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CONSCRIPTION AND THE CONSTITUTION: THE ORIGINAL UNDERSTANDING

*Leon Friedman**

I. INTRODUCTION

THE general words of the Constitution—famous phrases such as “due process,” “freedom of speech,” “interstate commerce,” and “raise and support armies”—are not self-evident concepts. As Justice Frankfurter said, “The language of the [Constitution] is to be read not as barren words found in a dictionary but as symbols of historic experience illumined by the presuppositions of those who employed them. Not what words did Madison and Hamilton use, but what was it in their minds which they conveyed?”¹ While the framers obviously could not have foreseen the discovery of electromagnetic radio waves or atomic energy, and had no “intent” concerning the regulation of television stations or uranium piles, they knew only too well the dangers of a professional army and the need for training and mobilizing the citizens for defense. They considered these problems in more detail than those of virtually any other governmental function, and thus the plans they made for our nation’s military forces deserve detailed inquiry. Such a study reveals that the military structure presently existing in the United States, which depends primarily upon direct conscription of citizens into the federal army, fails to meet the standards established by the framers of the Constitution in 1787.

Arguments about conscription produce rather strange alliances. The left has traditionally opposed the draft on the grounds that it violates the conscientious beliefs of those opposed to war, compels participation in military adventures against reform movements throughout the world, and generally lays the heavy hand of government too forcefully on the shoulders of every citizen. The con-

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This Article is based upon a study which was prepared for the New York Civil Liberties Union as a basic memorandum on the military clauses of the Constitution. Its purpose was to show that the Military Selective Service Act of 1967 is unconstitutional since it exceeds the powers granted to the federal government. This Article does not purport to examine the desirability or undesirability of any system of federal conscription; it attempts only to marshal the available historical evidence to demonstrate that the framers of the Constitution did not intend to grant Congress the power to conscript.

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1. *Dennis v. United States*, 341 U.S. 494, 523 (1950) (concurring opinion).

tinuing viability of this tradition is exemplified by Senator Mark Hatfield's recent assertion that a volunteer army would "preserve individual liberty and freedom as much as possible from unjustified intrusion by the government" and still provide "maximum national security with the greatest efficiency and economy."² The far right also has frequently called for a volunteer army, but for markedly different reasons. Many conservatives and military men prefer a professional army since regulars are more easily trained and controlled, and a permanent corps is more efficient in the long run because of the lower turn-over in personnel. Such a professional force also fits traditional elitist ideas held by the right about the organization of society.

Others have argued that a federal draft is necessary not only to mobilize the nation's manpower most efficiently in an emergency, but also to serve as a check upon military adventures that offend the political conscience of the country. While a volunteer army would necessarily be "composed of the poor and the black,"³ a conscripted army is made up of all classes. And, to the extent that the sons of the middle class are unwilling hostages of the military, their parents will want to know exactly where they will be sent and why. Opposition to the Vietnam war seems to be growing even among the traditionally conservative areas of the Midwest for precisely this reason. President Nixon, who reads the political pulse very clearly, has pressed for an end to the war and an end to the draft⁴ because he is aware of these sentiments.

Thus, the basic organization of our military forces involves problems that are crucial to the democratic process. The worries and concerns that troubled the framers of the Constitution are still with us, and, as the debate on the draft continues, another look backward may be worthwhile.

II. THE SELECTIVE DRAFT LAW CASES

A. *Background of the Cases*

In the 1918 decision of the *Selective Draft Law Cases* (*Arver v. United States*),⁵ the United States Supreme Court first upheld the constitutionality of congressional conscription. These decisions have never been seriously challenged, and have been cited re-

2. *A Volunteer Army Is the Answer*, N.Y. Times, March 30, 1969, § 6 (Magazine), at 34, 35.

3. G. REEDY, WHO WILL DO OUR FIGHTING FOR US? 56 (1969).

4. N.Y. Times, Jan. 31, 1969, at 1, col. 8.

5. 245 U.S. 366. *Arver* was the principal decision among the three contemporaneous cases dealing with the question; see notes 8-9 *infra* and accompanying text. Hereafter "*Arver*" will be used interchangeably with "*Selective Draft Law Cases*."

peatedly as determining that question once and for all time. This Article will attempt to show that the *Selective Draft Law Cases* were based upon superficial arguments, disregard of substantial historical evidence, and undue deference to the exigencies of the First World War—in short, that they were incorrectly decided.

The cases arose in the midst of World War I and were decided only eight months after passage of the 1917 draft law.⁶ The Selective Draft Act had been signed into law on May 18, 1917, and June 5 was set as registration day for all young men of draft age. Two who refused to register were Joseph F. Arver and Otto H. Wangerin; they were indicted on June 8, 1917, tried the following month before a United States district court in Minnesota, found guilty, and sentenced to one year in prison. The Supreme Court granted a writ of error directly to the trial court,⁷ and argument was presented on December 13 and 14, 1917, along with the cases of other draft resisters from New York. At the same time the Court heard the appeals of Alexander Berkman and Emma Goldman,⁸ two noted anarchist leaders who had been found guilty of conspiring to counsel resistance to the draft law in New York, and the appeals of Charles E. Ruthenberg, Alfred Wagenknecht, and Charles Baker, prominent Ohio Socialists who were convicted of encouraging a young man not to register.⁹

In asserting the invalidity of the draft, the defendants pressed two primary arguments: that the thirteenth amendment's prohibition of involuntary servitude deprived Congress of any power to conscript; and that the draft conflicted with the militia clauses of the Constitution since the federal government had effectively destroyed the state forces by drawing all the members of the state militia into federal service and shipping them overseas. In the course of their argument, the defendants traced the history of English military organization, emphasizing that no general conscription law had been passed in England prior to the twentieth century. They also claimed that the acts and regulations of the draft unlawfully delegated legislative authority to the President.

The Government's case was argued by John W. Davis, then Solicitor General, later Democratic presidential candidate, and one of the greatest advocates ever to practice before the Supreme Court.

6. Act of May 18, 1917, 40 Stat. 76.

7. At this time, a writ of error could be taken from the district court directly to the Supreme Court in any case involving "the construction or application of the Constitution of the United States." Act of March 3, 1911, ch. 231, § 238, 36 Stat. 1157.

8. *Goldman v. United States*, 245 U.S. 474 (1918).

9. *Ruthenberg v. United States*, 245 U.S. 480 (1918).

Davis submitted a joint brief for all of the cases, and Chief Justice Edward White carefully followed it in his opinion upholding the law. Davis characterized the power to conscript as an essential attribute of sovereignty. He cited the large number of nations enforcing compulsory military service in 1917, concluding: "It would be a contradiction in terms to declare the Government of the United States a sovereign, endowed with all the powers necessary for its existence, yet lacking in the most essential of all—the power of self-defense."¹⁰ The Government also cited the many colonial and state laws in force before 1787—almost 200 were listed—calling for compulsory militia service by all male citizens. Davis argued that the fact that a federal draft was proposed (although not passed) in 1814 and the fact that a conscription law was enacted during the Civil War showed the practical exercise of the power and was therefore a recognition of it.

Nor were the militia clauses of the Constitution¹¹ relevant, he claimed, since men were taken directly into a federal army by the 1917 law rather than as members of a federalized state militia. Finally, the Government dismissed the thirteenth amendment argument by pointing out that the sole purpose of the amendment was to abolish chattel slavery, not to eliminate compulsory governmental service.

Surprisingly, none of the parties in the *Selective Draft Law Cases* relied to any extent on precedent or history. There had been a few remarks about conscription in earlier federal cases,¹² and a Pennsylvania Supreme Court case, *Kneedler v. Lane*,¹³ had upheld the Civil War draft. But no Supreme Court decision that was on point had ever been handed down. Even though the Government's brief was 137 pages long, only three pages were devoted to the Constitutional Convention of 1787 and to the various state ratifying conventions while an additional three pages contained citations from *The Federalist Papers*. Yet these sources are traditionally the most important aid to constitutional interpretation. Moreover, the petitioners' briefs in *Arver* discussed the same subject matter in only one paragraph. Thus, the Court was deprived of the most crucial materials on which to base its decision.

The Supreme Court's unanimous opinion upholding the con-

10. Brief for the United States at 10, *Ruthenberg v. United States*, 245 U.S. 480 (1918).

11. U.S. CONST., art. I, § 8, cl. 16; *id.*, art. I, § 10.

12. See, e.g., *In re Grimley*, 137 U.S. 147, 153 (1890); *Tarble's Case*, 80 U.S. (13 Wall.) 397, 408 (1871).

13. 45 Pa. 238 (1863).

scription law followed the government's presentation closely. In essence, Chief Justice White found that the constitutional provisions granting Congress power "to declare war"¹⁴ and "to raise and support armies,"¹⁵ combined with the necessary and proper clause, permitted the Government to draft citizens directly into a federal army.¹⁶

The Chief Justice's opinion placed principal reliance on five points. (1) The constitutional language allowing Congress to raise armies permitted a compulsory draft, since Congress must have the power to procure men by any means for those armies. (2) All nations as attributes of sovereignty have the right to conscript. (3) The English had compelled military service throughout their history. (4) The colonies had also used conscription into the militia. (5) The Continental Congress' lack of power to raise and control its own army was one of the reasons for the formation of the new Constitution. The Court then went beyond the Federalist period and noted that in 1814 Secretary of War James Monroe had proposed a plan for conscription, and that a conscription law had been passed during the Civil War. An analysis of each constituent part of the Court's opinion shows how the political pressures of World War I produced a chain of errors in this most crucial case concerning the federal government's relationship to its citizens.

B. *Constitutional Language*

Chief Justice White began his opinion by quoting the various military clauses in the Constitution. He then wrote:

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. . . . [I]t 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 exertions is in no substantial sense a power.¹⁷

14. Art. I, § 8, cl. 11.

15. Art. I, § 8, cl. 12.

16. The Government cited an earlier federal case, *United States v. Sugar*, 243 F. 423, 436 (E.D. Mich. 1917), for the proposition that "power to declare war necessarily involves the power to carry it on, and this implies the means, saying nothing . . . of the express power 'to raise and support armies' as the provided means." Since war had been declared, it was not necessary to distinguish between the two sources of congressional power. Brief for the United States at 12, *Ruthenberg v. United States*, 245 U.S. 480 (1918).

17. 245 U.S. at 377-78.

However, as shown below,¹⁸ the proposed grant of power to raise a federal army by any means was questioned or opposed by a substantial political group when the Constitution was submitted for ratification. The Antifederalists did not wish a standing army of any kind to be established by the central government; thus the bare power to *enlist* a military force was significant in terms of the Confederation experience and in terms of the restrictions suggested by the critics of the Constitution. Furthermore, none of the federal government's enumerated powers can be exercised "without the men to compose" the offices involved. Did the grant of authority "to establish Post Offices" carry with it the power to conscript postmen? Does the power to "coin money" include the power to conscript employees for the mint? Without the specific grants in article I, Congress might not be able to expend public monies to build post offices or mints or to buy arms, and might not even be able to pay its employees in these branches of government. But no one ever suggested before the *Arver* case that any other enumerated power included authority to compel service in the governmental organization involved.

C. *Universality of Conscription*

To show that compulsory service was required by the Constitution, the Court noted that in 1918 most of the nations of the world had compulsory military service.¹⁹ However, the fact that every other nation in the world may have enforced conscription during World War I is irrelevant if the framers of the Constitution did not grant Congress that power. The United States may be the only nation with an electoral college system of choosing its chief executive or with a federal system with prohibitions on local interference with interstate commerce. The fact that virtually every other jurisdiction in the world permits the use of illegally seized evidence in criminal trials is of no relevance when an interpretation of our Constitution is at issue.

Compulsory military service was not enacted in any modern nation until more than ten years after the ratification of the Constitution. A leading authority on conscription has described it as "something characteristically modern [which] occurred for the first

18. See text accompanying notes 128-74 *infra*.

19. 245 U.S. at 378:

It may not be doubted that the very conception of a just government and its duty to the citizens includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it. . . . To do more than state the proposition is absolutely unnecessary in view of the practical illustration afforded by the almost universal legislation to that effect now in force.

time in France [in] 1798."²⁰ Moreover, to argue that the Constitution does not permit a draft does not deny the "obligation of the citizen to render military service in case of need and the right to compel it." The framers knew that the nation's manpower might have to be marshalled in an emergency; but, as shown below, the system they selected was one requiring mobilization through the state militia system, not direct conscription into a federal army. Finally, at present, a much smaller group of nations enforces direct conscription than did in 1918; for example, Great Britain, Canada, India, and Pakistan do not have a direct draft today.²¹ But clearly the Constitution does not change as a larger or smaller number of foreign states pass laws on military service, and thus the *Arver* Court's reliance on the universality of conscription is at best marginally relevant.

D. *The English Experience*

The next argument advanced in the *Selective Draft Law Cases* was drawn from the military history of Great Britain. In one rather terse paragraph, the Court concluded:

In England it is certain that before the Norman Conquest the duty of the great militant body of the citizens was recognized and enforceable It is unnecessary to follow the long controversy between Crown and Parliament as to the branch of the government in which the power resided, since there never was any doubt that it somewhere resided. So also it is wholly unnecessary to explore the situation for the purpose of fixing the sources whence in England it came to be understood that the citizen or the force organized from the militia as such could not without their consent be compelled to render service in a foreign country, since there is no room to contend that such principle ever rested upon any challenge of the right of Parliament to impose compulsory duty upon the citizen to perform military duty wherever the public exigency exacted, whether at home or abroad. This is exemplified by the present English Service Act.²²

To cite the English experience before the Norman Conquest as a precedent for the American Constitution is far fetched at the very least. Similarly, the fact that the English Service Act of 1916 may have compelled service abroad has little relevance to the intention of the framers in 1787. But, ignoring these difficulties, the

20. Colby, *Conscription in Modern Form*, THE INFANTRY JOURNAL, June 1929, quoted in Freeman, *The Constitutionality of Peacetime Conscription*, 31 VA. L. REV. 40, 68 (1944).

21. *Conscription*, in 6 ENCYCLOPAEDIA BRITANNICA 366, 368 (1967 ed.).

22. 245 U.S. at 378-79.

Court leaped over a thousand years of English history in a few brief sentences and disregarded the crucial period preceding the Revolutionary War. The latter omission is particularly unfortunate, for an examination of the relevant historical period clearly demonstrates that during colonial times the regular army forces in England were always composed of volunteers.

In Cromwell's time, the Levellers and other republican supporters had demanded specific protection against conscription as part of the basic freedoms of all Englishmen. The original "Agreement of the People" presented to the Council of the Army in 1647 contained a section which proclaimed that "constraining any of us to serve in the wars is against our freedom; and therefore we do not allow it in our Representatives."²³

The Agreement of the People which was finally passed by the House of Commons in 1648 specifically provided:

We do not empower [Parliament] to impress or constrain any person to serve in foreign war, either by sea or land, nor for any military service within the kingdom; save that they may take order for the forming, training and exercising of the people in a military way, to be in readiness for resisting of foreign invasions, suppressing of sudden insurrections, or for assisting in execution of the laws; and may take order for the employing and conducting of them for those ends; provided, that even in such cases, none be compellable to go out of the county he lives in, if he procure another to serve in his room.²⁴

The behavior of Cromwell's troops in suppressing Parliament and taking command of the government proved to later commentators that a standing military force, independent of legislative control, was the most dangerous enemy of liberty. John Trenchard, one of the great liberal pamphleteers and an important influence on American colonial thought, wrote in 1698 that Cromwell's reign was

a true and lively Example of a Government with an Army; an Army that was raised in the Cause, and for the sake of Liberty; composed for the most part of Men of Religion and Sobriety. If this Army could commit such violences upon a Parliament always successful, that had acquired so much Reputation both at home and abroad, at a time when the whole People were trained in Arms, and the Pulse of the Nation beat high for Liberty; what are we to expect . . . in a future Age.²⁵

23. S. GARDINER, *THE CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION*, 1625-60, at 334 (2d ed. 1899).

24. *Id.* at 368-69.

