such form of worship as he may think proper, *not injurious to the equal rights of others*, * * *"

There may have been a time when the First Amendment was

130. 5 ELLIOT'S DEBATES (1876) 498, 2 FARRAND, *op. cit. supra* note 29, 461.

131. 2 ELLIOT'S DEBATES (1876) 120.

132. A very good collection of these proposals is in SCHAFF, CHURCH AND STATE IN THE UNITED STATES, pp. 29-34.

133. Annals of Congress, First Congress II, 1818, 1822, 1824, 1827.

134. 4 ELLIOT'S DEBATES (1876) 424.

135. E. g. 32 STAT. L. 775, sec. 2, also 1917 and 1940 Selective Service Law.

136. 319 U. S. 624, 633, footnote, 63 Sup. Ct. 1178, 1183 (1942).

137. 133 U. S. 333, 342, 10 Sup. Ct. 299, 301 (1889). It has been recognized that "religious" includes broadly "ethical," U. S. *ex rel.* Phillips v. Downer, 135 F. (2d) 521 (C. C. A. 2d, 1943) and U. S. v. Kauten, 133 F. (2d) 703 (C. C. A. 2d, 1943).

no restriction upon the states¹³⁸ but the substantial protection of that amendment is now carried by the 14th.

The sound position would seem to be that religious freedom protects the conscientious objector in his belief, in teaching it, and in acting upon it to the point of refusing to bear arms; all these rights are subject to reasonable legislative regulation in protection of the rights of others and of the government; any legislative modification of the rights must be in response and in proportion to a clear and present danger to the rights of others. This can be seen from the recent case of *Prince v. Massachusetts*,¹³⁹ another *Jehovah's Witness* case decided after *West Virginia v. Barnette*. Mrs. Prince claimed the right for her niece, aged nine, to distribute literature on the streets of a city in violation of a child labor act of Massachusetts providing that no girl under 18 should sell or distribute papers, magazines or other articles of merchandise on the street. By a 5-4 decision the Court, though it recognized that all "the great liberties insured by the First Article * * * have preferred position in our basic scheme," held that the Massachusetts provision was a reasonable regulation. Similar cases will readily come to mind.¹⁴⁰ It is, I take it, in accordance with this general view that courts have held that conscientious objectors during this war must report to Civilian Public Service camps.¹⁴¹ The limitation on legislation regulating the right of conscientious objectors to exercise their constitutional right has not yet been fixed; in due course by a process of exclusion and inclusion its boundaries can be marked out as the boundaries of legislative power have been judicially defined in other fields.

The attention of the reader is again called to the conclusions stated in the outline. This article has not attempted to discuss whether peacetime conscription is or is not desirable.¹⁴² It has.

138. *Permoli v. First Municipality No. 1 of New Orleans*, 44 U. S. 589, 609 (1845).

139. 88 L. Ed. (Adv.) 403 (1944).

140. *E. g. Reynolds v. United States*, 98 U. S. 145 (1878).

141. *E. g. Rase v. United States*, 129 F. (2d) 204 (C. C. A. 6th, 1942).

142. A good collection of material pro and con will be found in the *Handbook on Conscription*, Am. Fr. Serv. Comm., 20 S. 12th Street, Philadelphia, Penna. For those interested in abolishing conscription in the world through

said, that either the Constitution will have to be amended or the military system will have to be formed in accordance with the present Constitution.

Harrop A. Freeman.

WILLIAMSBURG, VA.

treaty, see the proposals of Woodrow Wilson, Lloyd George, Lord Riddel and others: *THE TREATY OF VERSAILLES AND AFTER* (1935) 61-63; *BIRDSALL, VERSAILLES, TWENTY YEARS AFTER* (1941) 125; *BONSALL, UNFINISHED BUSINESS* (1944) 152.