

1920

Constitutional Law - War Powers of Congress (Validity of Conscription Act)

Francis Joseph Vurpillat
Notre Dame Law School

Follow this and additional works at: https://scholarship.law.nd.edu/law_faculty_scholarship



Part of the [Constitutional Law Commons](#), [Legislation Commons](#), and the [Military, War, and Peace Commons](#)

Recommended Citation

Francis J. Vurpillat, *Constitutional Law - War Powers of Congress (Validity of Conscription Act)*, 1 Notre Dame L. Rep. 41 (1920).
Available at: https://scholarship.law.nd.edu/law_faculty_scholarship/977

This Article is brought to you for free and open access by the Publications at NDLScholarship. It has been accepted for inclusion in Journal Articles by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

ONLY OUR OWN OPINION
CONSTITUTIONAL LAW-WAR POWERS OF CONGRESS.
(Validity of Conscription Act)*

by

Francis J. Vurpillat.

*NOTE: This paper was read before The Round Table of South Bend, Indiana, and before the classes in constitutional law prior to the rendition of the decision by the United States Supreme Court, sustaining the Conscription Act. The paper is here presented in its original form, by request, on account of its controversial character and legal-brief style, the subject-matter of constitutional law and war powers being ever new to students of the law.

The subject, the validity of the Conscription Act, necessarily presents a legal question. But it is at once a question intensely interesting to the layman as well as to the lawyer, because of its vital importance to the nation in this world-war crisis, to the General Government in its powers to cope with an unscrupulous and dangerous enemy, to all the citizens in their rights and conditions affected, and especially to the millions of young Americans who must answer their country's call to serve as soldiers and, if need be, die in this unprecedented war on foreign battlefields.

That we may clearly understand the points for and against the Conscription Act we must keep in mind the peculiar nature of our government, national and state, and its constitutional history. Under the Articles of Confederation, before the adoption of the Constitution, the states were sovereign, completely independent and bound together only by a league. But as stated by Chief Justice Marshall, in *McCulloch vs. Maryland*, 4 Wheat. 316-4 L. Ed. 579, "in order to form a more perfect union, it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers." By the adoption of the Constitution national sovereignty passed from the States to the United States. nation and government. It is said by

the Supreme Court of the United States that "The only Government of this country which other nations recognize or treat with is the Government of the Union, and the only American Flag known throughout the world is the Flag of the United States." *Fong Yue Ting vs. U. S.* 13 Sup. Ct. Rep. 1016-37 L. Ed. 905. The United States, therefore, possesses the character of a sovereign nation. The Constitution confides to the General Government plenary control over all foreign relations. A large measure of the internal sovereignty or local government is left to the states, subject, however, to the express provision in the Constitution itself that this Constitution and the laws and treaties made pursuant thereto "shall be the supreme law of the land."

We come now to consider whether the United States as a sovereign nation, under the Constitution, has the power to enact the Conscription Act, which shall operate as the supreme law of the land, binding upon all the citizens of the country even those who are for the time serving as members of the State militia. True it is that the Federal Government has only such powers as are expressly or by necessary implication granted to it by the Constitution, and that all powers not so granted to the General Government are reserved to the States and the people. But what is

the rule of constitutional construction that must be applied in determining the powers of the United States?

In construing the commerce clause of the Constitution in the case of *Gibbons vs. Ogden*, 9 Wheat. 1-6 L. Ed. 23, Chief Justice Marshall laid down the rule of construction which has ever since been adhered to. The Chief Justice said: "This instrument contains an enumeration of powers granted by the people to their government. It has been said that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the Constitution which gives countenance to this rule? . . . What do the gentlemen mean by a strict construction? . . . If they contend for that narrow construction which, in support of some theory not to be found in the constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument; for that narrow construction which would cripple the government, and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the Constitution is to be expounded. . . . We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred."