25. *A Short History of Standing Armies*, in 1 *A COLLECTION OF TRACTS OF JOHN TRENCHARD AND THOMAS GORDON* 71-72 (1751).

Trenchard described the subsequent excesses of Charles II's time—the bribery of Parliament, the dissolution of the municipal corporations, the defiance of the Constitution—as a direct outgrowth of the king's control of a professional army.²⁶ Seizing upon the pretext of a war with Holland, Charles raised a force of 12,000 men but kept half of them near London so that they would be available for use against the legislative leaders. When the House of Commons ordered the Army disbanded, Charles dissolved Parliament; a new House again voted to disperse the army, and passed a resolution stating that "*the continuance of any Standing Forces in this Nation other than the Militia, was illegal, and a great Grievance and Vexation to the People.*"²⁷

Charles' successor, James II, continued the effort to maintain his own armed forces. When the Duke of Monmouth attempted to overthrow him in 1685, James increased the army to 15,000 men and later 30,000. To strengthen his position against Parliament, he sought allies among the Protestant dissenters and filled the army with Irish Catholics until they constituted about one third of his total forces. According to Trenchard, James "violated the Rights of the People, fell out with the Church of *England*, made uncertain Friends of the Dissenters and disobliged his own Army; by which means they all united against him."²⁸ William of Orange and Mary ascended to the English throne in 1689, and shortly thereafter Parliament passed a Declaration of Rights, the basic Bill of Rights in the English Constitution. The sixth article of the Declaration stated: "That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of parliament, is against law."²⁹ In Trenchard's view, however, even William went too far in organizing his army. War in Ireland led Parliament to grant the king 50,000 men and Trenchard wrote: "I will venture to say, that if this Army does not make us Slaves, we are the only People upon Earth in such Circumstances that ever escaped it, with the 4th part of their number."³⁰

John Trenchard and his later collaborator Thomas Gordon were significant transmitters of English liberal thought to the colonies. Historian Bernard Bailyn wrote of the English "coffeehouse radicals":

26. *Id.* at 74-75: "But he durst not have dreamt of all these Violations if he had not had an Army to justify them . . . [H]e rais'd Guards in *England* (a Thing unheard of before in our *English* Constitution) and by degrees increas'd them, till they became a formidable Army . . ."

27. *Id.* at 76-77

28. *Id.* at 80.

29. 1 W. & M., 2d sess., c. 2 (1688 O.S.).

30. Trenchard, *supra* note 25, at 78.

More than any other single group of writers they shaped the mind of the American Revolutionary generation. To the colonists the most important of these publicists and intellectual middlemen were those spokesmen for extreme libertarianism, John Trenchard . . . and Thomas Gordon.³¹

The overreachings of Cromwell, Charles II, and James II through their control of standing armies were prominent in the minds of the colonists as examples of the destruction of freedom; as Trenchard had written, "in no Country, Liberty and an Army stand together; so that to know whether a People are Free or Slaves, it is necessary only to ask, whether there is an Army kept amongst them."³² The answer to this threat lay in a militia system in which the "Nobility and chief Gentry of England are the Commanders, and the Body of it made up of the Freeholders, their Sons and Servants."³³ To Englishmen who shared this belief that a professional army was an instrument of tyranny, the idea of direct conscription into that force was unthinkable.

Proposals to conscript for the regular Army were advanced in Parliament in 1704 and 1707, but were rejected.³⁴ Moreover, under the military laws passed in 1756,³⁵ 1757,³⁶ 1778,³⁷ and 1779,³⁸ only idle and disorderly persons were pressed into service, and then only as punishment. This too was strongly condemned. It is true that compulsory service for the British militia system was theoretically established during this period; the act of 1757 provided an elaborate structure for choosing the militia on a territorial basis.³⁹ However, an extensive system of exemptions or substitutes made it extremely unlikely that a nonvolunteer would be taken. Professor J. R. Western, the leading expert on the English militia system, has noted:

The development of the law on the raising of militiamen can be summed up by saying that the principle of obligatory personal service receded farther and farther into the background. Every facility and encouragement was given for the discharge of the obligation by some means of voluntary enlistment, and few balloted men seemed to have had to serve in person save by their own free will.⁴⁰

31. THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 35 (1967).

32. Trenchard, *An Argument Shewing that a Standing Army Is Inconsistent with a Free Government*, in 1 A COLLECTION OF TRACTS, *supra* note 25, at 14.

33. *Id.* at 23.

34. Freeman, *supra* note 20, at 68-69.

35. 29 Geo. 2, c. 4.

36. 30 Geo. 2, c. 8.

37. 18 Geo. 3, c. 53.

38. 19 Geo. 3, c. 10.

39. 30 Geo. 2, c. 25, §§ 19-21.

40. THE ENGLISH MILITIA IN THE EIGHTEENTH CENTURY 254 (1965).

Professor Western also points out that a great many Englishmen found compulsory military service so "profoundly distasteful" that there were numerous riots against service in the militia after passage of the act of 1757, but that popular unrest abated when it became understood that the law could be avoided and "real conscription was not to be introduced."⁴¹ This strong popular opposition to conscription occurred despite the fact that the English militia acts specifically provided that no militiamen would be forced to serve abroad and that only a limited amount of service was required at home.⁴² Nonetheless popular hostility to military service was widespread and the people's aversion to forced military service, even in the militia, continued for many years.

The American colonial leaders were steeped in this anti-military tradition; the available evidence indicates that they were extremely sensitive to the dangers of a professional army and that they saw clearly the distinction between regular forces and the armed citizenry composing the militia. They were also conscious of the fact that no general compulsory conscription law for the regular army was in force in England during the eighteenth century.

E. *The Colonial Militia*

After discussing the English experience, the Supreme Court in the *Selective Draft Law Cases* cited the colonial militia system as a precedent for conscription:

In the Colonies before the separation from England, there cannot be the slightest doubt that the right to enforce military service was unquestioned and that practical effect was given to the power in many cases. Indeed the brief of the Government contains a list of Colonial acts manifesting the power and its enforcement in more than two hundred cases. . . . [I]t is indisputable that the States in response to the calls made upon them [by the Continental Congress] met the situation when they deemed it necessary by directing enforced military service on the part of the citizens. In fact the duty of the citizen to render military service and the power to compel him against his consent to do so was expressly sanctioned by the constitutions of at least nine of the States.⁴³

However, the colonial militia system has only the most tenuous connection to any modern conscription program. In the first place, the militia was thought of as the armed citizenry as a whole; that is, every able-bodied man was expected to own a weapon and to use it

41. *Id.* at 290-91.

42. *E.g.*, 30 Geo. 2, c. 25, §§ 19, 24, 51 (1757).

43. 245 U.S. at 379-80.

for the protection of his colony. Second, the primary duty expected of each militiaman was merely that he enroll, arm, muster, and attend periodic general training sessions.⁴⁴ This system hardly qualifies as a precedent for forced conscription of a citizen for an uninterrupted period in a regular army.

As Professor Russell F. Weigley points out, a distinction soon developed between the "Common Militia"—the entire population of able-bodied men—and the "Volunteer Militia" which in fact performed the functions required of an armed force:

When troops were needed for a campaign, the legislatures assigned quotas to the local militia districts. The local officials then called for volunteers and could impress or draft men when sufficient numbers did not come forward. Usually, compulsory service was limited to expeditions within the colony

Out of these methods there naturally grew more or less permanent formations of those persons willing to volunteer for active duty. . . .⁴⁵

The Selective Service System in its 1947 monograph *The Backgrounds of Selective Service* attempted to expand the *Arver* opinion's collection of compulsory colonial laws, citing hundreds of statutes which it claimed were precedents for federal conscription. But the laws show that the only element of compulsion in the colonial militia related to mustering and training. The training itself was often extremely lax, except in times of emergency.⁴⁶ Furthermore, most of the colonial statutes requiring periods of actual military service rather than mere training stipulated that the power existed only for defensive purposes. The Virginia statutes, for example, provided that men could be raised only in case of attack or upon certain knowledge of Indian presence.⁴⁷

Initially, most of the colonial laws restricted militia service to duty within the colony except in emergency situations, when the

44. See, e.g., R. WEIGLEY, *HISTORY OF THE UNITED STATES ARMY* 6 (1967):

The Massachusetts [militia] Law of 1631, passed when the colony was so new that it was extremely insecure, called for weekly drills, to be held every Saturday. Later it seemed safe enough to drill less often, and in 1637, training days were set at eight a year. When danger reappeared, training again intensified proportionately; there were twice-weekly drills during King Philip's War in 1675-76. On the training days, a town's militia company generally assembled on public grounds, held roll call and prayer, practiced the manual of arms and close order drill, and passed under review and inspection by the militia officers and other public officials. There might also be target practice and sham battles followed in the afternoon—when times were not too perilous—by refreshments, games, and socializing.

45. *Id.* at 8.

46. Cf. note 44 *supra*.

47. See SELECTIVE SERVICE SYSTEM, 2 *BACKGROUNDS OF SELECTIVE SERVICE*, pt. 14, at 4, 62, 76, 145, 166, 178-79 (Special Monograph No. 1, 1947) [hereinafter *BACKGROUNDS*].

governor could permit service outside the borders for limited purposes.⁴⁸ In later years the laws restricted to nonfreeholders compulsory service which would lead to expeditions outside the colony. A Virginia law passed in 1752⁴⁹ gave the colony power to levy vagrants or nonvoters, but no person who had a right to vote could be forced to serve outside Virginia. A later Virginia statute⁵⁰ also provided that only vagrants and the unemployed could be impressed for service beyond the borders of the colony. This restriction was congruent with the English practice, which made the militia strictly a county force except in time of invasion and excluded all peacetime service outside the immediate borders of the organizing province.

The Massachusetts laws were comparable. Special legislation was necessary to permit service outside the colony,⁵¹ and service was required only against an "attempt or enterprize [at] the destruction or invasion, detriment or annoyance of our province."⁵² Similarly, South Carolina passed a law in 1778 permitting "all idle, lewd, disorderly men," "sturdy beggars," and "vagrants" to go out of the state into the Continental Army ranks to fill the state's quotas.⁵³

In many states personal service from each citizen was not required. Liberal laws existed which provided for either substitution or payment of a small fine in lieu of service. For example, in Massachusetts there were five laws passed between 1740 and 1781 allowing a man to arrange for a substitute to take his place in the militia.⁵⁴ Other states, including Connecticut, Virginia, and New York, passed legislation providing for a small fine which freed citizens from virtually all forms of militia service. This practice became increasingly frequent in later years of the colonial period.⁵⁵

By the 1750's and the 1760's the need for even minimal universal training of all the males of the colonies had receded, and the trend was away from any kind of compulsion. No fewer than nine states abandoned compulsory military establishments in this period.⁵⁶ The fact that vagrants and the unemployed were swelling the ranks of the militia, as they had filled the ranks of the British standing army following the statute of 1756, made military service less and less desirable. A recent commentator has noted:

48. R. WEIGLEY, *supra* note 44, at 8.

49. 2 BACKGROUNDS, pt. 14, at 123-24.

50. *Id.* at 186-87.

51. *Id.*, pt. 6, at 205, 214-15.

52. *Id.* at 137.

53. *Id.*, pt. 13, at 57.

54. *Id.*, pt. 1, at 45-46.

55. *See id.* at 34-69.

56. *Id.* at 5.

It is difficult to believe that the colonial volunteers of the eighteenth century had more in common with the pityable recruits of the contemporary European armies than with the militia levies of an earlier period; nevertheless, changes in the social composition of American forces between about 1650 and 1750 were in that direction. . . .

Perhaps the vital change was in the tone of active service: with more social pariahs filling the ranks and military objectives less clearly connected to parochial interests, respectable men felt not so impelled by a sense of duty or guilt to take up arms. Only when a war approached totality (as in the Puritan crusade to Louisbourg in 1745, when an impressive percentage of Massachusetts manpower served in the land and sea forces) might the older attitude appear.⁵⁷

Only during the emergency of the Revolution was this trend reversed and compulsory service reintroduced. But every effort was made to fill the Continental Army quotas with nonvoters and non-freeholders.

Thus, the colonial experience showed only that (1) the primary compulsory aspect of the militia was the requirement to train; (2) the militia was fundamentally a defensive force; (3) continuous service was required solely during periods of emergency; (4) service outside the colony was for outcasts only; and (5) the trend was away from compulsion in the years preceding the Revolution. It is therefore not surprising that the Selective Service System was obliged to admit that the "evidence reveals no preconstitutional systems valuable as models" for a universal draft.⁵⁸

F. *Formation of the Constitution*

Another proposition which the Supreme Court relied upon to uphold the constitutionality of the draft related to the creation of a new government in 1787. The Court noted:

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.⁵⁹

This statement, however, completely jumbles a very complicated political process which began before the Revolution. The experi-

57. Shy, *A New Look at the Colonial Militia*, 20 WM. & MARY Q. 175, 182-83 (3d ser. 1963).

58. 2 BACKGROUNDS, pt. 1, at 2.

59. 245 U.S. at 381.

ence of the nation during the war and the dangers which the Constitution-makers were concerned about cannot be telescoped in the offhand way that the Court attempted in the *Selective Draft Law Cases*. A more detailed analysis of that period is necessary.

III. FORMULATION OF THE MILITARY CLAUSES OF THE CONSTITUTION

A. *Political Background*

As noted above, widespread revulsion existed in the American colonies against a standing professional army. Almost all of the colonial statesmen were familiar with John Trenchard's essays, in which he repeatedly sought to demonstrate that "unhappy Nations have lost that precious Jewel *Liberty* . . . [when] their Necessities or Indiscretion have permitted a Standing Army to be kept amongst them."⁶⁰ The behavior of British troops in America during the ten years before the Revolution confirmed their worst fears of this danger. When British troops landed in Boston in 1768 Andrew Eliot, a leading statesman, wrote: "To have a standing army! Good God! What can be worse to a people who have tasted the sweets of liberty!"⁶¹ The Boston Massacre of 1770 and passage of the Quartering Act in 1774, which permitted the seizure of all buildings for the use of British troops, showed the colonists how accurate Trenchard had been. Indeed, one of the principal complaints expressed in the Declaration of Independence was that George III "Has kept among us, in times of peace, standing armies without the consent of our legislature," and "has effected to render the military independent of and superior to the civil power."

As a result of the popular apprehensions about the military, the Continental Congress imposed strict control over the army that it organized to fight the Revolutionary War. Marcus Cunliffe, the distinguished English historian, has recently concluded that: "[T]he Continental Congress and the majority of Americans were sometimes more concerned with the danger of military overlordship than the danger of military inefficiency. From a combination of doctrine and habit they were reluctant to create their own version of a standing army."⁶² Examples of the distrust are plentiful; for instance, the Continental Congress insisted on regular reports from its commanding officer, George Washington, appointed his staff officers, and obliged him to consult with his generals in council before any major

60. Trenchard, *supra* note 32, at 7.

61. B. BAILYN, *supra* note 31, at 114.

62. SOLDIERS AND CIVILIANS 40-41 (1968).

military decision was made.⁶³ Even in the midst of the war, Connecticut proposed that no peacetime army should be allowed.⁶⁴

Furthermore, throughout the Revolution, Congress was never given any power to conscript soldiers directly into the Continental ranks. It had to rely primarily on the militia forces of the various states for the bulk of its fighting men. These forces were occasionally supplemented by enlistments; in June 1775, Congress permitted the enlistment of ten companies into the Continental Army to help New England militia forces around Boston. Although Congress later authorized increased musters, the enlistments, which ran generally for one year, always fell far below expectations. Short-term enlistments seemed an unnecessary leniency in the face of the national emergency, but as Professor Weigley has observed, "the basic cause of that policy was not Congressional folly but the caution necessary in creating a professional army among a people who had fled Europe partly to escape such armies."⁶⁵

When the states were called upon for levies or quotas of troops to meet specific campaign needs, the Continental Congress could not even compel them to deliver the number of troops requisitioned; as might be expected, some were notoriously slow in providing manpower. George Washington suggested a direct draft system in 1777, 1778, and 1780, but "Congress did not dare invoke that instrument in any year of the war."⁶⁶ The most that the Continental Congress was prepared to do was to urge the states to deliver their quotas "by draughts, or in any other manner they shall think proper."⁶⁷

However, the states were reluctant to rely upon conscription as a means of satisfying their congressional quotas. In part, this hesitancy may have resulted from the feeling that the state militia systems contained safeguards for the individual which would be vitiated when state forces were put under the control of the central government. While the militia laws had a compulsory element in that all the male citizens had to enroll, train, and muster, the militiamen were usually enrolled with their friends under officers whom they had known most of their lives. As noted above, generous provisions existed for paid substitutes to take the place of those

63. R. WEIGLEY, *supra* note 44, at 30.

64. M. CUNLIFFE, *supra* note 62, at 41.

65. R. WEIGLEY, *supra* note 44, at 38.

66. *Id.* at 38. Professor Weigley states that "Washington . . . had to recognize that compulsory service . . . imposed on an unlucky portion of the national manpower was a policy the country was not likely to accept." *Id.* at 41.

