



AMERICAN CONSTITUTIONALISM
 VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

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Chapter 6: The Civil War/Reconstruction Era – Powers of the National Government

Congressional Debate on the Conscription Bill (1863)¹

As the Civil War dragged on, political leaders recognized that neither the Union nor the Confederate armies could be adequate when staffed entirely by volunteers. Federal law in 1860 required presidents to work through the state governments when calling forth troops to fight for the nation. Acting consistently with the Militia Act of 1795, both Abraham Lincoln and Jefferson Davis relied on state militia during the early days of the Civil War. This traditional system failed to provide either side with the troops necessary to fight a prolonged war. The Confederate Congress moved first, adopting a draft in 1862. Critics complained the measure violated states' rights. A year later, the U.S. Congress adopted a military draft. The Conscription Act of 1863 empowered the president to draft able-bodied men twenty to forty-five years of age directly into the U.S. army. Critics of the draft in Congress, who tended to be critics of the war generally, argued that the draft was unconstitutional. Senator James Bayard of Delaware and many Democrats maintained that the federal government could "raise and support" a national army only by calling out the state militias or asking for individual volunteers, not by instituting a national draft. Most Republicans and some Democrats argued that the draft was a necessary and proper means for executing the congressional power to raise and support an army. Everyone accepted that the states could and routinely did conscript individuals into the militia, with whatever exceptions and qualifications that the states thought appropriate.

Senator Henry WILSON (Republican, Massachusetts)

....
 If we mean to maintain the supremacy of the Constitution and the law, if we mean to preserve the united of the Republic, if we mean American shall live and have a position and name among the nations, we must fill the broken and thinned ranks of our wasted battalions.

....
 If we accept peace, disunion, death, then we may speedily summon home again our armies; if we accept war, until the flag of the Republic waves over every foot of our united country, then we must see to it that the ranks of our armies, broken by toil, disease and death, are filled again with the health and vigor of life. To fill the thinned ranks of our battalions, we must again call upon the people. The immense numbers already summoned to the field, the scarcity and high rewards of labor, press upon all of us the conviction that the ranks of our regiments cannot be filled again by the old system of volunteering. If we summon the militia, we must have new regiments and new officers – raw soldiers and untrained officers – enormous expenses and impotent forces. The nation needs not new regiments nor more officers; it needs new bayonets in the war-wasted ranks of the veteran regiments. In the ranks of these battle-scared regiments one new recruit is worth more than three in new regiments under untried officers: and the chances of comfort, health, and life are far greater in the old than in new regiments.

Volunteers we cannot obtain, and everything forbids that we should resort to the temporary expedient of calling out the militia. Such a call would waste the resources and absorb the energies and increase but little the military forces of the country. The needs of the nation demand that we should rely not upon volunteering, nor upon calling forth the militia, but that we should fill the regiments now in the

¹ Excerpt taken from *Congressional Globe*, 37th Cong., 3rd Sess., 976–977, 1363–1367.



field, worn and wasted by disease and death, by enrolling and drafting the population of the country under the constitutional authority “to raise and support armies.” The Constitution of the United States confers upon Congress the absolute and complete power “to raise and support armies,” qualified only by the provision that appropriations for that purpose shall be for not more than two years. . . . The illustrious framers of the Constitution, the statesmen and soldiers who had seen and felt, too, the weakness of the old Confederation, gave Congress the absolute power “to raise and support armies.” That unqualified grant of power carries with it, in the language of the *Federalist*, “all the powers requisite to the complete execution of its trust.” . . .

Sir, this grant to Congress of the power “to raise and support armies” carries with it the right to do it by voluntary enlistment or by compulsory process. If men cannot be raised by voluntary enlistment, then the Government must raise men by involuntary means, or the power to raise and support armies for the public defense is a nullity.

Senator James BAYARD (Democrat, Delaware)

. . . [F]rom the foundation of the Government to this day no attempt has ever been made in this country to pass a bill of this character by any Congress of the United States; no such bill has been introduced; no such doctrine as is involved in this bill has been contended for—that under the power to raise armies you can raise them in any other mode than by enlistment or recruiting or by the acceptance of volunteers. Heretofore it has been always held that the reserved force of the nation is the militia of the several States, which can be called into its service by the President of the United States under the provisions that Congress may adopt for that purpose; but when you call that militia into service, you call then in, not as individuals, but as organized bodies of men, to be commanded, under the express provision of the Constitution, by officers appointed by the States, and to be disciplined under the discipline that Congress prescribes, by the State authorities alone. The difference is very wide between a force of that kind in a Confederacy consisting of one General and many State governments, and the assumption of the right to control the entire able-bodied men of the country and force them into the regular standing army of the United States.

Sir, the power granted is to raise and support armies; and I admit if you choose to disregard the character and genius of the Government, and the objects for which it was framed, to disregard other provisions of the same Constitution, and the whole scope and object and intent of that Constitution, you may decide that the words convey power to raise an army in any mode Congress may prescribe. I cannot adopt such a construction. I read the words with the meaning in which they must be understood, having relation to the form of Government and the other provisions of the Constitution, in order to give a rational construction to the power intended to be conveyed.

...
What, then, is the construction which should be given to the power “to raise and support armies” in a free confederate Government as distinguished from a centralized despotism? . . . [A] free Government must always be founded on the decentralization and subdivision of power. . . . [A] fair construction is that the power “to raise and support armies” is to raise and support them in the modes only which were known and practiced in the country from which we have derived our institutions. That is by voluntary enlistment, recruiting, or volunteering, but not by conscription.

....
. . . [I]t is provided that Congress shall have the power “to provide and maintain a navy; to make rules for the government and regulation of the land and naval forces” — you must take [all the provisions] together—“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.”

Such are the provisions in the first article. In the second article, second section of the Constitution, it is provided that “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.*”



Taking all these clauses together, what is the unavoidable conclusion? If the power of Congress exists to call the entire able-bodied population of the United States into the standing regular Army of the United States by conscription, what is there left, and where was the necessity for these provisions as to the organization of the militia? . . . Was not the object, and can any other be assigned, to check that tendency to abuse which is inherent in centralized power, and to avert the inevitable danger arising from the entire military force of the United States being vested in a central Government of which the President was the head, and to command which he might select his own officers and agents?

....

Sir, I have heard it said in this Chamber, and repeated constantly in the public press, that the life of the nation is staked on success in putting down this rebellion. Mr. President, I differ from the honorable Senators as to what constitutes the life of the nation. In my judgment, the life of a free people consists in the preservation of their liberties, not in the extent of their dominion. If I must make the choice between the destruction of our form of government and the establishment of an imperial despotism in this country, a single Government over the whole country, including, if you please Canada and Mexico, or the severance of this Union into two, three, or four different republican Governments, I should not hesitate to accept the latter as preferable for the happiness of the people and their future prosperity.

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