This opinion of Chief Justice Marshall and the rule of construction here stated, we would respectfully

urge upon the consideration of the gentlemen who would cripple the national government in the defeat of the Conscription Act by means of that strict and narrow construction of the Constitution which is here so vigorously condemned.

In the absence of any express grant of power to Congress to declare war and to raise and maintain armies by any means it may deem necessary and proper, we submit that such power exists as a necessary attribute to sovereignty, and must be construed to have been conferred by the very act of the creation of the United States Government in the adoption of the Constitution. Self preservation is not only the first law of nature, but of nations as well. To make war and peace with other nations is universally recognized as a legitimate exercise of external sovereignty; and this power necessarily implies the power to raise and maintain armies and navies to that end by any means that the sovereign power may adopt. Speaking of the Louisiana purchase and the acquisition of Florida and Alaska, Black, in his work on Constitutional Law, says: "The power cannot be derived from any narrow or technical interpretation of the Constitution. But it is necessary to recognize that there is in this country a national sovereignty. That being conceded, it easily follows that the right to acquire territory is incidental to this sovereignty. It is in effect a resulting power, growing necessarily out of the aggregate of powers delegated to the national government by the Constitution."

If sovereignty in itself be not sufficient to sustain the Conscription Act as a war measure of the United States, it must, however, exert a

strong influence in the construction to be put upon the enumerated war powers granted to Congress by Section 8 of Article I of the Constitution, which are as follows:

To declare war, grant letters of marque and reprisal and make rules concerning captures on land and water;

To raise and support armies; (appropriations therefor to be made for two years at a time);

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;

To provide for organizing, arming and disciplining the militia and for governing such part of them as may be employed in the service of the United States.

These powers are expressly granted, are absolute and without any limitation or restriction whatever as to the means by which they may be exercised. And to these powers must be added the provision that "the President shall be the commander in chief of the army and navy of the United States and the militia of the several states when called into the actual service of the United States," a provision which VonHolst's Constitutional Law declares, invests the president, as such commander, with all the power which the King of England enjoyed as the commander of the land and naval forces of the United Kingdom.

Concerning these war powers it is said in Black's Constitutional Law that "the power to declare war necessarily includes the authority to prose-

cute the war, and make it effective, by all and any means, and in every manner, known to and exercised by any independent nation under the rules and laws of war as the same are ascertained by the principles of international law. Justice Field, in the case of *Miller vs. United States* II Wall. 268-20 L. Ed. 135 says: "It is evident that legislation founded upon the war powers of the government, and directed against the public enemies of the United States, is subject to different considerations and limitations from those applicable to legislation founded upon the municipal power of the government. . . . Legislation (founded on the war powers) is subject to no limitations, except such as are imposed by the law of nations in the conduct of war. The war powers of the government have no express limitations in the constitution, and the only limitation to which their exercise is subject is the law of nations." In *Stewart vs. Kahn* (II Wall, 493-20 L. Ed. 17) the Supreme Court says: "The measures to be taken in carrying on war and to suppress insurrections are not defined. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the constitution." In construing the enumerated power granted to Congress "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers," Chief Justice Marshall said:

"We think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high

duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

In the light of the principles and rules enunciated, and with the guidance afforded us by the eminent authorities cited, let us proceed to a construction of the constitution necessary to sustain the validity of the Conscription Act.

In addition to the unrestricted powers granted to Congress to raise and support armies, to provide and maintain a navy, and to make rules for the government and regulation of the land and naval forces, for the purpose of waging any war it may declare, Congress also is given the power "to provide for calling forth the militia to execute the laws of the Union, to suppress insurrections and repel invasions" and "to provide for organizing, arming and disciplining the militia. . . ." It is the attempt to construe this added power over the state militia for domestic purposes, into a limitation upon the absolute and unrestricted powers of Congress over all its citizens for war purposes, that furnishes the only apparent objection to the Conscription Act. We say apparent objection advisedly, for it is not a real objection.