67. E. BURNETT, *THE CONTINENTAL CONGRESS* 390 (1941).

unwilling to serve, and the laws generally provided that the troops could not be sent outside their immediate borders without the consent of the legislature or the governor. The government leaders who controlled the militia were also subject to close electoral check. But none of these safeguards was present when a distant central authority in which the state had only one of thirteen voices decided whom or where the men had to fight. Thomas Jefferson expressed the prevailing sentiment in the states in a letter to John Adams, dated May 16, 1777:

Our battalions for the Continental service was sometime ago so far filled as rendered the recommendation of a draught from the militia hardly requisite. And the more so as in this country it ever was the most unpopular and impracticable thing that could be attempted. Our people under the monarchical government have learnt to consider it as the last of all oppressions.⁶⁸

The Continental Congress not only had to rely on the states for quotas of troops for each campaign; it also had to come hat-in-hand to them for money to pay for the troops it enlisted and the supplies it required, since Congress had no power to tax.⁶⁹ Each state was obliged to pay a proportion of the general expenses, based on its population. The states moved as slowly to supply money as they did to furnish men for the Continental cause; by 1780, fifty million dollars in quotas remained unpaid, and Congress was powerless to demand compliance.⁷⁰

There was another reason why the states were not prepared to surrender control of their individual militias to the central authorities: they wished to insure that they would have sufficient manpower to protect their own borders. The generous bounties offered by the states often meant that their ranks were adequate at the same time that the Continental army was experiencing the greatest difficulties recruiting troops. The state bounties "almost put a stop to enlistments in the Continental Army, for few engaged to serve three years . . . when by volunteering to serve in the militia for a few months they received a bigger bounty and higher pay."⁷¹ When the states did supply troops to the central government, they wanted to retain direct control over their own forces even in the field. Early in the war, for example, Samuel Adams of Massachusetts

68. 2 PAPERS OF THOMAS JEFFERSON 18 (J. Boyd ed. 1950).

69. See, e.g., J. ALLEN, *THE AMERICAN REVOLUTION* 216 (1954): "Taxes had come to be associated in patriot thinking with British tyranny, and in any event Congress lacked authority to collect them."

70. J. MILLER, *TRIUMPH OF FREEDOM: 1775-1783*, at 456-59 (1948).

71. *Id.* at 238.

wrote to Elbridge Gerry that "the Militia of each Colony should be and remain under the sole Direction of its own Legislative which is and ought to be the sovereign and uncontrollable power within its own limits or Territory."⁷² Gerry agreed with Adams, and responded: "We already see the growing thirst for Power in some of the inferior departments of the army, which ought to be regulated so far as to keep the military entirely subservient to the civil in every part of the United Colonies."⁷³ This combination of Congress' dependence on the states for men and money and the states' constant attempts to interfere with the military authorities nearly drove George Washington to distraction. In 1780 he wrote, "I most firmly believe that the Independence of the United States never will be established until there is an Army on foot for the War; that [if we are to rely on occasional or annual levies] we must sink under the expence; and ruin must follow."⁷⁴

Thus, the American leaders emerged from the Revolution with four separate and conflicting ideas about organizing the military power of the United States:

(1) Washington and other military leaders claimed that a federal, professional army, financed by the central government, had to be maintained.⁷⁵

(2) The political leaders continued to reflect the long-established popular fear of a standing army. Samuel Adams indicated the prevalence of this view even after the war when he wrote that a "standing army, however necessary it may be at some times, is always dangerous to the liberties of the people. Soldiers are apt to consider themselves as a body distinct from the rest of the citizens."⁷⁶

(3) The states continued to see the importance of maintaining as much control over their own militia as they possibly could.

(4) The idea of a direct draft by a central government acting upon every citizen without the intervening authority of the state governments was firmly and totally rejected even at the darkest moments of the Revolution.

The experience of the new nation immediately after the Revolutionary War confirmed each of these notions. The deplorable state of the nation's finances made the members of the army uneasy about the bounties and pay allowances which had been promised

72. E. BURNETT, *supra* note 67, at 107.

73. *Id.*

74. 20 THE WRITINGS OF GEORGE WASHINGTON 113-14 (J. Fitzpatrick ed. 1937).

75. *See id.* at 49-50: "Regular Troops alone are equal to the exigencies of modern war . . . No militia will ever acquire the habits necessary to resist a regular force."

76. R. WEIGLEY, *supra* note 44, at 75.

them. In 1783, a group of officers in New Jersey drew up a list of complaints and hinted at mutiny if they were not fulfilled; later the same year eighty Pennsylvania soldiers marched from Lancaster to Philadelphia and barricaded the Continental Congress in the State House while demanding redress of their grievances.⁷⁷ The apprehension that these actions caused led Congress to reduce the federal army to fewer than one hundred men. However, because of the need to defend the large Northwest section of the country and to garrison the various forts in Indian territory, the army was increased to approximately seven hundred men in 1785. When Shays' Rebellion broke out in 1786 in western Massachusetts—near the Springfield arsenal where the bulk of the Continental military stores were located—the army was increased to two thousand men. But the Massachusetts militia, and not the federal army, finally dispersed the rebels. To George Washington, Secretary of War Henry Knox, and others, the uprising demonstrated that the Confederation had become so feeble that it was unable to defend even its forts and arsenals.⁷⁸

The danger of popular uprisings such as Shays' Rebellion was one of the contributing factors leading to the call for the Constitutional Convention in the spring of 1787. But, while the weakness of the federal authorities during the Revolution and Shays' Rebellion disturbed many of the political leaders, they did not lose their well-established distrust of centralized government in general and of standing armies in particular.⁷⁹ The attempt by king and parliament to rule from across the seas through a professional army was not to be duplicated in the United States. Again and again during this period the people expressed their fear of too strong a central authority;⁸⁰ the constant refrain that "the purse and the sword" were not to be put in the same hands meant that the power to tax and spend the public monies and an unlimited power to control the

77. *Id.* at 76-79.

78. *See, e.g.*, Letter to Henry Knox, in *THE WASHINGTON PAPERS* 229-31 (S. Padover ed. 1958). *See also* R. WEIGLEY, *supra* note 44, at 84; W. WILSON, *GEORGE WASHINGTON* 256 (1897).

79. *See, e.g.*, J. MAIN, *THE ANTIFEDERALISTS* 15 (1961):

The suspicion of a standing army and the Antifederal determination to keep in local hands the control over the military had important consequences during and after the Revolution. Equally important in its effects was the conviction that the power to tax must be retained by the people. The long struggle with the governors and the decade of controversy with king and parliament re-emphasized and intensified a doctrine shared by all Englishmen.

80. For example, the town of West Springfield, Massachusetts, reminded its representatives to guard against a Congress "which will form a design upon the liberties of the People & [it will not be] difficult to execute such a design when they have the absolute command of the navy, the army & the purse." *Id.* at 15-16.

military should not be combined. In general, it was felt that a new balance should be created, giving the federal authorities some power to raise money, to establish a uniform currency, and to exercise direct command over a small military force required for essential tasks. But under no circumstances did the people wish to invest a new centralized government, over which they had little control, with the power to build up a standing army like the one that had been the instrument of oppression before 1775.

B. *The Philadelphia Constitutional Convention*

The Philadelphia Convention commenced its proceedings on May 28, 1787. The presentation of credentials, election of a chairman and adoption of rules took place on the first and part of the second day; the main business of the Convention began on May 29 with a speech by Edmund Randolph, Governor of Virginia and leader of the largest and most prestigious delegation. In his lengthy discourse, he enumerated the defects of the Articles of Confederation and commented upon the troubles then facing the separate states, including Shays' Rebellion in Massachusetts, the "havoc of paper money," violated treaties, and commercial discord. He then introduced a fifteen-point plan for a new federal government which could correct these shortcomings.⁸¹ The Randolph or Virginia Plan became the basis for discussing changes in the Confederation and served as the skeleton of the new Constitution. Randolph must therefore be considered one of the chief architects of the Constitution.

The very first defect of the government under the Articles of Confederation, according to Randolph, stemmed from its inability to defend itself against foreign invasion. As Madison reported his remarks, Randolph said the following:

He then proceeded to enumerate the defects: 1. that the confederation produced no security agai[nst] foreign invasion; congress not being permitted to prevent a war not to support it by th[eir] own authority—Of this he cited many examples; most of wh[ich] tended to shew . . . that particular states might by their conduct provoke war without controul; and that *neither militia nor draughts being fit for defence on such occasions, enlistments only could be successful*, and these could not be executed without money.⁸²

James McHenry of Maryland took down a more complete description of Randolph's speech. Elaborating on the enumerated defects,

81. RECORDS OF THE FEDERAL CONVENTION 7-14, 18-19 (M. Farrand ed. 1937) [hereinafter Farrand].

82. *Id.* at 19 (emphasis added).

Randolph noted that the Confederation had no means of preventing the states from provoking foreign invasion.⁸³ The Confederation, he said, could not even support a war; the states were constantly in arrears to the federal treasury, and the journals of the Continental Congress showed that a series of feeble expedients had been employed in the attempt to raise money for the nation's defense. He continued:

What reason to expect that the treasury will be better filled in the future, or that money can be obtained under the present powers of Congress to support a war. Volunteers not to be depended on for such a purpose. Militia difficult to be collected and almost impossible to be kept in the field. *Draughts stretch the strings of government too violently to be adopted.* Nothing short of a regular military force will answer the end of war, and this only to be created and supported by money.⁸⁴

Thus, at the very outset Randolph phrased the problem of providing an army in terms of *money*. Volunteer companies who would enlist without bounties—a system urged by many leaders and included in some of the early military laws—were “not to be depended on.” Since Congress had been totally dependent on the states for its revenues—including the money required for defense—a change was necessary in order to give the central government sufficient funds to support its army. The humiliating spectacle of Congress pleading with the states for money to defend the country could not continue; the “military force” to be raised under the new Constitution was one that had to be financed directly by the government. But Randolph, expressing the views of the strongest Federalist delegates—those who wished to give the national government the widest powers—excluded the power to conscript as too dangerous: it “stretch[ed] the strings of government too violently to be adopted.” The debates in the Convention, and those that took place afterwards in the states, centered on the desirability of his fourth alternative, on “enlistments” which alone “could be successful.”⁸⁵ The question to which the political leaders addressed themselves was whether federal officials should have the funds and authority to pay for a professional volunteer army and the right to control such a force.

Since the states had made every effort to retain command over their militia even when the troops were fighting under the Con-

83. *Id.* at 24-25: “If a state acts against a foreign power contrary to the laws of nations or violates a treaty, [the Confederation] cannot punish that State, or compel its obedience to the treaty It therefore cannot prevent a war.”

84. *Id.* at 25 (emphasis added).

85. *Id.* at 25-26.

tinental aegis, it was important to Randolph and other Federalists that direct control of a central army be in the hands of the new government. And, because the states had proved so reluctant to meet their quotas during the Revolution, it was important that the central authorities be free to enlist their forces directly from the people rather than being required to act through the states. But the delegates realized that they tread on dangerous ground by suggesting the formation of such a force in peacetime. What could be "worse to a people who have tasted the sweets of liberty" than a standing army? However, the idea of a direct draft of citizens into the national military was rejected on the very first day of the Convention as a matter too impossible to consider. No one—not the staunchest Federalist in the hall—was prepared to go that far.

Following discussion of the various elements of the Randolph Plan, which contained no specific military clause, attention focused on the alternative scheme introduced by William Paterson of New Jersey. It proposed that the executive "direct all military operations; provided that none of the persons composing the federal Executive shall on any occasion take command of any troops, so as personally to conduct any enterprise as General or in any other capacity."⁸⁶ The Committee of Detail, assigned to prepare the actual words of the new Constitution, in its fourth working draft of late July, suggested that the new government be empowered to "make war," "raise armies," and "equip Fleets."⁸⁷ For unknown reasons, the seventh draft recommended that "the Legislature of U.S. shall have the exclusive power—of raising a military Land Force—of equipping a Navy";⁸⁸ but the ninth draft returned to the original phraseology, "to make war; to raise armies, to build and equip Fleets." Shortly thereafter the Convention accepted a motion to change "raise armies" to "raise and support armies" and "build and equip" a navy to "provide and maintain."⁸⁹

At this point the Convention encountered its first real difficulties with the Government's power to raise and support armies; the key issue was again the historic fear of standing armies. Madison had already warned:

A standing military force, with an overgrown Executive will not long be safe companions to liberty. The means of defense agst. foreign danger, have been always the instruments of tyranny at home Throughout all Europe, the armies kept up under the

86. *Id.* at 244.

87. 2 *id.* at 143.

88. *Id.* at 158.

89. *Id.* at 323.

pretext of defending, have enslaved the people. It is perhaps questionable, whether the best concerted system of absolute power in Europe cd. maintain itself, in a situation, where no alarms of external danger cd. tame the people to the domestic yoke.⁹⁰

Elbridge Gerry of Massachusetts also was greatly concerned about the military clause. He acknowledged that the chief defect under the Articles of Confederation was the fact that the "existing Congs. is so constructed that it cannot of itself maintain an army."⁹¹ But, while many Antifederalists later advocated an absolute prohibition on a standing army in time of peace, Gerry was prepared to grant a limited power to Congress in this area.⁹² His solution was to allow Congress to use funds for maintaining a specific number of troops: "He proposed that there should not be kept up in time of peace more than _____ thousand troops. His idea was that the blank should be filled with two or three thousand."⁹³ Discussion continued with several members offering solutions to this problem, but ultimately no limit was imposed.

The Convention hedged even the limited power that it granted to buy an army through enlistments by insisting that "no appropriation of money to that use shall be for a longer term than two years."⁹⁴ By making the army return to the people—the legislative branch—for funds every two years, the delegates sought to minimize the dangers of tyranny. They considered this method of control more appropriate than a restriction on the number of troops or a ban on any peacetime establishment.⁹⁵ Later, George Mason introduced a resolution to preface the militia sections of the Constitution with a clause stating "that the liberties of the people may be better secured against the danger of standing armies in time of peace."⁹⁶ The motion was seconded by Randolph, and James Madison spoke in favor of it: "It did not restrain Congress from establishing a military force in time of peace if found necessary; and as armies

90. 1 *id.* at 465. George Mason of Virginia also expressed "hope there would be no standing army in time of peace, unless it might be for a few garrisons. The Militia ought therefore to be the more effectually prepared for the public defense." 2 *id.* at 326.

91. *Id.* at 329.

92. *Cf. id.*: "The people were jealous on this head, and great opposition to the plan would spring from such an omission. . . . He thought an army dangerous in time of peace & could never consent to a power to keep up an indefinite number."

93. *Id.*

94. *Id.* at 508.

95. Elbridge Gerry objected even to that clause since it "implied there was to be a standing army which he inveigled against as dangerous to liberty, as unnecessary even for so great an extent of Country as this, and if necessary, some restriction on the number & duration ought to be provided." *Id.* at 509.

