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I WOULD RATHER BE RIGHT THAN PRESIDENT.—Henry Clay.

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THE CONSCRIPTION LAW.

Dissenting Opinion of Justices Strong and Read, affirming its Constitutionality.

Kneeder vs. Lane, Barret, Wells and Ashmand. Smith vs. Lane, Barret, Wells and Young. Nickells vs. Lehman, Marsdis, Murphy and Scanlan.

In the Supreme Court of Pennsylvania, in equity. Motion for an injunction.

STRONG, J.—The complainants having been enrolled and drafted, under the provisions of the act of Congress of March 3d, 1863, entitled "An Act for enrolling and calling out the national forces, and for other purposes," have presented their bills in this court against the persons who constitute the board of enrollment, and against the enrolling officers, praying that they may be enjoined against proceeding under the act of Congress, with the requisition, enrolment, and draft of citizens of the Commonwealth, and of persons of foreign birth who have declared their intention to become citizens under and in pursuance of the laws to perform compulsory military duty in the service of the United States, and particularly that the defendants may be enjoined from all proceedings against the persons of the complainants, under pretence of executing the said laws of the United States. The bills having been filed, motions are now made for preliminary injunctions, until final hearing. These motions have been argued only on the part of the complainants. We have, therefore, nothing before us but the bills and the special affidavits of the complainants.

It is to be noticed that neither the bills nor the accompanying affidavits aver that the complainants are not subject to enrolment and draft into the military service of the United States, under the act of Congress, if the act be valid; nor is it asserted that they have been improperly or fraudulently drawn. It is not alleged that the defendants have done anything, or that they propose to do anything, not warranted and required by the words and spirit of the enactment. The complainants rest wholly upon the assertion that the act of Congress is unconstitutional, and, therefore, void. It is denied that there is any power in the Federal Government to compel the military service of a citizen by direct action upon him, and it is insisted that Congress can constitutionally raise armies in no other way than by voluntary enlistments.

The necessity of vesting in the Federal Government power to raise, support, and employ a military force was plain to the framers of the Constitution, as well as to the people of the States by whom it was ratified. This is manifested by many provisions of that instrument, as well as by its general purpose, declared to be for "common defence." Indeed, such a power is necessary to preserve the existence of any independent government, and none has ever existed without it. It was, therefore, expressly ordained in the eighth article that the Congress of the United States should have power to "provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions." It was also ordained that they should have power to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress. Nor is this all. It is obvious that if the grant of power to have a military force had stopped here, it would not have answered all the purposes for which the Government was formed.—It was intended to frame a government that should make a new member in the family of nations. To this end, within a limited sphere, every attribute of sovereignty was given. To it was delegated the absolute and unlimited power of making treaties with other nations—a power explicitly denied to the States. This unrestricted power of making treaties involved the possibility of offensive and defensive alliances. Under such treaties, the new government might be required to send armies beyond the limits of its territorial jurisdiction. And, in fact, at the time when the Constitution was formed, a treaty of alliance, offensive and defensive, was in existence between the old Confederacy and the Government of France.—Yet more. Apart from the obligations assumed by treaty, it was well known that there are many cases where the rights of a nation and its citizens cannot be protected or vindicated within its own boundaries. But the power conferred upon Congress over the militia is insufficient to enable the fulfilment of the demands of such treaties, or to protect the rights of the Government, or its citizens, in those cases in which protection must be sought beyond the territorial limits of the country. The power to call the militia into the service of the Federal Government is limited by express terms. It reaches only three cases. The call may be made "to execute the laws of the Union, to suppress insurrections, and to repel invasions," and for no other uses. The militia cannot be summoned for the invasion of a country without the limits of the United States. They cannot be employed, therefore, to execute treaties of offensive alliance, nor in any case where military power is needed abroad, to enforce rights necessarily sought in foreign lands. This must have been understood by the framers of the Constitution, and it was for such reasons, doubtless, that other powers to raise and maintain a military force were conferred upon Congress, in addition to those which were given over the militia. By the same section of the eighth article of the Constitution, it was ordained, in words of the largest meaning, that Congress should have power to "raise and support armies"—a power not to be confounded with that given over the militia of the country.—Unlike that, it was unrestricted, unless it be considered a restriction that appropriations of money to the use of raising and supporting armies were forbidden for a longer term than two years. In one sense this was a practical restriction. Without appropriations no army can be maintained, and the limited period for which appropriations can be made enables the people to pass judgment upon the maintenance and even existence of the army every two years, and in every new Congress. But in the clause conferring authority to raise armies, no limitation is imposed other than this indirect one, either upon the magnitude of the force which Congress is empowered to raise, or upon the uses for which it may be employed, or upon the mode in which the army may be raised. If there be any restriction upon the mode of exercising the power, it must be found elsewhere than in the clause of the Constitution that conferred it. And if a restricted mode of exercise was intended, it is remarkable that it was not expressed, when limitations were so carefully imposed upon the power given to call forth the militia—and, more especially, when, as it appears from the prohibition of appropriations for the army for a longer time than two years, the subject of limiting the power was directly before the minds of the authors of the Constitution.