True it is that, when Congress calls forth the militia for the purely domestic purposes enumerated in the constitution such militia cannot be made to serve beyond the territorial limits of the United States. The Supreme Court has so held. But these decisions must be considered as hold-

ing simply this, and nothing more. They can have no application to the Conscription Act, because that act is not founded upon the militia clause of the Constitution at all. The Conscription Act is a legitimate exercise of national sovereignty, and is founded upon the war powers expressly granted in the Constitution, and calls forth all the citizens of the country, without discrimination for the purpose of raising and maintaining an army to wage a foreign war already upon us. Mr. George W. Wickersham, as Attorney General of the United States, speaking of an Act of Congress, of date March 27, 1908, founded upon the militia power, which attempted to authorize the President to call the militia for use, and when so called, to serve either within or without the territory of the United States," said: "If this provision were to be construed to authorize Congress to use the Organized Militia for any other than the three purposes specified, it would be unconstitutional." This opinion is said to militate against the Conscription Act. But note the language of this eminent lawyer: "*If this provision is to be construed to authorize Congress to use the Organized Militia.*" Organized Militia being capitalized, clearly having reference, therefore, to the Organized Militia as such. The Conscription Act does nothing of the kind and bears no similarity to the act construed by Mr. Wickersham. Furthermore, we are informed that the one-time Attorney General, at the recent meeting of the American Bar Association stated that his official opinion applied to an act founded on the militia power of Congress, and could have no application to the Conscription Act which is based solely

upon the other war powers of Congress. Thus, all this argument and citation of authority brought to the attack of the Conscription Act, must fall before the irrefutable logic of the country justice of the peace, that "they have no bearing on the case."

In the case of *Burroughs vs. Peyton*, 16 Gratton 475 the militia is defined as "a body of men composed of citizens occupied temporarily in the pursuit of civil life, while an army is said to be a body of men whose business is war." Why should the militia of the state be recognized as having any greater right than other citizens of the United States? Why should they be exempted from the call of their country in time of national peril and disaster? Are they any less citizens of the United States because they are militia? What divine right of the State or what inalienable character of its militia, exempts such citizens from their country's call to arms that every other citizen in the land must answer? To so construe the powers of congress as to give absolute exemption to the state militia, is to put it into the power of the state to thwart the powers of Congress altogether; for, if a state may make militia of some of its citizens it may make militia of all. Thus would all the war powers of congress be made nugatory, except, indeed, the so-called power to raise a volunteer army, and this exception, we submit, is a rank contradiction in terms—power to raise a volunteer. To raise this absurd contention to the dignity of a constitutional construction would be to transform the already vanishing war power of Congress to a mere glimmering hope that some patriots might volunteer to come to the rescue of their helpless country. The state

has no such power, and the citizen, merely because he happens to be a member of the state militia, has no such exemption. The Constitution of the United States and the Conscription Law enacted pursuant thereto, are the supreme law of the land, "any thing in the constitutions or laws of any state to the contrary notwithstanding," as so prescribed in this very language of the Constitution itself.

The Constitution makes no provision whatever for a national militia. There is no such thing; and whoever uses that phrase commits error. In lieu of such national militia, Congress is empowered to call the state militia to serve the same purposes in the nation that they are organized to serve in their respective states. The militia is a peace organization for domestic purposes only. The Constitution does make provision for a National Army. Congress is empowered to call all the citizens of the United States to serve the same purposes as any army in the world may be made to serve its nation. The National Army is a war organization for the purpose of waging war. There are two express powers affecting the militia, as such, for the domestic purposes enumerated. There are four other express powers affecting the citizens, as such, and these are for purposes of war. No necessary relation exists between these militia powers on the one hand and the four war powers on the other hand. No conflict need be invited in the process of their construction. Indeed such conflict can be and should be avoided. In the absence of the two provisions relating to the militia, no difficulty would arise in the construction of the four war powers first enumerated in

the constitution which establish the power of Congress to raise an army by calling all its citizens. Why, then, should the two provisions that follow, granting added power to Congress over an entirely distinct subject matter, be construed as a subtraction from or a limitation upon the war powers already enumerated and granted without an "if".