96. *Id.* at 617.

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 Govt. on that head."⁹⁷ The motion, however, did not pass.

In summary, article I, clause 12 gave Congress a power it lacked under the Confederation—the unlimited authority to use federal funds to enlist an army. The power was granted because, as Randolph had observed, the militias were “difficult to be collected and . . . kept in the field” and because no other alternative seemed feasible. But the historic fears of a standing army led the delegates to limit the power at what they considered its source—by restricting the funds available to maintain an army. Clause 12 answered the concern of those who wished the new government to have *some* authority to keep up *some kind* of independent military force which would be used for specific national purposes. But it was hardly a blank check for the government to use *all* authority to raise *any* forces it desired in *any* manner it chose. Certainly it did not grant the power to draft; even the Federalists believed that such authority would “stretch the strings of government too violently to be adopted.”

The manner in which the militias were organized confirms the idea that the body of state militias consisting of the citizens at large, and not a national professional standing army, was intended to be the main military force of the United States. When Randolph introduced the original Virginia Plan, he suggested that “the national legislature” should have authority “to call forth the force of the Union agst. any member of the Union failing to fulfill its duty under the articles thereof.”⁹⁸ The issue was proposed three times with one change: “the federal Executive,” said the advocates of this modification, “shall be authorized to call forth ye power of the Confederated States, or so much thereof as may be necessary to enforce and compel an obedience to such Acts, or an Observance of such Treaties” that were passed by Congress.⁹⁹

The Convention was caught between two conflicting imperatives. On the one hand, they did not want the national authorities to coerce citizens with a standing army; on the other hand, if the only alternative power, the militia, were used as the primary arm of the United States, would it not then become a mere tool of the federal government? Hamilton, indeed, had thought it desirable for

97. *Id.*

98. 1 *id.* at 21.

99. *Id.* at 244-45.

"the Militia of all the States to be under the sole and exclusive direction of the United States."¹⁰⁰ But this idea, never formally submitted, was hardly acceptable. The states would not give up complete control over their own forces. The solution came in one of the many compromises made during the Convention. The Committee of Detail in reporting the third draft of the Constitution provided that no state shall keep a naval or land force, "Militia excepted to be disciplined, etc. according to the Regulations of the U.S."¹⁰¹ This language was elaborated by James Wilson, who proposed a clause stating that the legislature of the United States "shall possess the exclusive Right of establishing the Government and Discipline of the Militia—and of ordering the Militia of any State to any Place within U.S."¹⁰² By the time that the ninth draft was completed, the clause provided that Congress would have the power "to (make laws for) call(ing) forth the Aid of the Militia, in order to execute the Laws of the Union, (to) enforce Treaties, (to) suppress Insurrections, and repel invasions."¹⁰³ With the deletion of the reference to treaties,¹⁰⁴ this became clause 15 of article I, section 8 of the Constitution.

In the debate on the militia power, the delegates were quite concerned that there should be national uniformity in the regulation of the militia.¹⁰⁵ The matter was debated on August 18, 1787, with Oliver Ellsworth insisting that the whole authority of the militia should not be taken away from the states. Roger Sherman, John Dickinson, and George Mason attempted to work out a compromise allowing the government to exercise control over a certain portion of the Militia, one fourth to one tenth. Madison advocated national control, arguing: "If the States would trust the Genl. Govt. with a power over the public treasure, they would from the same consideration of necessity grant it the direction of the public force."¹⁰⁶ Moreover, Madison asserted, only the federal government had a full view of the general situation and could mobilize and

100. *Id.* at 293.

101. 2 *id.* at 135.

102. *Id.* at 159.

103. *Id.* at 168.

104. It is interesting to note that after the deletion of the phrase referring to treaties, the three instances in which the militia could be called out corresponded almost exactly to the provisions of the English Agreement of the People passed by the House of Commons in 1648. See text accompanying notes 23-24 *supra*.

105. For example, General C. C. Pinckney mentioned a case that had occurred during the war in which dissimilarity in the militia of different states "had produced the most serious mischiefs. Uniformity was essential. The States would never keep up a proper discipline of their militia." 2 Farrand 330.

106. *Id.* at 332.

marshal the necessary forces to meet any contingency. General C. C. Pinckney, on the basis of his military experience, had very "scanty faith in Militia. There must be also a real military force The United States had been making an experiment without it, and we see the consequence in their rapid approaches toward anarchy," a reference to Shays' Rebellion in Massachusetts the prior year.¹⁰⁷ Roger Sherman, however, insisted that the states would need their own militia for defense against invasion and insurrection and for enforcing obedience to their own laws. The matter was referred to a select committee at that point.

The debate on the matter was resumed on August 23, 1787. The select committee had proposed that Congress be given the power "to make laws for organizing, arming, disciplining the Militia, and for governing such parts of them as may be employed in the service of the U.S. reserving to the States respectively, the appointment of the officers, and authority of training the militia according to the discipline prescribed."¹⁰⁸ Once again Elbridge Gerry attacked the whole notion of giving the central government power over the militia¹⁰⁹ while Madison insisted that uniformity was necessary because the states neglected their militia. "The Discipline of the Militia is evidently a *National* concern," Madison said, "and ought to be provided for in the *National* Constitution."¹¹⁰ The Convention passed the proposal by a vote of nine to two, agreeing to a provision which allowed Congress "[t]o make laws for organizing arming & disciplining the Militia, and for governing such part of them as may be employed in the service of the U.S."¹¹¹ During the debate on the question whether the states should be free to appoint officers of the militia, Madison observed:

As the greatest danger is that of disunion of the States, it is necessary to guard agst. it by sufficient powers to the Common Govt. and as the greatest danger to liberty is from large standing armies, it is best to prevent them by an effectual provision for a good Militia.¹¹²

A clause allowing the states to appoint all of their officers was passed, and, with minor changes made by the Committee on Style,

107. *Id.*

108. *Id.* at 384-85.

109. "This power in the U.S. as explained is making the States drill-sergeants. He had as lief let the Citizens of Massachusetts be disarmed, as to take the command from the States, and subject them to the Genl. Legislature. It would be regarded as a system of Despotism." *Id.* at 385

110. *Id.* at 387.

111. *Id.*

112. *Id.* at 388.

it remains in the Constitution substantially as recommended by the Committee of Detail.¹¹³

The debate over the organization of the militia again points out how unthinkable it was to the framers that the central government could have any direct power to draft individual citizens into the general army. Only with the greatest reluctance did the delegates allow the central government to call the militia into service for specific purposes. The reason was obvious—a tyrannical central government with a large army would be able to destroy the hard-won liberties of the people. On the other hand, some central control was necessary to mobilize the militia for defense purposes and to compel obedience to the laws. But all the restrictions which the Convention imposed on this power, the fact that the states would be able to appoint the officers and train the militia, and the fact that the general government could control the militia only for the purpose of executing the laws of the Union, suppressing insurrections, and repelling invasions indicate that the framers were quite concerned about the danger of the central government using its military forces to suppress the freedoms of the people.

After circumscribing the central government's power to draw the militia into federal service with such careful restrictions, the delegates could not possibly have allowed the federal government to exercise direct control over the citizens by permitting a draft into the regular army. The matter was so impossible to imagine, given the circumstances and ideological climate of the times, that no voice was raised against it. The only mention of the draft at the Convention was by Edmund Randolph, a leading Federalist figure and proponent of the Constitution, who denied that the new government should have that power. It is inconceivable that stanch Antifederalists like Elbridge Gerry, who strongly opposed the creation of any standing army, would not have raised the loudest protest about any general power to draft by the federal government if they had thought that it was contained within the general grant of authority "to raise and support armies." All that was given by the grant, therefore, was the power to organize and enlist a federal, professional army which—the delegates thought—would consist of a limited number of garrison troops. That power was given grudgingly, only in the light of the severe hardship Congress had experienced during the Revolution in depending solely on the states for manpower and military supplies. But the door was opened for that limited purpose only.

113. U.S. CONST. art. I, § 8, cl. 16.

Differences in the language of the Constitution support this interpretation. When the word "armies" is used in article I, section 8, it does not encompass any organized body of the military; rather, it refers to an "army" in eighteenth century usage, a force far different from the "militia." The former existed as a highly specialized instrument of the central government, a body of trained and disciplined troops whose purpose was to protect the central government and execute its policies. The militia, on the other hand, was a quite different sort of military establishment, comprehending the whole mass of citizen-soldiers. Its principal function was to safeguard free men against foreign and domestic enemies—not the least of which was government itself. The idea that citizens have an obligation to bear arms for a national authority, and work against their own most profound interests, never occurred to the framers; it would have been a contradiction to their entire political heritage, manifestly inconsistent with their sense of the delicate balance between liberty and power, between the appetite for oppression and the instinct for resistance. If the citizen had any military obligation, it was to his local militia, where he and his compatriots might have to meet the advance of standing armies in the employ of even their own government.

C. *The Federalist Papers*

James Madison and Alexander Hamilton devoted a substantial portion of *The Federalist Papers* to the military clauses.¹¹⁴ The picture they drew of the military establishment confirms the foregoing interpretation of the structure that was delineated in the Philadelphia Convention. In the first place, the main military force was to be the militia; the professional army that was to be raised and controlled by the central government had limited functions. Hamilton's description of the English structure, which he used as a model for the American system, is illustrative:

A sufficient force to make head against a sudden descent, till the militia could have time to rally and embody, is all that has been deemed requisite [in England]. . . .

If we are wise enough to preserve the union, we may for ages enjoy an advantage similar to that of an insulated situation. . . . Extensive military establishments cannot, in this position, be necessary to our security.¹¹⁵

Besides bearing the initial shock of any sudden invasion until the

114. See generally THE FEDERALIST NOS. 8, 23-29, 41.

115. THE FEDERALIST No. 8, at 48-49 (J. Cooke ed. 1961).

militia could be mobilized, the regular army troops would guard the frontiers, "against the ravages and depredations of the Indians":

These garrisons must either be furnished by occasional detachments from the militia, or by permanent corps in the pay of the government. The first is impracticable; and if practicable, would be pernicious. The militia would not long, if at all, submit to be dragged from their occupations and families to perform that most disagreeable duty in times of profound peace. And if they could be prevailed upon, or compelled to do it, the increased expense of a frequent rotation of service and the loss of labor, and disconcertion of the industrious pursuits of individuals, would form conclusive objections to the scheme. It would be as burthensome and injurious to the public, as ruinous to private citizens. The latter resource of permanent corps in the pay of government amounts to a standing army in time of peace; a small one, indeed, but not the less real for being small.¹¹⁶

Thus Hamilton believed that the citizens at large would be enrolled in the militia while the regular army would consist of professionals enlisted for long periods. His statement is incompatible with any notion that the citizens could be taken directly into the regular army by a draft, "dragged from their occupations and families" in a "frequent rotation of service" to perform "disagreeable duty" in Indian territory.

As the preceding quotation indicates, Hamilton distinguished often between the citizens at large and the regular army. He noted that the art of war had progressed to the point at which specialization was necessary,¹¹⁷ and that the people no longer wished to devote themselves to the military arts:

The industrious habits of the people of the present day, absorbed in the pursuits of gain, and devoted to the improvements of agriculture and commerce are incompatible with the condition of a nation of soldiers, which was the true condition of the people of those [Greek] republics. The means of revenue, which have been so greatly multiplied by the encrease of gold and silver, and of the arts of industry, and the science of finance, which is the offspring of modern times, . . . have produced an intire revolution in the system of war, and have rendered disciplined armies, distinct from the

116. *THE FEDERALIST* No. 24, at 156-57 (J. Cooke ed. 1961).

117. *See, e.g., THE FEDERALIST* No. 25, at 162 (J. Cooke ed. 1961): "The steady operations of war against a regular and disciplined army, can only be successfully conducted by a force of the same kind. . . . War, like most other things, is a science to be acquired and perfected by diligence, by perseverance, by time, and by practice." Madison makes the same point in *THE FEDERALIST* No. 41, at 270 (J. Cooke ed. 1961): "If one nation maintains constantly a disciplined army, ready for the service of ambition or revenge, it obliges the most pacific nations who may be within the reach of its enterprizes to take corresponding precautions."

body of the citizens, the inseparable companion of frequent hostility.¹¹⁸

In a nation such as the United States, which was not subject to invasions or internal strife, armies would be small and the citizens would not be "habituated to look up to the military power for protection, or to submit to its oppressions"; instead, they would recognize professional armies as a necessary evil and would "stand ready to resist a power which they suppose may be exerted to the prejudice of their rights."¹¹⁹

Hamilton returned to this point in *The Federalist No. 29*, in which he again argued that a strong militia was the best protection against the dangers of a standing army.¹²⁰ Madison concurred in *The Federalist No. 46*:

Let a regular army, fully equal to the resources of the country be formed; and let it be entirely at the devotion of the Federal Government; still it would not be going too far to say, that the State Governments with the people on their side would be able to repel the danger. The highest number to which, according to the best computation, a standing army can be carried in any country, does not exceed one hundredth part of the whole number of souls; or one twenty-fifth part of the number able to bear arms. This proportion would not yield in the United States an army of more than twenty-five or thirty thousand men. To these would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence. It may well be doubted whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops.¹²¹

These statements show that Hamilton and Madison envisioned the regular army that Congress could raise as a small professional force, distinct from the citizens at large, and possessing limited functions and responsibilities. The yeomen of the country, organized in their militia, would be called out for the specific purposes mentioned in the Constitution and would act as a constant check on the government and its regular army. But the idea that citizens could be im-

118. THE FEDERALIST NO. 8, at 47 (J. Cooke ed. 1961).

119. *Id.* at 47-48.

120. According to Hamilton, a well-trained militia "'will not only lessen the call for military establishments; but if circumstances should at any time oblige the government to form an army of any magnitude, that army can never be formidable to the liberties of the people, while there is a large body of citizens little if at all inferior to them in discipline and the use of arms, who stand ready to defend their own rights and those of their fellow citizens.'" At 184 (J. Cooke ed. 1961).

121. At 321 (J. Cooke ed. 1961).

pressed into that army against their wills is totally inconsistent with the military structure outlined by the two Federalist leaders. No direct comment on this question appears in *The Federalist Papers* because it was entirely alien to the thinking of the time.

To both Hamilton and Madison, the problem of raising an army was simply a matter of raising the revenue to support the army, just as Randolph stated on the first day of the Philadelphia Convention.¹²² Since the Confederation lacked such a power, both men wanted to be sure that the new government would have independent means of securing funds for defense and would be given the authority to gather and support its own forces; but clearly nothing more was supposed to be granted by the Constitution. It is true that Hamilton was anxious to insure that the various limitations on the military power which existed under the Confederation or were suggested at the Convention would not be imposed, and at one point he used rather sweeping language to argue that position:

The authorities essential to the care of the common defence are these—to raise armies—to build and equip fleets—to prescribe rules for the government of both—to direct their operations—to provide for their support. These powers ought to exist without limitation: *Because it is impossible to foresee or to define the extent and variety of national exigencies, or the correspondent extent & variety of the means which may be necessary to satisfy them.* The circumstances that endanger the safety of nations are infinite; and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be co-extensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils, which are appointed to preside over the common defence.¹²³

These remarks are often cited to show the broad reach of the war power, and to support the assertion that this power necessarily includes the ability to conscript. However, those who rely on this language seldom note that Hamilton explains his meaning in the same paper. Two paragraphs after the quoted passage he states that

122. In *THE FEDERALIST* No. 41, at 276 (J. Cooke ed. 1961), Madison wrote: "The Power of levying and borrowing money, being the sinew of that which is to be exerted in the national defence, is properly thrown into the same class with it." At the beginning of *THE FEDERALIST* No. 30, at 187-88 (J. Cooke ed. 1961), the first paper after his discussion of the military clause, Hamilton stated: "It has been already observed that the Federal Government ought to possess the power of providing for the support of the national forces; in which proposition was intended to be included the expence of raising troops, of building and equipping fleets, and all other expences in any wise connected with military arrangements and operations."

