

AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 7: The Republican Era – Individual Rights/Personal Freedom and Public Morality

Selective Draft Law Cases (Arver, et al. v. U.S., 245 U.S. 366 [1918])

The Supreme Court of the United States did not consider the federal government's authority to draft citizens for military duty until after passage of the Selective Service Act of 1917. Most state courts during the Civil War sustained federal authority to draft civilians, but those rulings were not appealed. Opponents of the draft during World War I, however, did make their claims in federal courts. Those who were convicted of violating the Selective Service Act challenged its constitutionality on a variety of grounds, including the Thirteenth Amendment's prohibition against involuntary servitude.

The Supreme Court unanimously rejected those claims. Chief Justice White's majority opinion declared that the draft was a constitutional exercise of the congressional war power and that military obligations were not an involuntary servitude. . As you read the opinion consider how the court's opinion can be reconciled with the framers' concerns about "standing armies." Chief Justice White only discusses the Thirteenth Amendment briefly. Was that argument serious or was White correct to dismiss such claims with a few words? Why were opponents of the draft in 1917 able to bring their case to the Supreme Court when previous challenges to the draft were heard only in state courts?

CHIEF JUSTICE WHITE delivered the opinion of the Court.

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

The act proposed to raise a national army, first, by increasing the regular force to its maximum strength and there maintaining it; second, by incorporating into such army the members of the National Guard and National Guard Reserve already in the service of the United States . . . and maintaining their organizations to their full strength; third, by giving the President power in his discretion to organize by volunteer enlistment four divisions of infantry; fourth, by subjecting all male citizens between the ages of twenty-one and thirty to duty in the national army for the period of the existing emergency after the proclamation of the President announcing the necessity for their service; and fifth, by providing for selecting from the body so called, on the further proclamation of the President, 500,000 enlisted men, and a second body of the same number should the President in his discretion deem it necessary. To carry out its purposes the act made it the duty of those liable to the call to present themselves for registration on the proclamation of the President so as to subject themselves to the terms of the act and provided full federal means for carrying out the selective draft. It gave the President in his discretion power to create local boards to consider claims for exemption for physical disability or otherwise made by those called. The act exempted from subjection to the draft designated United States and state officials as well as those already in the military or naval service of the United States, regular or duly ordained ministers of religion and theological students under the conditions provided for, and while relieving from military service in the strict sense the members of religious sects as enumerated whose tenets excluded the moral right to

engage in war, nevertheless subjected such persons to the performance of service of a noncombatant character to be defined by the President. . . .

The possession of authority to enact the statute must be found in the clauses of the Constitution giving Congress power "to declare war; . . . to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; . . . to make rules for the government and regulation of the land and naval forces." Article 1, 8. And of course the powers conferred by these provisions like all other powers given carry with them as provided by the Constitution the authority "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." Article 1, 8.

As the mind cannot conceive an army without the men to compose it, on the face of the Constitution the objection that it does not give power to provide for such men would seem to be too frivolous for further notice. It is said, however, that since under the Constitution as originally framed state citizenship was primary and United States citizenship but derivative and dependent thereon, therefore the power conferred upon Congress to raise armies was only coterminous with United States citizenship and could not be exerted so as to cause that citizenship to lose its dependent character and dominate state citizenship. But the proposition simply denies to Congress the power to raise armies which the Constitution gives. That power by the very terms of the Constitution, being delegated, is supreme. Article 6. In truth the contention simply assails the wisdom of the framers of the Constitution in conferring authority on Congress and in not retaining it as it was under the Confederation in the several states. Further it is said, the right to provide is not denied by calling for volunteer enlistments, but it does not and cannot include the power to exact enforced military duty by the citizen. This however but challenges the existence of all power, for a governmental power which has no sanction to it and which therefore can only be exercised provided the citizen consents to its exertion is in no substantial sense a power. It is argued, however, that although this is abstractly true, it is not concretely so because as compelled military service is repugnant to a free government and in conflict with all the great guarantees of the Constitution as to individual liberty, it must be assumed that the authority to raise armies was intended to be limited to the right to call an army into existence counting alone upon the willingness of the citizen to do his duty in time of public need, that is, in time of war. But the premise of this proposition is so devoid of foundation that it leaves not even a shadow of ground upon which to base the conclusion. Let us see if this is not at once demonstrable. It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need, and the right to compel it. . . .

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

. . . [It is contended] that although it be within the power to call the citizen into the army without his consent, the army into which he enters after the call is to be limited in some respects to services for which the militia it is assumed may only be used. . . . The fallacy of the argument results from confounding the constitutional provisions concerning the militia with that conferring upon Congress the power to raise armies. It treats them as one while they are different. This is the militia clause:

"The Congress shall have power: . . . To provide for calling for the militia to execute the laws of the nation, suppress insurrections and repel invasions; to provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states, respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress." Article 1, 8.

