



AMERICAN CONSTITUTIONALISM  
 VOLUME I: STRUCTURES OF GOVERNMENT  
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Supplementary Material

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

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Chief Justice Taney, **Draft Opinion on the Conscription Law** (1863)<sup>1</sup>

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*The Supreme Court of the United States during the Civil War did not rule on the constitutionality of the draft, but the issue was adjudicated by several state courts. The Pennsylvania Supreme Court in **Kneedler v. Lane I** (1863) was the only tribunal that declared the draft unconstitutional. That decision was reversed in **Kneedler v. Lane II** (1864) after a Democratic member of the original 3-2 majority was defeated for reelection and replaced by a Republican. Chief Justice Roger Taney prepared a draft opinion declaring the draft to be unconstitutional, but he was never presented with a case that provided him with an opportunity to publish his anti-conscription sentiments. Taney would have held that a national draft was not a proper means for raising an army since it subverted the independent existence of the state militias.*

....

The Constitution establishes and recognizes two kinds of military force entirely different from each other in their character, obligations and duties.—The 12<sup>th</sup> clause of the 8<sup>th</sup> Section gives to Congress the power to raise and support armies. The power is general,—the number is not limited and it embraces times of peace as well as times of war, when raised it is exclusively subject to the control of the United States authorities.—It is a body of men separated from the general mass of citizens—subject to a different code of laws liable to be tried by Military Courts instead of the Civil Tribunals.—and may be employed at all times in or out of the United States, at the pleasure of Congress—and willing or not willing forced to obey the orders of their superior officers. . . . These rules and regulations so far as they concern the individuals who compose the army are altogether independent of State authority,—and the control of the whole body is exclusively and absolutely in the general government.—They compose the national forces,—or what is called in the Constitution the land forces of the United States.”

The other description of military force is the militia over which by the express provisions of the Constitution the general government can exercise no power in time of peace, and but a limited and specified power in time of war.—It will be observed that as relates to the Army the power is given to raise and support it, a power which Congress in its discretion may or may not exercise. But the militia is spoken of, as a known military force, always existing and needing no law to bring it into existence and merely requiring organization, discipline and training to make it efficient.

. . . . 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 to which they belong and consequently commanded by the officers appointed by the State.

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“The President shall be commander in chief of the Army and navy of the United States and of *the militia of the several States* when called into the actual service of the United States.”

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<sup>1</sup> Excerpt taken from Roger B. Taney, “Thoughts on the Conscription Law of the U. States—Rough Draft Requiring Revision.” in Philip G. Auchampaugh, ed., “A Great Justice on State and Federal Power being the Thoughts of Chief Justice Taney on the Federal Conscription Act,” *Tyler’s Quarterly Historical and Genealogical Magazine* 18 (1936): 72.



The distinction between the Army of the United States and the Militia of the several States and the power which the President may exercise over them respectively is here clearly stated. He has no power over the Militia unless when called into actual service of the United States. They are then called out in the language of the Constitution, as the militia of the several States. The General government has no militia, it has only the Army and Navy--The militia force duly organized and ready to be called out belongs to the several States and may be called on in the emergencies mentioned to aid the land and naval forces of the United States.

But if the act of Congress of which I am speaking can be maintained all of the clauses in the Constitution above referred to are abrogated. There is no longer any militia--it is absorbed in the Army.--Every able bodied Citizen, not exempted by that law, belongs to the national forces--that is to the Army of the United States. They are not to be called out as the Militia of a State--but as part of its land forces--and subject as soon as called on to all the obligations of a private soldier, in the ranks of the regular army."

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It appears to me impossible to believe that a Constitution and form of government framed by such men can contain provisions so repugnant to each other. For it the conscription law be authorized by the Constitution, then all of the clauses so elaborately prepared in relation to the militia, coupled as they are with the declaration "that a well regulated militia is necessary for the security of a free State," are of no practical value and may be set aside and annulled whenever Congress may deem it expedient.

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Much has been said in Courts of Justice as well as elsewhere of the war powers of the general government, and it seems to be assumed that the Constitution was made for a time of peace only and that there is no provision for a time of war. I can see no ground whatever for this argument. The war power of the Federal government is as clearly defined in the Constitution as its powers in time of peace--Congress may raise and support armies--it may provide and establish a Navy,--it may lay an embargo,--it may provide for calling out the militia of the several States--it may grant letters of marque and reprisal,--it may suspend habeas corpus,--it may quarter soldiers in a house without the consent of the owner, in a manner to be regulated by law, which it cannot do in time of peace. These are all war powers--powers to be exercised in time of war--or in preparation for war,--And when we find these powers and none others enumerated and conferred for war purposes, it is conclusive proof that they are all that were deemed necessary, and that it was not deemed safe or prudent to trust more in the hands of the new government.

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I have already spoken of the sovereignty reserved to the States, as altogether independent of the sovereignty of the United States and in no respect subordinate to it. . . . An as the militia when called into the service of the United States were to be taken from the people of the State it is essential to the existence of State Sovereignty that its governors, judges and civil officers necessary for the purpose of carrying on the government should not be taken away, and the government thereby disorganized and rendered incapable of fulfilling the duties for which it was created, what officers are required for that purpose, the State sovereignty alone can judge, accordingly we find in the clause of the Constitution herein before referred to, that no power is granted to the Federal government to determine what description of persons shall compose the military force called the militia. . . .

....

But the Act of Congress assumes the right of the General government to enroll in the national forces of the United States, and is in the army or "land forces" as they are called in the Constitution, every able bodied male citizen of the State without regarding the position he may hold in the State government--neither the judges nor executive officers, except the governor, are exempted and are made liable to trial by military court, and to punishment as deserters, if they refuse to march when ordered by the President.--What is to become of the people of a State if their executive officers and judges are taken away, and their Courts of Justice shut up? . . .

....

For the reasons above stated, I am of opinion that this Act of Congress is unconstitutional and void,--and confers no lawful authority on the persons appointed to execute it.