123. *THE FEDERALIST* No. 23, at 147 (J. Cooke ed. 1961).

"unless it can be shewn, that the circumstances which may affect the public safety are reducible within certain determinate limits" there should be "no limitation of that authority, which is to provide for the defence and protection of the community, in any manner essential to its efficacy; that is in any matter essential to the *formation, direction or support* of the NATIONAL FORCES."¹²⁴ In other words, Hamilton is simply declaring that any traditional or accepted way of forming a professional army (in terms of the number or manner of enlisting men) or directing it (through any command structure decided by the authorities) or supporting it (by any system of pay scales deemed desirable) must be allowed. His statements can be understood only as a response to the various restrictions on a federal army suggested by the Antifederalists: a ban on any peacetime establishment, an absolute numerical limit on the peacetime army, or a short-term period of enlistment for professional soldiers. These were the limitations that he wished to avoid and his expansive language was offered to counter these attacks on the military power. Since even the most violent Antifederalist never claimed that the new government would have the power to conscript,¹²⁵ his statements were not directed to that problem in any way.

The interpretation is confirmed still later in *The Federalist No. 23*. In denigrating the old revolutionary military system, Hamilton argues:

We must discard the fallacious scheme of quotas and requisitions as . . . impracticable and unjust. The result from all this is, that the Union ought to be invested with full power to levy troops; to build and equip fleets, and to raise the revenues, which will be required for the formation and support of an army and navy, in the customary and ordinary modes practiced in other governments.¹²⁶

By "levy[ing] troops" Hamilton meant federalizing the state militia and bringing them into federal service by executive decree instead of requesting the states to furnish them under the quota system. Moreover, as stated earlier,¹²⁷ no government in the world had exercised a general power to conscript its citizens into its regular army—other than as punishment or as a means of removing paupers from the streets—at the time that the Constitution was drafted. Thus, it is clearly illogical to interpret Hamilton's statements as

124. *Id.* at 147-48.

125. See generally text accompanying notes 128-74 *infra*.

126. At 148-49 (J. Cooke ed. 1961).

127. See text accompanying notes 19-21 *supra*.

advocacy for a power beyond that which any other contemporary government had ever asserted; at most he must have been arguing only that the federal government should be given the same general powers which other states possessed, the ability to use unlimited funds to buy an army through enlistments. The juxtaposition of his remarks about the system of quotas and requisitions with a discussion of the power to raise troops shows the intent of his statement: the federal government should be able to compel the states to supply their militias and to enlist men directly without the interposition of the states.

In summary, *The Federalist Papers* must be interpreted in terms of the Confederation's inability to control the military and the Antifederalist arguments which Hamilton and Madison sought to counter. The broad language in *The Federalist Papers* met both of these problems. They are answers to specific questions raised at the time about the proper organization of the armed forces. But both men make clear in their remarks about the function and composition of the professional army that it would not be composed of the citizens at large.

D. State Ratifying Conventions

The arguments in the various state ratifying conventions also reflect strong popular sentiment against a standing army of any kind. Not only those attacking the Constitution but also some of its most forceful defenders repeated the maxim that a standing army was a potential instrument of tyranny although it was necessary to defend the nation against hostile invaders.¹²⁸ The grudging support which the military clauses received from those who must be regarded as its principal defenders is a good indication that everyone expected the standing army to be a small professional volunteer army and as Hamilton indicated, a mere holding force until the militia could be mobilized. Further evidence that none of the founders thought power had been granted to conscript into a federal army is the fact that even the most vociferous Antifederalists never raised this spectre in attacking the new Constitution.¹²⁹ They objected to the federal government's power to enforce its laws directly on the citizens of the states, to levy taxes upon them, or to have federal courts exercise jurisdiction over them, and they undoubtedly would have made reference to the power to conscript if they had had any idea that such a grant of authority was written

128. E.g., *THE FEDERALIST* No. 41, at 271 (J. Cooke ed. 1961) (Hamilton).

129. See generally text accompanying notes 128-74 *infra*.

into the new instrument. The absence of any claims in this area is strong evidence that the power was not present, since the Antifederalists drew on every conceivable source, particularly when the military clauses were in issue, to undermine ratification.

Indeed, many of the arguments which the Antifederalists asserted against the new Constitution, and many of the amendments which were recommended to correct alleged defects, were premised on the implicit assumption that the power to draft did not exist. For example, the delegates in a number of state conventions, proposed that the Constitution be amended to limit the term of *enlistments* for all members of the federal army.¹³⁰ If they thought that the federal government could conscript directly, they would surely have included a limit on the conscription term as well. In another state some delegates wished to include a conscientious objector clause in the Constitution. But they mentioned this problem not in connection with the power to raise a federal army but only in discussing the militia clauses¹³¹—a clear indication of the belief that compulsory service was possible only in the state militia. An examination of this pattern in the various state conventions confirms the universality of these sentiments.

1. *Opposition to Standing Armies*

Perhaps the most articulate attack upon the new Constitution was made by Luther Martin, one of Maryland's delegates to the Constitutional Convention. He delivered an address entitled "The Genuine Information" to the Maryland legislature on November 29, 1787, describing the proceedings in Philadelphia. His report, which ran for approximately forty printed pages in Elliot's *Debates*, was the most detailed Antifederalist challenge to the new Constitution. When he addressed himself to the section of the Constitution dealing with Congress' power to raise an army, Martin had the following comments:

[T]he Congress have also a power given them to raise and support *armies*, without any limitation as to numbers and without any restriction in time of peace. Thus, sir, this plan of government, instead of guarding against a standing army,—that engine of arbitrary power, which has so often and so successfully been used for the subversion of freedom,—has, in its formation, given it an express and constitutional sanction, and hath provided for its introduction. Nor could this be prevented. I took the sense of the Convention on a proposition, by which the Congress should not have power, in time

130. See pt. 4 *infra*.

131. See text accompanying notes 163-64 *infra*.

of peace, to keep imbodyed more than a certain number of regular troops, that number to be ascertained by what should be considered a respectable peace establishment. This proposition was rejected by a majority, it being their determination that the power of Congress to keep up a standing army, even in peace, should only be restrained by their will and pleasure.¹³²

The Antifederalists in Massachusetts took a similar view, placing particular emphasis on the danger inherent in the fact that the new Constitution granted Congress "the power of the purse and the sword."¹³³ General Thompson, a strong Antifederalist figure, cited the English experience, saying: "Congress will have power to keep standing armies. The great Mr. Pitt says, standing armies are dangerous—keep your militia in order . . ."¹³⁴ And, in Pennsylvania, minority delegates who voted against ratification issued an address declaring their "Reasons of Dissent"; one of the principal grounds which they specified was the fear of the central government's military power:

A standing army in the hands of a government placed so independent of the people, may be made a fatal instrument to overturn the public liberties; it may be employed to enforce the collection of the most oppressive taxes, and to carry into execution the most arbitrary measures. An ambitious man who may have the army at his devotion, may step up into the throne, and seize upon absolute power.¹³⁵

On the other hand, the delegates in many states recognized the need for a small peacetime standing army, primarily as a frontier garrison force; but they frequently emphasized the limited nature of this exception. James Iredell, a leading advocate of ratification in North Carolina and later an Associate Justice of the Supreme Court, expressed the hope that "in time of peace, there will not be occasion, at anytime, but for a very small number of forces."¹³⁶ Similarly, James Wilson of Pennsylvania supported the immediate creation of a small federal army to guard the frontier as a means of avoiding the possibility that a large force would be needed later; in his view, "[o]ur enemies, finding us invulnerable, will not attack us; and we shall thus prevent the occasion for larger standing armies."¹³⁷ In James Madison's opinion, however, "the most effectual

132. 1 J. ELLIOT, *DEBATES* 370-71 (2d ed. 1836) [hereinafter *DEBATES*].

133. 2 *DEBATES* 57: "Congress, with the purse-strings in their hands, will use the sword with a witness."

134. *Id.* at 80.

135. J. McMASTER & F. STONE, *PENNSYLVANIA AND THE FEDERAL CONSTITUTION, 1787-1788*, at 480 (1888).

136. 4 *DEBATES* 96.

137. 2 *id.* at 521.

way" to avoid standing armies was to strengthen the state forces and "to give the general government full power to call forth the militia, and exert the whole natural strength of the Union."¹³⁸

In the New York ratifying convention several amendments were proposed which indicate the kind of army that contemporary statesmen thought would be organized by the federal government. John Lansing recommended the adoption of a clause which provided "That no standing army, or regular troops, shall be raised, or kept up, in time of peace, without the consent of two thirds of the members of both houses present."¹³⁹ Alexander Hamilton also proposed an amendment that was substantially similar.¹⁴⁰ An amended version of Lansing's proposal was eventually adopted by the New York convention,¹⁴¹ and, in a preamble to the ratifying document, the delegates proclaimed:

[T]hat a well-regulated militia, including the body of the people *capable of bearing arms*, is the proper, natural and safe defence of a free state.

. . . .

That standing armies, in time of peace, are dangerous to liberty, and ought not to be kept up, except in cases of necessity . . .¹⁴²

Proposals to amend the Constitution by adding a prohibition on standing armies continued even after ratification and were frequently supported by Thomas Jefferson in his correspondence.¹⁴³

As these comments demonstrate, the leaders who ratified the Constitution believed that the militia—the armed body of all the citizens—was the prime source of the nation's defense, and that only a small professional army with limited functions could be created by the federal government. This contrast between a standing army and "the people" was often quite explicit in the debates of the Virginia convention,¹⁴⁴ which were recorded more extensively

138. 3 *id.* at 381.

139. 2 *id.* at 406.

140. 5 PAPERS OF ALEXANDER HAMILTON 185 (H. Syrett & J. Cooke ed. 1962): "That no Appropriation of money in time of Peace for the Support of an Army shall be by Less than two thirds of the Representatives and Senators present."

141. 1 DEBATES 330.

142. *Id.* at 328.

143. See, e.g., 13 PAPERS OF THOMAS JEFFERSON 442-43 (J. Boyd ed. 1956):

I sincerely rejoice at the acceptance of our new constitution by nine states. It is a good canvas, on which some strokes only want retouching. What these are, I think are sufficiently manifested by the general voice from North to South, which calls for a bill of rights. It seems pretty generally understood that this should go to Juries, Habeas corpus, Standing armies If no check can be found to keep the number of standing troops within safe bounds . . . abandon them altogether, discipline well the militia, and guard the magazines with them. More than magazine-guards will be useless if few, and dangerous if many

See also 12 *id.* 440; 14 *id.* 678.

144. See, e.g., 3 DEBATES 425: "Mr. GEORGE MASON. . . . I ask, Who are the

than those of any other state. James Madison made a particularly forceful assertion of this distinction in defending the federal government's power to call out the militia:

If resistance should be made to the execution of the laws . . . it ought to be overcome. This could be done only in two ways—either by regular forces or by the people. . . . If insurrections should arise, or invasion should take place, the people ought unquestionably to be employed, to suppress and repel them, rather than a standing army.¹⁴⁵

Randolph concurred in the judgment that primary military duties should fall upon "the people" rather than a standing army; in his interpretation of the Constitution, defense was "left to the militia, who will suffer if they become the instruments of tyranny."¹⁴⁶

2. *Comparison with the Military Powers of the Confederation and Other Countries*

Another indication that the Constitution did not purport to give the federal government the power of conscription can be found in the frequent comparisons made in state ratifying conventions between the new military system and the one established under the Articles of Confederation. In response to the Antifederalists' expressions of apprehension about standing armies, supporters of the Constitution argued that the military clauses were merely a recognition of the practices of the former government; thus, Chancellor Robert R. Livingston¹⁴⁷ of New York, James Wilson¹⁴⁸ and Thomas McKean¹⁴⁹ of Pennsylvania, and Alexander Hamilton¹⁵⁰

militia? They consist now of the whole people, except a few public officers." *See also id.* at 379, 385.

145. *Id.* at 378.

146. *Id.* at 401.

147. 2 DEBATES 278-79:

But, say the gentlemen, our present Congress have not the same powers. I answer, they have the very same. Congress have the powers of making war and peace, of levying money and raising men

We are told that this Constitution gives Congress the power over the purse and the sword. Sir, have not all good governments this power? Nay, does anyone doubt that, under the old Confederation, Congress holds the purse and the sword? How many loans did they procure which we are bound to pay! How many men did they raise whom we are bound to maintain!

148. *Id.* at 468: "Another objection is, 'that Congress may borrow money, keep up standing armies and command the militia.' The present Congress possesses the power of borrowing money and of keeping up standing armies."

149. *Id.* at 537: "The power of raising and supporting armies is not only necessary, but is enjoyed by the present Congress, who also judge of the expediency or necessity of keeping them up."

150. *Id.* at 352: "A government, to act with energy, should have the possession of all its revenues to answer present purposes. The principle for which I contend is recognized in all its extent by our old Constitution. Congress is authorized to raise troops, to call for supplies without limitation and to borrow money to any amount."

all asserted that the power to control the purse and the sword which was granted by the new instrument was essentially the same as that existing in the Confederation. That is, many defenders of the Constitution felt that the answer to the problem of national defense lay in the explicit grant of power to raise money for enlisting an army, and not in any system so radical as direct conscription into the federal forces. This distinction is particularly clear in James Wilson's discussion of Shays' Rebellion:

It may be frequently necessary to keep up standing armies in time of peace. The present Congress have experienced the necessity, and seven hundred troops are just as much a standing army as seventy thousand. . . . They may go further, and raise an army, without communicating to the public the purpose for which it is raised. On a particular occasion they did this. When the commotion existed in Massachusetts, they gave orders for enlisting an additional body of two thousand men.¹⁵¹

In addition to comparing the new government's authority to that of the old Confederation, some delegates also claimed that the military power of the United States was to be the same as that practiced by other nations—and, as noted above,¹⁵² no nation practiced conscription at the time that the Constitution was adopted. Thus, when Thomas Dawes of Massachusetts cited the English experience with standing armies under Charles II, James II, and William III as support for the proposition that national legislatures have the inherent authority "to raise armies,"¹⁵³ he must have been referring to the kind of professional volunteer army which Great Britain maintained throughout the eighteenth century. James Wilson's analogy to foreign governments also underscores what the delegates meant when they passed upon the power to "raise and support armies": "I have taken some pains to inform myself how the other governments of the world stand with regard to this power, and the result of my inquiry is, that there is not one which has not the power of raising and keeping up standing armies."¹⁵⁴

3. *Amendments on Military Jurisdiction*

The possibility that citizens could be tried by courts-martial was of central concern to many statesmen of the time who thought that trial by jury was the individual's greatest safeguard against tyranny. Luther Martin, the Maryland Antifederalist, expressed considerable concern over this problem, but he mentioned it only

151. *Id.* at 520-21.

152. See text accompanying notes 19-21 *supra*.

153. 2 DEBATES 97-98.

154. *Id.* at 520.

with respect to the militia clause, and not in connection with the provision for federal armies:

It was thought that not more than a certain part of the militia of any one state ought to be obliged to march out of the same . . . at any one time, without the consent of the legislature of such state. This amendment I endeavored to obtain; but . . . it was not adopted. As it now stands, the Congress will have the power, if they please, to march the whole militia of Maryland to the remotest part of the Union, and to keep them in service as long as they think proper, without being in any respect dependent upon the government of Maryland for this unlimited exercise of power over its citizens—all of whom, from the lowest to the greatest, may, during such service, be subjected to military law, and tied up and whipped . . . like the meanest of slaves.¹⁵⁵

According to Martin, who was a delegate to the Philadelphia Convention, it was the federal government's power to call out the militia that created the danger of military control over Maryland citizens; he did not even mention this problem when he discussed the congressional power to raise and support armies. It seems probable that his failure to mention the issue in the latter context was due to the unarticulated assumption that the regular army would be composed of volunteers who would waive their right to jury trial by enlisting.