The line which separates it from the army power is not only inherently plainly marked by the text of the two clauses, but will stand out in bolder relief by considering the condition before the Constitution was adopted and the remedy which it provided for the military situation with which it dealt. The right on the one hand of Congress under the Confederation to call on the states for forces and the duty on the other of the states to furnish when called, embraced the complete power of government over the subject.

When the two were combined and were delegated to Congress all governmental power on that subject was conferred, a result manifested not only by the grant made but by the limitation expressly put upon the states on the subject. The army sphere therefore embraces such complete authority. But the duty of exerting the power thus conferred in all its plenitude was not made at once obligatory but was wisely left to depend upon the discretion of Congress as to the arising of the exigencies which would call it in part or in whole into play. There was left therefore under the sway of the states undelegated the control of the militia to the extent that such control was not taken away by the exercise by Congress of its power to raise armies. . . .

And upon this understanding of the two powers the legislative and executive authority has been exerted from the beginning. From the act of the first session of Congress carrying over the army of the government under the Confederation to the United States under the Constitution . . . down to 1812 the authority to raise armies was regularly exerted as a distinct and substantive power, the force being raised and recruited by enlistment. Except for one act formulating a plan by which the entire body of citizens (the militia) subject to military duty was to be organized in every state . . . which was never carried into effect, Congress confined itself to providing for the organization of a specified number distributed among the states according to their quota to be trained as directed by Congress and to be called by the President as need might require. When the War of 1812 came the result of these two forces composed the army to be relied upon by Congress to carry on the war. Either because it proved to be weak in numbers or because of insubordination developed among the forces called and manifested by their refusal to cross the border, the government determined that the exercise of the power to organize an army by compulsory draft was necessary and Mr. Monroe, the Secretary of War (Mr. Madison being President), in a letter to Congress recommended several plans of legislation on that subject. It suffices to say that by each of them it was proposed that the United States deal directly with the body of citizens subject to military duty and call a designated number out of the population between the ages of 18 and 45 for service in the army. The power which it was recommended be exerted was clearly an unmixed federal power dealing with the subject from the sphere of the authority given to Congress to raise armies and not from the sphere of the right to deal with the militia as such, whether organized or unorganized. A bill was introduced giving effect to the plan. Opposition developed, but we need not stop to consider it because it substantially rested upon the incompatibility of compulsory military service with free government, a subject which from what we have said has been disposed of. Peace came before the bill was enacted.

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

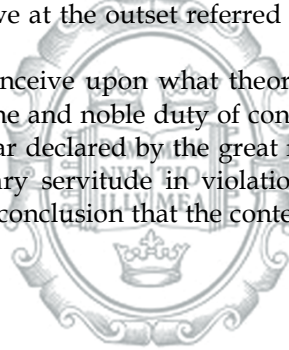
So the course of legislation from that date to 1861 affords no ground for any other than the same conception of legislative power which we have already stated. In that year when the mutterings of the dread conflict which was to come began to be heard and the proclamation of the President calling a force into existence was issued it was addressed to the body organized out of the militia and trained by the states in accordance with the previous acts of Congress. That force being inadequate to meet the situation, an act was passed authorizing the acceptance of 500,000 volunteers by the President to be by him organized into a national army. This was soon followed by another act increasing the force of the militia to be organized by the states for the purpose of being drawn upon when trained under the direction of Congress, the two acts when considered together presenting in the clearest possible form the distinction between the power of Congress to raise armies and its authority under the militia clause. But it soon became manifest that more men were required. As a result the Act of March 3, 1863 was adopted entitled "An act for enrolling and calling out the national forces and for other purposes." By that act which was clearly intended to directly exert upon all the citizens of the United States the national power which it had been proposed to exert in 1814 on the recommendation of the then Secretary of War, Mr. Monroe, every male citizen of the United States between the ages of 20 and 45 was made subject by the direct action of Congress to be called by compulsory draft to service in a national army at such time and in such

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

Brevity prevents doing more than to call attention to the fact that the organized body of militia within the states as trained by the states under the direction of Congress became known as the National Guard. Act of January 21, 1903. . .

. . . [W]e pass without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the act to which we at the outset referred because we think its unsoundness is too apparent to require us to do more.

Finally, as we are unable to conceive upon what theory the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation as the result of a war declared by the great representative body of the people can be said to be the imposition of involuntary servitude in violation of the prohibitions of the Thirteenth Amendment, we are constrained to the conclusion that the contention to that effect is refuted by its mere statement.



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