In no important case has the discretionary power of Congress over the means to be employed in the execution of any of its enumerated powers been denied by the Supreme Court of the United States and a fixed and arbitrary rule of construction applied instead. Nor will such a rule of construction be adopted in this case to deny the sound discretion exercised by Congress in the enactment of the Conscription Act. "It would have been an unwise attempt," says Chief Justice Marshall (*McCulloch vs. Maryland*) "to provide by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur." Justice Strong, in the second *Legal Tender* Decision, says: "It was at such a time and in such an emergency (*Civil War*) that the *Legal Tender Acts* were passed. Now, if it were certain that nothing else would have supplied the absolute necessities of the treasury, that nothing else would have enabled the government to maintain its armies and navy, that nothing else would have saved the government and the Constitution from destruction, while the *Legal Tender Acts* would, could any one be bold enough to assert that Congress transgressed its powers." Anent the war powers of Congress the United States Supreme Court already has given ex-

pression to a strong opinion in the *Tarbel's Case* 13 Wall. 408-20 L. Ed. 601. In this case the court said: "Among the powers assigned to the government is the power to raise and support armies. . . . Its control over the subject is plenary and exclusive. It can determine without question from any state authority how the army shall be raised, whether by voluntary enlistments or forced draft the age at which the soldier shall be received and the period for which he shall be taken, the compensation he shall be allowed, and the service to which he shall be assigned."

But what of the contentions against the validity of the Conscription Act? The cardinal rule to be observed in the interpretation of the constitution is that effect must be given to the intention of the people who adopted it. And this intention must be ascertained from the instrument itself, from the very language used to express that intention. If this language does not plainly import the intention, if indeed, it be ambiguous, then resort may be had to the expressed purposes for which the instrument was adopted and the government was established. If ambiguity still remains, then, and not until then, have we a right to consider matters extraneous of the constitution itself in aid of its interpretation.

We strenuously deny that any ambiguity exists as to the nature or extent of the war powers granted to Congress in the Constitution. The language used in the grant of these powers is so plain and unequivocal that "he that runs may read." These powers appear in four enumerations of Sec. 8, Article I. *ante*, each without a word, phrase, clause or sentence, qualifying or restricting the

power, as for instance, the power "to declare war" and "to raise and support armies."

The only contention against the Conscription Act which is based upon any construction of the language of the Constitution at all, is the persistent fallacy of construing the Act as an exercise of power over the state militia in virtue of the separately enumerated grant of such power, instead of construing it, as Congress expressly declares it to be and as it clearly is, an exercise of the war powers in virtue of the four enumerated grants of power for such purpose. We have already adverted to this. The enumerated powers of Congress over the state militia also need no aid in their construction. Their language too is plain and unequivocal. In the absence of any declaration of war by Congress and the enactment by it of a law such as the Conscription Act for raising a national army, neither Congress nor the President can call and use the state militia, as such, for purposes other than those enumerated in the Constitution, namely: "to execute the laws of the Union, to suppress insurrection and repel invasions." That the militia, who are mere peace officers, have always been recognized as having immunity from service "outside the realm" is admitted, and that "such immunity was a thousand years old" in Great Britain before the adoption of our Constitution. But that any citizen of any civilized country under the sun since the dawn of time ever held immunity from his country's call to war, we emphatically deny. Even England, as is well known, has used her citizens as soldiers for the prosecution of wars, both offensive and defensive, everywhere throughout her whole history, despite the much

vaunted immunity of the militia. And the acts of Parliament declaring such wars and raising armies to wage them did not constitute any amendments to the so-called British Constitution, but were the legitimate and frequent exercise of the sovereign power inherent in every organized government, whether autocratic or democratic.