It is apparent that the members of the Maryland convention shared Martin's assumption, for they proposed an amendment providing "That the militia shall not be subjected to martial law, except in time of war, invasion or rebellion."¹⁵⁶ According to the Amending Committee:

This provision to restrain the powers of Congress over the militia, although by no means so ample as that provided by the Magna Carta and the other great fundamental and Constitutional laws of Great Britain . . . yet it may prove an inestimable check; for all other provisions in favor of the rights of men would be vain and nugatory, if the power of subjecting all men, able to bear arms, to martial law at any moment should remain vested in Congress.¹⁵⁷

A similar amendment was proposed in Virginia.¹⁵⁸ It hardly seems possible that the delegates in these two states would be concerned about the danger that state citizens forced into the militia could

155. 1 *id.* at 371.

156. 2 *id.* at 552.

157. *Id.*

158. 3 *id.* at 660:

That each state respectively shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same. That the militia shall not be subject to martial law, except when in actual service, in time of war, invasion or rebellion

be subject to martial law, but would completely ignore the fate of state citizens conscripted directly into a national army. Rather, the conclusions seems inescapable that the Maryland and Virginia delegates believed that the militia clauses constituted the sole mechanism by which unwilling citizens could be brought under the jurisdiction of the federal military apparatus.

4. *Amendments on Term of Enlistment*

In addition to the amendment concerning military jurisdiction, the Maryland convention proposed several other limitations on the military power. Two of these amendments provided that soldiers could not be quartered in private houses and that no mutiny bill could continue in force longer than two years; a third stipulated that "no soldier be enlisted for a longer time than four years, except in time of war, and then only during the war."¹⁵⁹ Amendments which were virtually identical to the latter provision were also introduced in North Carolina¹⁶⁰ and Virginia.¹⁶¹

According to the proponents of the Maryland amendments, the three limitations on the federal government were necessary because "[t]hese were the only checks that could be obtained against the unlimited power of raising and regulating standing armies, the natural enemies of freedom."¹⁶² But surely the amendment limiting terms of enlistment would be a failure in achieving this objective if the federal government had the power to conscript citizens for unlimited periods of time. Again, the conclusion seems inescapable that the delegates who proposed these limitations on the central government's military powers never imagined that the new Constitution granted Congress the greater power of direct conscription.

5. *Proposals Concerning Conscientious Objectors*

Since many Pennsylvania citizens were Quakers who opposed military service in any form, that state's convention was forced to deal with the problem of conscientious objection. Thomas McKean discussed this problem; but, significantly, he referred to conscientious objection only in the context of the federal government's control over the militia, and not in relation to Congress' power to raise and support armies.¹⁶³ The minority report issued by the

159. 2 DEBATES 552.

160. 4 *id.* at 245.

161. 3 *id.* at 660.

162. 2 *id.* at 552.

163. *Id.* at 537: "It is objected that the powers of Congress are too large, because 'they have the power of calling for the militia on necessary occasions, and may call them from one end of the continent to the other, and wantonly harass them; besides, they may coerce men to act in the militia whose consciences are against bearing arms in any case.'"

Pennsylvania Antifederalists was also quite explicit in condemning the incursions on individual liberty that were possible under the militia clause:

The absolute unqualified command that Congress have over the militia may be made instrumental to the destruction of all liberty

First, the personal liberty of every man, probably from sixteen to sixty years of age, may be destroyed by the power Congress have in organizing and governing of the militia.¹⁶⁴

The Pennsylvania dissenters did not mention the threat to "the personal liberty of every man" in connection with the federal government's power to raise armies; in their view, apparently, the only compulsory military service contemplated by the Constitution was through the state militias. The minority delegates advanced another objection:

Secondly, the rights of conscience may be violated, as there is no exemption of those persons who are conscientiously scrupulous of bearing arms. These compose a respectable proportion of the community in the state

[During the Revolution] the framers of our State Constitution made the most express and decided declaration and stipulations in favor of the rights of conscience; but now, when no necessity exists, those dearest rights of men are left insecure.¹⁶⁵

The Pennsylvania dissenters' failure to relate the problem of conscientious objection to the provision for a standing army is easily explained by hypothesizing their belief that the regular army would be composed solely of volunteers who obviously would have no scruples about bearing arms.

6. *Financial Aspects of the Military Power*

The contemporary identification of "the power of the purse and the power of the sword" served to focus the attention of many state delegates upon the government's financial ability to support an army, and those who believed in the need for a strong system of national defense often asserted that Congress should be able to raise substantial sums of money quickly in the event of invasion or other emergency.¹⁶⁶ As a corollary to this proposition, however, proponents of a strong central government believed that the Congress

164. J. McMASTER & F. STONE, *supra* note 135, at 480.

165. *Id.* at 480-81.

166. *See, e.g.*, 2 DEBATES 66-67 (remarks of Christopher Gore of Boston): "Is America to wait until she is attacked, before she attempts a preparation at defense? This certainly would be unwise; it would be courting our enemies to make war upon us. The operations of war are sudden, and call for large sums of money." *See also id.* at 68, 189, 191.

would need financial power in order to buy an army through enlistments. Thus, James Wilson of Pennsylvania asked rhetorically:

Have not the freest of governments those powers [of the sword and the purse]? And are they not in the fullest exercise of them? . . . Can we create a government without the power to act? How can it act without the assistance of men? And how are men to be procured without being paid for their services?¹⁶⁷

On the other hand, Antifederalist Richard Henry Lee opposed granting the national government unrestricted power to "engage officers and men for any number of years"; it was his fear that "[w]e shall have a large standing army as soon as the monies to support them can possibly be found."¹⁶⁸ "An army is not a very agreeable place of *employment*," he added, "for the young gentlemen of many families";¹⁶⁹ apparently he was concerned that those who would be attracted to a professional army would be insensitive to the values of liberty.

Some delegates also were apprehensive about the impact that compulsory militia service would have upon the civilian economy. Since the vast majority of citizens were farmers by occupation, a call of the militia during the planting or harvesting season could cause great hardship. Thus, Edmund Randolph,¹⁷⁰ Henry Lee,¹⁷¹ and Francis Corbin supported a professional army that would promote a more appropriate division of labor. Corbin argued to the Virginia convention:

If some of the community are exclusively inured to its defence, and the rest attend to agriculture, the consequence will be, that the arts of war and defence, and of cultivating the soil, will be understood If, on the contrary, our defence be solely intrusted to militia, ignorance of arms and negligence of farming will ensue. . . . If we are called in the time of sowing seed, or of harvest, the means of subsistence might be lost; and the loss of one year's crop might have been prevented by a trivial expense, if appropriated to the purpose of supporting a part of the community, exclusively occupied in the defence of the whole.¹⁷²

Thus in the eyes of Corbin, Lee, and Randolph, regular troops—

167. 2 *id.* at 522.

168. *Letters from the Federal Farmer to the Republican* (Letter No. III), in *ESSENTIAL WORKS OF THE FOUNDING FATHERS* 282 (L. Kriegel ed. 1964).

169. *Id.* at 282-83.

170. 3 *DEBATES* 77: "The militia of our country will be wanted for agriculture It must be neglected if those hands which ought to attend to it are occasionally called forth on military expeditions."

171. *See id.* at 177. Henry "Light-Horse Harry" Lee should not be confused with his cousin Richard Henry Lee (*see* text accompanying note 168 *supra*). For biographies of the two men, *see* 11 *DICTIONARY OF AMERICAN BIOGRAPHY* 107, 117 (D. Malone ed. 1933).

172. 3 *DEBATES* 112-13.

"a part of the community, exclusively occupied in the defense of the whole"—would take the military burden off the militia—the yeomen of the country who would devote themselves to agriculture and the mechanic arts. In their view, the farmers—the citizens at large—could not be forced into the regular army. In that case men would be called out at sowing time or at the harvest, which all three men saw as dangerous to agricultural industry. Wilson Nicholas discerned another economic reason for relying upon a professional volunteer army. Even if the militia were adequate for national defense, he contended, reliance on state forces imposed an unequal burden upon the poor. "If war be supported by militia," he argued, "it is by personal service. The poor man does just as much as the rich. Is this just?" Moreover, the rich man could easily exempt himself by finding a substitute. But if the military duties were entrusted to a regular army, Nicholas said, the soldiers would be "paid by taxes raised from the people, according to their property; and then the rich man pays an adequate share."¹⁷³ Thus, according to Nicholas, when regular troops were used to carry on a war, personal service by the poor would not be required; professional soldiers would be used, paid for by taxes. This argument strikes an ironic note in light of current debates upon the desirability of a volunteer army;¹⁷⁴ but the clear import of the delegates' discussion of economic factors is that the regular army was viewed by all parties as a professional force procured by enlistments, not by forced service of the people.

E. Early Congresses and the Military Power

The actions of the first Congresses elected under the Constitution, which included many of the delegates to the Philadelphia Convention, support the view that conscription was not authorized by the Constitution. One of the most important items of business confronting the first Congress was, of course, the promulgation of a Bill of Rights, and, in June of 1789, James Madison introduced a series of proposed amendments to the Constitution. One of these, which eventually became the second amendment, stated:

The right of the people to keep and bear arms shall not be infringed; a well-armed and well-regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms shall be compelled to render military service in person.¹⁷⁵

¹⁷³ *Id.* at 389.

¹⁷⁴ *See, e.g.,* G. REEDY, WHO WILL DO OUR FIGHTING FOR US? 56 (1969): "When we say 'volunteer army' we are really saying an army composed of the poor and the black."

¹⁷⁵ 1 ANNALS OF CONGRESS, 1st Cong., 434 (1834).

The fact that Madison sought to insert a conscientious-objector clause into the Constitution indicates the significance he ascribed to freedom of conscience; yet, his proposed objector clause dealt only with the militia power. It seems difficult to believe that he would seek to limit the militia's power to compel service in this manner and ignore a comparable power in the federal government, if there was any serious possibility that the federal government could conscript citizens. Like the other statesmen of the time, he apparently thought that compulsory military service could take place only in the militia, and that was the only area about which he concerned himself.

Opponents of Madison's conscientious-objector clause argued that the problem was too difficult and uncertain to be dealt with by an inflexible constitutional provision,¹⁷⁶ and the clause was finally eliminated in September 1789 by the Senate.¹⁷⁷ However, the second amendment that was finally adopted emphasizes once again the sharp distinction that was made between the militia and the regular army at the time the Constitution was adopted. The amendment's assertions that the militia was "necessary to the security of a free state" and that "the right of the people to keep and bear arms shall not be infringed" can be traced to the Virginia ratifying convention. There, George Mason had argued that the federal government might "neglect" or "harass and abuse" the militia "in order to have the pretense of establishing a standing army."¹⁷⁸ Patrick Henry had agreed; in his opinion, the "militia . . . is our ultimate safety. We can have no security without it."¹⁷⁹ Thus, the people organized in the state militias were regarded as a counterforce against the threat that the regular army could be used as an instrument of oppres-

176. See, e.g., *id.* at 751 (remarks of Representative Benson of New York):

If this stands part of the Constitution, it will be a question before the Judiciary on every regulation you make with respect to the organization of this militia It is extremely injudicious to intermix matters of doubt with fundamentals.

I have no reason to believe but the Legislature will always possess humanity enough to indulge this class of citizens in a matter they are so desirous of; but they ought to be left to their discretion.

177. See E. DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* 46 n.9 (1957). There was strong sentiment in the House for the provision. Elias Boudinot, once President of the Continental Congress and in 1789 a Representative from New Jersey, defended the conscientious-objector clause. "In forming a militia," he said "an effectual defence ought to be calculated, and no characters of this religious description ought to be compelled to take up arms." He added that "by striking out the clause, people may be led to believe that there is an intention in the General Government to compel all its citizens to bear arms." 1 ANNALS OF CONGRESS, 1st Cong., 767. Of course, since the clause in question related only to the militia, Boudinot's statements would make no sense if Congress had the power to conscript. For in that case the general government would be able "to compel all its citizens to bear arms," a power which Boudinot was denying.

178. 3 DEBATES 379.

179. *Id.* at 385.

sion,¹⁸⁰ and service in the militia was a right of the citizen that could not be transgressed by the federal government.¹⁸¹ Clearly, this balance of power could be upset, and the citizen's right to bear arms in the militia undermined, if the federal government had the power to compel large numbers of citizens to serve in the regular army.

Congress moved quickly to implement the military sections of the Constitution. At the instigation of Secretary of War Knox, a statute was passed in September of 1789 legalizing the existence of the 840-man army inherited from the Confederation;¹⁸² about six months later the authorized force was increased to over a thousand men.¹⁸³ The statutes clearly dealt only with enlisted forces, but in spite of this fact, there was substantial opposition in Congress to the creation of a standing army.¹⁸⁴

The size of the regular army was increased twice more during the next two years,¹⁸⁵ and in May of 1792 Congress passed a uniform militia law.¹⁸⁶ The latter provision had developed from a plan proposed by Secretary of War Knox in 1790 which would have obliged every male citizen to enroll and train for specific periods in a federally organized militia system. A select part of the militia—the “advanced corps” of younger men—would be extensively trained and ready for service on short notice. Congressional opposition to this proposal proved insurmountable,¹⁸⁷ and, after two years

180. Cf. R. WEIGLEY, *HISTORY OF THE UNITED STATES ARMY* 87 (1967): “It was possible to regard the state militias as a check against a federal standing army, since they had just accomplished a very similar purpose: they had given birth to the Continental Army to check the threat of military despotism from the British army.”

181. Thus, Antifederalist Elbridge Gerry had argued against the inclusion of Madison's conscientious-objector clause in the Bill of Rights on the ground that Congress could declare large numbers of citizens religiously scrupulous “and thus prevent them from bearing arms” in the militia. 1 *ANNALS OF CONGRESS*, 1st Cong., 749-50 (1834).

182. Act of Sept. 29, 1789, ch. 25, 1 Stat. 95.

183. Act of April 30, 1790, ch. 10, 1 Stat. 119.

184. On March 30, 1790, Senator William Maclay confided to his diary:

This bill seems laying the foundation of a standing army. The justifiable reasons for using force seem to be the enforcing of law, quelling insurrections, and repelling invasions. The Constitution directs all these to be done by militia. Should the United States, unfortunately, be involved in war, an army for the annoyance of our enemy in their own country, (as the most effective mode of keeping the calamity at a distance . . .) will be necessary.

THE JOURNALS OF WILLIAM MACLAY 221 (E. Maclay ed. 1965). It is interesting to note that Maclay's conception of a foreign expeditionary force is an extension of Hamilton's idea that the regular army would serve only as a frontier garrison and as a holding force to permit time for mobilization of the militia in the event of invasion; see text accompanying notes 115-16 *supra*.

185. Act of March 3, 1791, ch. 28, 1 Stat. 222; Act of March 5, 1792, ch. 9, 1 Stat. 241.

186. Act of May 8, 1792, ch. 33, 1 Stat. 271.

187. Thomas Fitzsimons of Pennsylvania, a member of the Philadelphia Convention, asked “whether it would be the most eligible mode to subject all the citizens . . . to turn out as soldiers. A much smaller number would, in his opinion, answer

of consideration, Congress passed a law which required enrollment but did not specify any particular duration or type of training for the militia; these matters were left entirely to the states. Perhaps the most significant aspect of the episode is the fact that Knox, the foremost advocate of a strong military system, sought to establish compulsory universal military training not under the Constitutional grant of power to raise and support armies, but under the militia clause.

The early debates on the military also reflect a perception by many congressmen that their control over the militia was secondary to the states' regulatory power. Thus, one representative asserted that "the States alone are to say of what description of persons the militia shall consist, and who shall be exempt from militia duty; Congress have only power to organize them, when thus designated."¹⁸⁸

Questions about the proper size and composition of the military establishment were before Congress frequently during the early years of the Republic, particularly with regard to the kind of force that should be used to fight the Indians. Those who advocated the use of regular troops emphasized the adverse impact on agriculture that would result from use of the militia,¹⁸⁹ or the unreliability of poorly trained militiamen;¹⁹⁰ others contended that the regular troops were "trash" who "enlist for three dollars a month; which, in a country like the United States, is a sufficient description of their bodies as well as their minds."¹⁹¹ When the Whiskey Rebellion erupted in 1794, it was the militia that was summoned to suppress it; Washington called out 12,000 militiamen from four states, and maintained a peacekeeping force of 2,500 in the area after order was restored.¹⁹² Early Congresses also depended heavily on militia groups entering the federal service of their own choice. These volunteer units had a long tradition dating from the colonial period; frequently they furnished their own arms and elaborate uni-

all the purposes of a militia." 2 ANNALS OF CONGRESS 1805 (1790). Elias Boudinot agreed that there was "a manifest propriety in the measure." *Id.* In his diary, Maclay wrote: "General Knox offers a most exceptional bill for a general militia law which excites (as it is most probable he expected) a general opposition." THE JOURNALS OF WILLIAM MACLAY 235 (E. Maclay ed. 1965).

188. ANNALS OF CONGRESS, 2d Cong., 419 (1849) (remarks of Representative Sturges). Congressman Samuel Livermore of New Hampshire concurred. "It is a militia of the several States that Congress have power to organize, and provide a mode of discipline for. It is not a militia to be formed, or created—it already exists. He therefore thought it best to leave it to the respective States to make their own militia laws." *Id.*

189. *Id.* at 775-76.

190. *Id.* at 779.

191. *Id.* at 796.

192. Congress authorized these actions. Act of Nov. 29, 1794, ch. 1, 1 Stat. 403.

forms, and were composed of social elites.¹⁹³ In 1794¹⁹⁴ and 1798,¹⁹⁵ Congress authorized the President to accept volunteer militia units, but the statutes maintained a distinction between these groups and the troops obtained by regular enlistments.

Thus, in the first ten years of the nation Congress evidenced its understanding of the military powers granted in the Constitution by: (1) debating a constitutional amendment on conscientious objection which focused on the militia as the only compulsory military force; (2) passing the second amendment, which was totally incompatible with any notion of federal conscription; (3) grudgingly increasing the size of its regular, enlisted army; (4) passing a tepid militia law because it did not wish to compel the citizens to train in the militia; and (5) distinguishing between the "trash" of the regular army and the industrious yeoman of the militia. At no time during this period—not even during the quasi-war with France in 1797-1800—was there the slightest hint that Congress might have the power to enforce direct conscription.

F. *The Relationship Between the Militia and the Regular Army*

In the *Selective Draft Law Cases*, the Supreme Court placed considerable reliance on the relationship between the militia and the regular forces. The Court opened this phase of its argument by citing the portion of article I, section 10 which prohibits the states from keeping "Troops, or Ships of War in time of Peace" without the consent of Congress. This provision, together with the difficulties experienced by the Continental Congress in trying to get the states to meet their troop quotas and the grant of power to raise armies, led the Court to infer that the framers had intended to vest all the military powers in Congress.¹⁹⁶ Therefore, Chief Justice White concluded, "[t]here was left . . . 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."¹⁹⁷

193. See, e.g., R. WEIGLEY, *supra* note 180, at 8.

194. Act of May 9, 1794, ch. 27, 1 Stat. 367.

195. Act of May 28, 1798, ch. 47, 1 Stat. 558.

196. 245 U.S. at 382.

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.

197. 245 U.S. at 383.

It is undoubtedly true that the military clauses of the Constitution were designed in part to remedy the central government's lack of power under the Articles of Confederation; Alexander Hamilton's belief that a permanent military corps was needed to perform duties for which the militia was inappropriate¹⁹⁸ and his argument that sole reliance on the states for national defense could lead to unequal burdens or disastrous rivalries¹⁹⁹ clearly weighed heavily with those who assisted in drafting the Constitution. But these acknowledged facts hardly support the conclusion that Congress' power to raise and support armies extended to all attributes of state militia power, including the authority to conscript. Rather, the available historical evidence indicates that the Supreme Court in *Arver* did not pursue the distinction between the militia power and the army power far enough, and that the framers did not view the state militias and the federal army as simply complementary manifestations of the same power.

It is clear that the framers imposed no specific limitations on how the federal government could use its regular forces; in the opinion of some early statesmen, they could even be sent abroad to fight in foreign wars.²⁰⁰ At the same time, the militia could be used only for the limited purposes enumerated in the Constitution, and the states could not maintain regular forces on duty. This differential treatment of the uses to which the army and the militia could be put provides a marked contrast to the prevailing understanding of how the manpower could be raised for each force. The fact that the states could compel militia service did not mean that Congress would have equivalent power with respect to the army. As the preceding discussion of the Philadelphia Convention, *The Federalist Papers*, and the state ratifying conventions indicates, the contemporary understanding was that the regular army would be composed of volunteers who could not legitimately object if they were exposed to the dangers of questionable domestic conflicts or foreign entanglements. Indeed, the fact that various restrictions were imposed upon the use of the militia reflects the framers' belief that the citizens should not be taken into the army against their wills and employed in any military venture that the federal government might undertake. Thus, if the Court in the *Selective Draft Law Cases* had been more sensitive to the historical context in drawing inferences from the constitutional distinction between the militia and the regular army, it would not have concluded that every

198. THE FEDERALIST No. 24, at 156-57 (J. Cooke ed. 1961).

199. THE FEDERALIST No. 25, at 158-59 (J. Cooke ed. 1961).

200. See note 184 *supra*.

attribute of one force necessarily attached to the other. Instead, history points to the conclusion that the framers gave the federal government wide powers to *use* its army but not to *gather* it, while the militia's *functions* were specified but its manpower source was unlimited.

IV. THE NATION'S MILITARY HISTORY UNDER THE CONSTITUTION

A. *The War of 1812*

A major portion of the Court's opinion in the *Selective Draft Law Cases* dealt with the federal government's attempts to implement universal conscription after the adoption of the Constitution. The first significant attempt to enact a draft law occurred during the War of 1812, according to the Court, "[e]ither because [the existing regular army and militia force] proved to be weak in numbers or because of insubordination developed among the forces called and manifested by their refusal to cross the border."²⁰¹ In response to these pressures, Secretary of War Monroe introduced a plan to "call a designated number out of the population between the ages of 18 and 45 for service in the army."²⁰² The Court conceded that congressional opposition against the bill developed, but states that "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."²⁰³

In this manner, the Court blithely dismissed the most significant aspect of the Monroe Plan: not the fact that it was introduced, but the fact that Congress never passed the proposal because a substantial number of congressmen did not believe that the federal government had power to conscript. Senator Christopher Gore's assertion that the plan "never will and never ought to be submitted to by this country, while it retains one idea of civil freedom"²⁰⁴ was representative of the tenor of remarks made by those who opposed conscription,²⁰⁵ and came with particular force from a man who had been a strong proponent of the Constitution in the Massachusetts

201. 245 U.S. at 384.

202. 245 U.S. at 385.

203. 245 U.S. at 385.

204. ANNALS OF CONGRESS, 13th Cong., 3d Sess., 100 (1854).

205. Senator David Daggett of Connecticut opposed the bill because "it is utterly inconsistent with principles [of civil liberty] to compel any man to become a soldier for life, during a war, or for any fixed time. In Great Britain, a war-like nation . . . no such practice is, or can be, resorted to; the people would revolt at it It is alike odious here, and I hope it will remain so." *Id.* at 72. Similarly, Robert Goldsborough of Maryland challenged his fellow senators, saying "you dare not . . . attempt a conscription to fill the ranks of your regular army." *Id.* at 107.

ratifying convention. Several congressmen made more detailed attacks upon the proposal. Senator Jeremiah Mason of New Hampshire addressed himself to the specific problem of "whether the Constitution gives to this Government the power contended for," and found several grounds for concluding that it did not. In the first place, he observed, nothing in the Constitution imposed limits upon the sweeping power that the Government sought:

The power claimed is, doubtless, vastly greater and more dangerous than any other possessed by the Government. It subjects the personal freedom of every citizen, in comparison with which the rights of property are insignificant, to arbitrary discretion. Had there been the intention of granting such power, would there not have been some attempt to guard against the unjust and oppressive exercise of it, as was done in the granting of power of less importance?²⁰⁶

Furthermore, Mason argued, the constitutional grant of power "to provide and maintain a navy" could equally support the implication of a power to conscript, and the manpower need was, if anything, greater in the naval service; yet the government was not seeking the power to conscript for the navy. Indeed, Mason pointed out:

The British Government, before the Revolution did attempt to exercise in this country the supposed right of impressment for the Navy, which it never did for the Army. . . . Yet the Government, in their instructions to our Envoys for treating of peace with Great Britain, say "impressment is not an American practice but it is utterly repugnant to our Constitution and laws." The honorable Secretary [Monroe] when he drafted those instructions, knew not how soon he should be directed to contend for the contrary doctrine.²⁰⁷

The most eloquent attack on the Monroe Plan was made by Daniel Webster, who addressed the House of Representatives on December 9, 1814. First, he noted, the proposal went beyond the acknowledged power to call out the militia according to its existing organization; it was, in effect, a plan to raise "a standing army out of the militia by draft."²⁰⁸ Therefore, Webster stated, "The question is nothing less than whether the most essential rights of personal liberty shall be surrendered, and despotism embraced in its worst form."²⁰⁹ He then proceeded to ask:

Is this, sir, consistent with the character of a free government? Is this civil liberty? Is this the real character of our Constitution? No, sir, indeed it is not. The Constitution is libelled, foully libelled.

206. *Id.* at 80.

207. *Id.* at 81.

208. 14 THE WRITINGS AND SPEECHES OF DANIEL WEBSTER 57 (1903).

209. *Id.*

The people of this country have not established for themselves such a fabric of despotism. They have not purchased at a vast expense of their own treasure and their own blood a Magna Charta to be slaves. Where is it written in the Constitution . . . that you may take children from their parents, and parents from their children, and compel them to fight the battles of any war in which the folly or the wickedness of government may engage it?²¹⁰

Webster then turned his attention to the source of the power to conscript "which now for the first time comes forth . . . to trample down and destroy the dearest rights of personal liberty . . ." ²¹¹ The Government's claim of constitutional power was summarily dismissed: "I almost disdain to go to quotations and references to prove that such an abominable doctrine has no foundation in the Constitution of the country. It is enough to know that the instrument was intended as the basis of a free government, and that the power contended for is incompatible with any notion of personal liberty."²¹² Nor, argued Webster, could the Secretary of War justify his plan by saying that Congress could raise armies by any means not prohibited by the Constitution, and that "the power to raise would be granted in vain" if there were insufficient enlistments. "If this reasoning could prove anything," Webster retorted, "it would equally show, that whenever the legitimate power of the Constitution should be so badly administered as to cease to answer the great ends intended by them, such new powers may be assumed or usurped, as any existing administration may deem expedient."²¹³

This strong opposition made passage of the Monroe Plan a practical impossibility. John C. Calhoun, then a young representative from South Carolina, summarized the alternatives that were available to the federal government: "[T]he military force by which we can operate consists of . . . the regular force, whose general character is mercenary, the soldiers enlisting for the sake of bounty and subsistence; draughted militia called into the field by patriotic motives only."²¹⁴ Congress eventually settled upon a plan under which volunteer militia units could enlist for specific short periods; if they engaged to serve for more than nine months, the volunteers could receive acreage from the public lands instead of monthly pay.²¹⁵ The threat of a system of federal conscription, however, had repercussions even outside the Congress. In January of 1815, rep-

^{210.} *Id.* at 61.

^{211.} *Id.*

^{212.} *Id.* at 62.

^{213.} *Id.* at 63-64.

^{214.} ANNALS OF CONGRESS, 13th Cong., 3d Sess., 531 (1854).

^{215.} See SELECTIVE SERVICE SYSTEM, 3 THE SELECTIVE SERVICE ACT 155 (Special Monograph No. 2, 1954).

representatives of various New England states that were opposed to the war met at the Hartford Convention. One of the resolutions which they passed recommended that the states "adopt all such measures as may be necessary effectually to protect the citizens of said states" against acts of Congress "which shall contain provision, subjecting the militia or other citizens to forcible drafts, conscriptions, or impressments, not authorized by the 'constitution of the United States,'"²¹⁶ Thus, a substantial group of influential political leaders, within three decades after the Constitution was ratified, vigorously asserted that the federal government did not have the power of direct conscription; yet the *Arver* Court, in a single sentence, dismissed their arguments as irrelevant.

B. *The Civil War*

A final major point relied upon by the Supreme Court in the *Selective Draft Law Cases* was the use of direct conscription during the Civil War. Chief Justice White noted that early in the war the Union government relied upon militia and volunteers; when more men were required, however, a draft law was proposed and passed.²¹⁷ There is some doubt as to whether the true purpose of the Civil War Enrollment Act was to procure men through conscription; it seems equally possible that, as one historian has asserted, the measure was designed merely to stimulate enlistments in the regular army.²¹⁸ In any event, it is clear that even during the exigencies of the Civil War, a large segment of the populace actively opposed the draft.

The act was quite lenient by today's standards; for example, a drafted man could hire a substitute to perform his service for him,

216. A. FRIED, *THE JEFFERSONIAN AND HAMILTONIAN TRADITION IN AMERICAN POLITICS* 93 (1968).

217. 245 U.S. at 386:

By [the Act of March 3, 1863, ch. 75, 12 Stat. 731], 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 . . . every male citizen of the United States between the ages of twenty and forty-five was made subject by the direct action of Congress to be called by compulsory draft to service in a national army at such time and in such numbers as the President in his discretion might find necessary.

218. I F. SHANNON, *THE ORGANIZATION AND ADMINISTRATION OF THE UNION ARMY, 1861-1865*, at 308 (1928):

Very clearly the law was never intended as a direct procurer of men but merely as a whip in the hands of the federal government to stimulate state activities. Even the name of conscription was avoided by its friends who always spoke of it as the "enrollment bill." Only its enemies called it a "conscription bill," which term was considered by the administration men as an unfair epithet. But they knew whereof they spoke for, as they shaped it, the bill was not a conscription bill in any general sense; it was merely a piece of class legislation designed . . . merely to stimulate mercenary establishments and to match the rich man's dollars with the poor man's life. None would have been more horrified than Henry Wilson [the act's author] at the suggestion that every able-bodied man drafted should be compelled to serve . . .

or could purchase outright commutation from the draft.²¹⁹ Nevertheless, popular sentiment against conscription was so strong that protest riots occurred in many cities throughout the country. The largest disturbance, which took place in New York City, resulted in an estimated 1,200 deaths and millions of dollars in property damage. Fifteen regiments of regular troops were eventually required before the pillaging mobs could be subdued. A recent commentator has suggested several reasons for this violent reaction to the draft:

There was something deeply disturbing about a national military draft at best. It was not unheard of for states to raise their army quotas by various forms of compulsion, true. But a state government in the 1860's exerted a neighborly, close-to-home sort of authority. Or at least it seemed so to most people. Washington was different—distant and unfeeling, somehow alien. And for the average citizen, this new Act was the first effort the Federal government had ever made to reach out its long arm and lay its heavy hand directly on his—his!—shoulder.²²⁰

Some state and local governments joined the popular opposition to conscription. The state of Delaware and the city of Troy, New York, for example, passed laws authorizing the local government to pay the commutation fee for residents, and the Governor of Massachusetts asked the Secretary of War to suspend operation of the draft in that state for six or seven weeks because a sufficient number of substitutes could not be found. The people were also astute to find means of circumventing the draft law. Enrolling officers, who were required to canvass neighborhoods in order to find eligible males, were frequently lied to, avoided, and even physically attacked. Outright evasion was so widespread that a new word—"skedaddling"—was coined to describe it; new towns sprang up just across the northern borders in Canada, and many men took refuge in California or the mining towns of the western territories. In many parts of New England, so many farm laborers had deserted their employers and fled from the draft that crops were harvested only with great difficulty. The total number of "skedaddlers" may have been as high as 200,000.²²¹

Fraudulent exemptions were another popular means of evasion, and approximately 316,000 exemptions were made under the conscription law. When firemen became exempt, some towns enrolled

219. Civil War Enrollment Act, ch. 75, § 13, 12 Stat. 733 (1863). Subsequently the commutation fee was eliminated except for conscientious objectors (Act of July 4, 1864, ch. 237, §§ 2, 10, 13 Stat. 379-80), but enrollees were still permitted to furnish substitutes (Act of July 4, 1864, ch. 237, § 11, 13 Stat. 380).