The debates in the Constitutional Convention of 1787 are palpably perverted and misapplied in argument against the Conscription Act. That convention was created by Congress to amend the Articles of Confederation, but it found that instrument so defective as not to admit of correction. The convention, therefore, abandoned altogether the purpose for which it was called, and instead, adopted the Constitution which it reported to Congress with the recommendation that it be referred to the States, to be by them in turn submitted to the people for adoption. In this manner was the United States Government established. So inherently defective were the Articles of Confederation that they were thus rejected as an entirety. And the one defect that stood out more prominently than all the others, was the utter inadequacy of power in the United States Government to wage war and to raise and support armies; the utter inefficiency of the state militia as a war organization upon which the General Government was made to depend. To obviate for all time this defect, which almost proved fatal to the success of the revolution and to our independence, and to make of the United States under the Constitution a powerful nation, equal in sovereignty to every other state in the international world, there were adopted by that Constitutional Con-

vention the four unrestricted powers, namely: to declare war, to raise and support armies, to provide and maintain a navy, and to govern the land and naval forces. The intention of the patriots who framed the Constitution and the people who adopted it is to be derived from the plain language used by them to express that intention and to create the power granted, and not by resort to any individual construction put upon the conflicting statements made in convention debate. And yet, there are a few men insisting in this manner upon such a construction of the Constitution as will make the United States of today still dependent upon the state militia and, in fact, more impotent and inefficient than it was under the Articles of Confederation,—a contention so palpably absurd as to provoke derision and contempt. The real solution of the militia and war power controversy in the Constitutional Convention is this: No national militia was created at all, but instead the states were permitted to retain their respective militia and the General Government empowered to call and use these militia for the enumerated national peace purposes of executing the laws of the Union, to suppress insurrection and repel invasions. And to obviate the grave defect and impotency in the National Government of having to depend upon the state militia in time of war, the four enumerated war powers were conferred without any limitation whatever as to the extent of those powers or the means by which they were to be exercised.

Except for the purposes of the Civil War, when President Lincoln and the Congress did not hesitate to adopt the conscription and enforced draft, it has always been the policy

of the government to depend upon the state militia for domestic purposes and upon the volunteer system for general war purposes. This policy of the Government has been uniformly criticised and condemned by military men and writers on the military unpreparedness of the United States. And President Wilson in his public speeches plainly pointed out the inadequacy of this policy in the present world-war crisis, as a reason why the Congress should enact the Conscription Law. And yet, strange as it may seem, these criticisms of the government for adhering to such a *policy* are cited as establishing the *principle* that the Government is powerless to raise an army by any other than the militia and volunteer systems. This furnishes the perfect example of the boomerang in argument. Instead of establishing the invalidity of the Conscription Act, these criticisms have at last influenced Congress to exercise its discretionary power of raising a national army by the more adequate means of Conscription and these military men and writers now are approving the congressional action.

We have no patience with the contention for a construction of the constitution that would make the United States more impotent and inefficient than it was under the Articles of Confederation, and that would leave it a pitiable and humiliating spectacle in the gaze of the international world—a sovereign nation shorn of its inherent power to wage war and raise and support armies; to resist wanton assaults upon its sovereign rights, and threatened destruction of its institutions; unable to defend its citizens or to prevent the substitution of an autocracy for the present glorious freedom of its people. And yet we see

this very contention emblazoned, by a few, in speech and petition, with all the fallacy, sophistry and vociferousness of the demagogue. No wonder the great Lincoln was stirred to real eloquence and just wrath by the same ill-timed and illogical contention against the conscription act of the Civil War that is urged against the present act, to give expression to the following opinion in support of the power of Congress validly to enact such a law. President Lincoln said:

"In this case, those who desire the rebellion to succeed, and others who seek reward in a different way, are very active in accommodating us with this class of arguments. They tell us the law is unconstitutional. It is the first instance, I believe, in which the power of Congress to do a thing has ever been questioned in a case when the power is given by the Constitution in express terms. Whether a power can be implied when it is not expressed has often been the subject of controversy; but this is the first case in which the degree of effrontery has been ventured upon by denying a power which is plainly and distinctly written down in the Constitution. The Constitution declares that 'the Congress shall have power . . . to raise and support armies; but no appropriation of money to that use shall be for a longer time than two years.' The whole scope of the conscription act is 'to raise and support armies.' There is nothing else in it. . . . Do you admit that the power is given to raise and support armies, and yet insist that by this act Congress has not exercised the power in a constitutional mode, has not done the thing in the right way? Who is to judge that? The Constitution gives Congress the power, but it does not prescribe the mode, or expressly declare who shall

prescribe it. In such case Congress must prescribe the mode or relinquish the power. There is no alternative. . . . The power is given fully, completely, unconditionally. It is not a power to raise armies if state authorities consent; nor if the men to compose the armies are entirely willing; but it is a power to raise and support armies given to Congress by the Constitution without an 'if.' . . . The principle of the draft, which simply is involuntary or enforced service, is not new. It has been practiced in all ages of the world. It was well known to the framers of our Constitution as one of the modes of raising armies, at the time they placed in that instrument the provision that 'the Congress shall have power to raise and support armies' . . . Wherein is the peculiar hardship now?"

The foregoing opinion was quoted by Honorable Charles E. Hughes, late Justice of the United States Supreme Court, in his recent address before the American Bar Association. Mr. Hughes commented on this opinion as follows: "These are the words of Lincoln, penned in the midst of the Civil War, in which conscription was enforced, and his reasoning is conclusive. And while the question was not presented to the United States Supreme Court, the power of Congress was explicitly recognized in *Tarbel's case*. 13 Wall. 407, 20 L. Ed. 600, and in later opinions."

"To provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity" and "to make the (United States and the) world safe for democracy," the Congress has recognized a state of war existing against us and has enacted the Conscription Law as the neces-

sary means for raising and maintaining an army to wage this war. If it be said that these means resorted to by Congress in the enforced draft, and by the President as Commander in Chief of the army in using our forces to fight a foreign foe on foreign fields, are extraordinary means, it must immediately be replied that the conditions confronting us too are extraordinary and cannot be met by any other means. A war-mad military autocracy, which can be compared only to the very "Gates of Hell" described by the Scriptures, is trying to prevail against Christianity, civilization and international law, to impose upon us and the world their military domination and to destroy the constitutional democracy which now is our glorious heritage.

We firmly believe that the sound discretion exercised by Congress in the adoption of the Conscription Act as the means of raising an army for use in the present world-war crisis will be sustained by the United States Supreme Court, just as such discretionary right of Congress as to the means to be used has always been recognized in every important exercise of its power under the Constitution. Witness the decisions sustaining the National Bank Act, the Confiscation Acts of the Civil War, the Legal Tender Act, the Sherman Anti-Trust Law and the Adamson Eight-hour Law.

Would it not be a violation of the fundamental principle of our institutions, that one of the separate departments of the government shall not usurp power committed by the Constitution to another department, for the Judiciary in this case to deny to the Legislative Branch the war powers and the discretionary means of exercising them when they are expressly conferred upon The Congress by the Constitution?

Are not these war powers and their exercise by Congress, and the power of the Executive, as Commander in Chief of the Army, to fight on foreign fields, political powers for which The Congress and the President, respectively, are answerable only to the people,—political powers over which the Judiciary can assume no jurisdiction whatever?

We believe that the Judiciary will be in unison with the Legislative and Executive branches of the Government in respect of these powers and the means of their exercise; and that, as a result, our country will emerge from this national crisis and world-war triumphant and victorious, with the sun of American Democracy shining throughout the world more brilliantly than ever before, and with the Flag of the United States floating higher in the heavens, inspiring renewed love and patriotism in the people at home and a lasting gratitude and respect in the peoples abroad.