220. J. McCAGUE, *THE SECOND REBELLION* 17 (1968).

221. 2 F. SHANNON, *THE ORGANIZATION AND ADMINISTRATION OF THE UNION ARMY, 1861-1865*, at 184-85 (1928).

all of their able-bodied men into the fire brigade; in 1864 Congress had to pass special legislation to meet such wholesale attempts to avoid service.²²² Malingering of practically every variety occurred, even to the point that some men maimed themselves in order to fail the physical requirements for the army. The combination of evasion, exemptions, commutations, and armed resistance showed that a substantial portion of the nation was not prepared to accept conscription as a part of the citizen's obligation to the state. As the end of the war approached, Congress began to respond to this general opposition; in March of 1865, a law providing for more liberal substitution was passed,²²³ and the following month the draft law was allowed to expire.

This history of inefficiency and evasion seems to cast doubt on the *Arver* Court's assertion that "[i]t would be childish to deny the value of the added strength which was . . . afforded"²²⁴ by the Civil War draft. The Court based this conclusion on "the official report of the Provost Marshall General," which claimed that "it was the efficient aid resulting from the forces created by the draft . . . which obviated a disaster . . . and carried that struggle to a complete and successful conclusion."²²⁵ The available statistics, however, cast considerable doubt on this assertion:

Altogether, only six per cent of the 2,666,999 men who served in the Union Army during the Civil War were secured directly through conscription. Of 249,259 persons "held to service" under the Enrollment Act of 1863, 86,724 escaped by payment of commutation, leaving 168,649 "men raised." But of the latter, 116,188 were substitutes, and only 46,347 were "held to personal service."²²⁶

No case questioning the Civil War draft was heard by the Supreme Court, but it is known that Chief Justice Roger Taney prepared a rough outline of an opinion declaring the act unconstitutional. Taney's draft opinion began by noting that congressional power to call out the militia for specified purposes, and asking "what description of persons composes the militia who . . . may be called to aid the general government in the emergencies . . . mentioned?"²²⁷ The answer, he said, could be found in the second amendment's declaration that "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":

222. Act of Feb. 24, 1864, ch. 13, 13 Stat. 6.

223. Act of March 3, 1865, ch. 79, 13 Stat. 487.

224. 245 U.S. at 387.

225. *Id.*

226. R. WEIGLEY, *HISTORY OF THE UNITED STATES ARMY* 210 (1967).

227. 18 TYLER'S *QUARTERLY HISTORICAL AND GENEALOGICAL MAGAZINE* 79 (1939).

The militia is therefore to be composed of Citizens of the States, who retain all their rights and privileges as citizens, who when called into service by the United States are not to be "fused into one body"—nor confounded with the Army of the United States, but are to be called out as the militia of the several states . . . and consequently commanded by the officers appointed by the State. It is only in that form or organization that they are recognized in the Constitution as a military force.²²⁸

Given this clear distinction between the army and the militia, Taney continued, the limitations on the President's power to control the militia are equally clear: "He has no power over the Militia unless [they are] called into the actual service of the United States. They are then called out in the language of the Constitution, as the militia of the several States."²²⁹ This constitutional plan would be thwarted, Taney believed, if the government exercised the power of direct conscription:

There is no longer any militia—it is absorbed in the Army. Every able bodied Citizen . . . belongs to the national forces—that is to the Army of the United States

The Generals, Colonels and other Officers appointed by the State according to the provisions of the Constitution are reduced to the ranks, and compelled to march as private soldiers . . . and they and every other able bodied citizen except those whom it has been the pleasure of Congress to exempt, are compelled against their will to subject themselves to military law . . . and to be treated as deserters if they refuse to surrender their civil rights.²³⁰

Thus, said Taney, implying the power of direct conscription would create an inconsistency among the military clauses of the constitution; the power of direct conscription into the federal army and the militia provisions would be "repugnant to each other" because "if the conscription law be authorized by the Constitution, then all of the clauses so elaborately prepared in relation to the militia . . . are of no practical value and may be set aside and annulled whenever Congress may deem it expedient."²³¹ Nor could this difficulty be overcome, Taney asserted, by claiming that no restrictions had been placed on the power to raise armies. "No just rule of construction," he wrote, "can give any weight to inferences drawn from general words, when these inferences are opposed to special and express provisions [governing the militia], in the same instrument."²³²

Chief Justice Taney also relied upon history to support his con-

228. *Id.*

229. *Id.* at 80.

230. *Id.*

231. *Id.*

232. *Id.* at 81.

struction of the military clauses. "During the period when the United States were English Colonies," he observed, "the Army of England—the standing army—was always raised by voluntary enlistments—and the right to coerce all the able bodied subjects of the Crown into the ranks of the Army . . . was not claimed or exercised by the English government."²³³ Against this historical background, Taney concluded, the words granting Congress the power to raise armies "necessarily implied that they were to be raised in the usual manner." Indeed, he added, "the general government has always heretofore so understood [the words] and has uniformly . . . recruited the ranks of its 'land forces' by volunteer enlistments for a specific period."²³⁴

Chief Justice Taney never had the opportunity to perfect or deliver his opinion because the Government never brought a draft case to the Supreme Court. However, the constitutionality of the Civil War draft was questioned in the courts of Pennsylvania and ultimately was upheld in *Kneedler v. Lane*.²³⁵ The *Kneedler* case, upon which the *Arver* Court relied,²³⁶ was decided under rather unusual circumstances. It arose when three young men sued the local enrolling board to enjoin the board members from enforcing the law; the United States did not defend these actions, and on November 9, 1863, the Pennsylvania Supreme Court announced in a three-to-two decision that the law was unconstitutional.

The first opinion for the majority was written by Chief Justice Walter Lowrie. He found that the Constitution recognized two distinct kinds of land forces, the militia and the army. The militia could be drawn into federal service only in the manner provided by the Constitution; if these forces were subject to paramount federal call, they could be effectively wiped out. Moreover, Lowrie said, the Constitution provides that taxes and duties must be raised according to a rule of "uniformity, equality, or proportion," but no such requirement is imposed by the army clause. If the army "may be recruited by force," he asserted, "we find no regulation or limitation of the exercise of the power, so as to prevent it from being arbitrary and partial, and hence we infer that such a mode of raising armies was not thought of, and was not granted." Lowrie dwelt at length on the dangers of implying such a broad power:

If Congress may institute the plan now under consideration, as

²³³. *Id.*

²³⁴. *Id.*

²³⁵. 45 Pa. 238 (1863).

²³⁶. 245 U.S. at 388.

a necessary and proper mode of exercising its power "to raise and support armies," then it seems to me to follow with more force that it may take a similar mode in the exercise of other powers, and may compel people to lend it their money; take their houses for offices and courts; . . . their mechanics and workshops for the different branches of business that are needed for army supplies; their physicians, ministers, and women for army surgeons, chaplains, nurses, and cooks I am quite unable now to suppose that so great a power could have been intended to be granted, and yet to be left so loosely guarded.²³⁷

Judge George W. Woodward issued a concurring opinion which relied heavily on the English experience. The framers, he said, had borrowed freely from the English system, and were familiar with the struggles which had prevented universal conscription in Great Britain. The framers intended, he argued, to create "a more free constitution than that of Great Britain—taking that as a model in some things—but enlarging the basis of popular rights in all respects that would be consistent with order and stability." Thus Woodward concluded that "[a]ssuredly the framers of our constitution did not intend to subject the people of the states to a system of conscription which was applied in the mother country only to paupers and vagabonds."²³⁸ Judge James Thompson's concurrence also emphasized that the customary mode of raising armies in England had been voluntary enlistments. He then pointed out that at the time the Constitution was ratified a substantial segment of public opinion opposed any form of standing army; "but what would have been thought," Thompson asked, "if it had been discovered or avowed that in its creation [the federal army] might be directly and openly destructive of the individual liberties of those who were to compose it, and that it might be extended to embrace all the able-bodied citizens in the states!"²³⁹

The injunctions prayed for were issued on November 9, 1863. However, Chief Justice Lowrie's term expired on December 12, and he was replaced by Daniel Agnew, who was known to favor the draft. The Government then moved to vacate the injunctions. On January 16, 1864, the court vacated the initial orders over a bitter

237. 45 Pa. at 248.

238. 45 Pa. at 254-55.

239. 45 Pa. at 267. The two judges who voted in favor of the act on first hearing were William Strong and John M. Read. Strong relied primarily upon the lack of constitutional restrictions on the power to raise armies, and upon the drafts imposed by the states during the Revolutionary War. Read depended upon the obligation of every member of society to defend the state; he cited the Knox plan of 1790, Monroe's 1814 draft proposal, and the English laws providing for a levy on idle and disorderly persons to show prior recognitions of the power.

dissent by Judge Woodward, who had just been elevated to the position of Chief Justice. The Government, he pointed out, had failed to appear in the first hearing even though every opportunity had been given them to present their views; nor had they made any effort to seek reargument while Chief Justice Lowrie was still on the bench. Moreover, he said, the decision granting the injunction was a final judgment which could have been appealed to the United States Supreme Court; in any event, the dissenting judges should have been bound by the initial decision since no new facts had been presented.²⁴⁰ On this divisive note, the Government obtained a victory in the first case to pass upon the constitutionality of conscription; but the narrow margin of this victory is emphasized by the fact that three of the six Pennsylvania judges who considered the matter held that Congress lacked the power to enforce direct conscription.

C. *World War I and After*

After the expiration of the Civil War draft, the Government did not attempt to use conscription again until the outbreak of World War I. On April 5, 1917—the day before Congress declared war on Germany—the Wilson administration introduced its Army Bill, which provided for compulsory military service. Opposition arose immediately, with Speaker of the House Champ Clark insisting on a volunteer system. “I protest with all my heart and mind and soul,” he proclaimed, “against having the slur of being a conscript placed upon the men of Missouri. In the estimation of Missourians there is precious little difference between a conscript and a convict.”²⁴¹ The Senate opposition was led by Robert M. LaFollette. “[The] power once granted,” he said, “will attach to the office [of the President], and will be exercised so long as the Nation shall last, by every successive incumbent, no matter how ambitious or bloody-minded he may be.”²⁴² Nevertheless, on May 18, 1917, the Selective Service Act was passed by large majorities in both Houses. June 5, 1917, was set as registration day, and most Americans responded to the call.

The hysteria of World War I created what was probably the most serious erosion of political and civil liberty in our history. Zechariah Chafee, in his famed analysis of *Free Speech in the United States*, recounts numerous instances of official disregard for

240. 45 Pa. at 323-29.

241. H. PETERSON & G. FITE, *OPPONENTS OF WAR, 1917-1918*, at 22 (1957).

242. *Id.*

first amendment rights.²⁴³ Under the Espionage Act,²⁴⁴ any statement which tended to obstruct the draft became criminal,²⁴⁵ and the courts enforced this provision vigorously. J. P. Doe, son of the great Chief Justice of New Hampshire, was convicted for writing a chain letter arguing that Germany had not broken its promise to the United States on submarine warfare. The producer of a film entitled "The Spirit of '76," which contained footage on Patrick Henry's speech, the Declaration of Independence, and scenes of British outrages committed during the Revolution, was also found guilty under the Espionage Act, since Britain was then our ally. Abraham Sugarman, Minnesota state secretary of the Socialist Party, told an open meeting: "This is supposed to be a free country. Like Hell it is." He then stated that the Selective Draft Act was unconstitutional and that no one had to obey it. He, too, was convicted, and a federal judge sentenced him to three years at Leavenworth.²⁴⁶ Ministers who preached that it was against Christian principles to fight were prosecuted, as were vigorous political opponents of congressmen who had voted for conscription.²⁴⁷ Twenty-seven farmers from South Dakota claimed that their county's draft quota was too high and argued against the war generally; they received one-year sentences. Socialists, I.W.W. members, and labor leaders opposed to the war were systematically rounded up, tried in the most perfunctory manner before judges who openly called them traitors, and given maximum sentences. Newspapers and magazines that editorialized against the war were denied mailing privileges; insufficiently patriotic teachers were removed from their posts.²⁴⁸

In this atmosphere the Supreme Court's decision in the *Selective Draft Law Cases* was almost inevitable. Suggestions by critics of the war that the draft was unconstitutional had led to indictments under the Espionage Act, and the overwhelming sentiment in the country was in favor of maximum mobilization to fight the hated Germans. The briefs in the *Arver* case never even touched on the early history of the military clauses; instead, they focused primarily on the thirteenth amendment's prohibition of involuntary servitude. It is most unfortunate that such an important question was

243. At 42, 51, 80 (1941). See also Kalven, "Uninhibited, Robust, and Wide-Open"—A Note on Free Speech and the Warren Court, 67 MICH. L. REV. 289, 290-91 (1968).

244. Ch. 30, 40 Stat. 217 (1917), as amended, ch. 75, 40 Stat. 553 (1918).

245. Ch. 30, tit. I, § 3, 40 Stat. 219 (1917), as amended, ch. 75, § 1, 40 Stat. 553 (1918). See also CHAFEE, *supra* note 243, at 39.

246. H. PETERSON & G. FITE, *supra* note 241, at 37. See also Kalven, *supra* note 243, at 290-91.

247. *Id.* at 115-16, 155.

248. *Id.* at 43-60, 92-112, 203-04.

resolved in such an unsatisfactory decision; yet, despite its manifest deficiencies and questionable arguments, the *Arver* opinion has survived unchallenged as part of our constitutional doctrine.

One reason for the survival of the *Selective Draft Law Cases* may be in the fact that conscription is a relatively rare phenomenon in this country. From 1789 until 1940—the first 151 years of the nation's history—draft laws were in force for a total of only four years, once during the Civil War and once during World War I. Proposals for compulsory military service were firmly rejected by Congress in the 1920's and 1930's.²⁴⁹ Finally, when the German army overran France in 1940, Congress again assented to a conscription program—the first peacetime draft in our history—over vociferous opposition in both houses.²⁵⁰ This was the last time that any substantial political opinion opposed conscription until January 1969, when nine senators introduced a bill to return to a volunteer system²⁵¹ and President Nixon recommended abolition of the draft.²⁵² Perhaps the growing public opposition to the most unpopular war in the nation's history will persuade Congress to revert to the kind of military establishment contemplated by the Constitution, or provide the Supreme Court with the opportunity to give the military clauses of the Constitution the full and impartial judicial consideration that they demand but have never received.

249. See SELECTIVE SERVICE SYSTEM, 3 THE SELECTIVE SERVICE ACT, 224, 232, 237 (Special Monograph No. 2, 1954).

250. For example, Senator Arthur Vandenberg of Michigan told the Senate: I am opposed to tearing up 150 years of American history and tradition, in which none but volunteers have [sic] entered the peacetime Armies and Navies of the United States

There must have been sound reasons all down the years why our predecessors in the Congress always consistently and relentlessly shunned this thing which we are now asked to do. These reasons must have been related in some indispensable fashion to the fundamental theory that peacetime military conscription is repugnant to the spirit of democracy and the soul of Republican institutions, and that it leads in dark directions.

Gillam, *The Peacetime Draft*, 57 YALE REV. 495, 498 (1968). Even the Act's supporters insisted it was a temporary expedient. Representative James W. Wadsworth, who introduced the legislation, said: "This is an emergency measure. . . . It is not an attempt to establish a permanent policy in the United States." *Id.* at 502.

251. Voluntary Military Manpower Procurement Act of 1969, S. 503, 91st Cong., 1st sess. For reports of the introduction of this bill, see 115 CONG. REC. S691-99 (daily ed. Jan. 22, 1969); N.Y. Times, Jan. 23, 1969, at 1, col. 8.

252. N.Y. Times, Jan. 31, 1969, at 1, col. 8.