This part of the Constitution, like every other, must be held to mean what its framers, and the people who adopted it, intended it should mean. We are not at liberty to read it in any other sense. We cannot insert restrictions upon powers given in unlimited terms, any more than we can strike out restrictions imposed.

There is sometimes great confusion of ideas in the consideration of questions arising under the Constitution of the United States, caused by a misapprehension of a well-recognized and oft repeated principle. It is said, and truly said, that the Federal Government is one of limited powers. It has no other than such as are expressly given to it, and such as (in the language of the Constitution itself) "are necessary and proper for carrying into execution" the powers expressly given.—By the tenth article of the amendments, it is ordained that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. Of course there can be no presumption in favor of the existence of a power sought to be exercised by Congress. It must be found in the Constitution. But this principle is misapplied when it is used, as is sometimes the case, to restrict the right to exercise a power expressly given. It is of value when the inquiry is whether a power has been conferred, but of no avail to strip a power given in general terms, of any of its attributes. The powers of the Federal Government are limited in number, not in their nature. A power vested in Congress is as ample as it would be if possessed by any other legislature, none the less because held by the Federal Government. It is not enlarged or diminished by the character of its possessor.—Congress has power to borrow money. Is it any less than the power of a State to borrow money? Because the Federal Government has not all the powers which a State Government has, will it be contended that it cannot borrow money, or regulate commerce, or fix a standard of weights and measures, in the same way, by the same means, and to the same extent as any State might have done had no Federal Constitution ever been formed? If not, and surely this will not be contended, why is not the Federal power to raise armies as large and as unfettered in the mode in which it may be exercised as was the power to raise armies possessed by the States before 1787, and possessed by them now, in time of war? If they were not restricted to voluntary enlistments in procuring a military force, upon what principle can Congress be? In Gibbons vs. Ogden (9 Wheaton, 196,) the Supreme Court of the United States laid down the principle that all the powers vested by the Constitution in Congress are complete in themselves, and may be exercised to their utmost extent, and that there are no limitations upon them, other than such as are prescribed in the Constitution.

It is not difficult to ascertain what must have been intended by the founders of the Government when they conferred upon Congress the power to "raise armies." At the time when the Constitution was formed and when it was submitted to the people for adoption, the mode of raising armies by coercion, by enrollment, classification and draft, as well as by voluntary enlistment, was well known, practised in other countries, and familiar to the people of the different States. In 1756, but a short period before the Revolutionary War, a British statute had enacted that all persons without employment might be seized and coerced into the military service of the kingdom. The act may be found at length in Ruffhead's British Statutes at Large, vol. 7, page 268. Another act of similar character was passed in 1757, British Statutes at Large, vol. 8, page 11. Both were enacted under the administration of William Pitt, afterwards Lord Chatham, reputed to have been one of the staunchest friends of English liberties. They were founded upon a principle always recognized in the Roman empire, and asserted by all modern civilized governments, that every able-bodied man capable of bearing arms, owes personal military service to the government which protects him. Lord Chatham's acts were harsh and unequal in their operations, much more so than the act of Congress now assailed. They reached only a select portion of the able-bodied men in the community, and they opened wide a door for favoritism and other abuses. For these reasons they must have been the more prominently before the eyes of the framers of the Federal Constitution, when they were providing safeguards to liberty, and checks to arbitrary power.—Yet, in full view of such enactments, they conferred upon Congress an unqualified power to raise armies. And, still more than this, coercion into military service, by classification and draft from the able-bodied men of the country, was to them a well-known mode of raising armies in the different States which confederated to carry on the Revolutionary war. It was equally well known to the people who ordained and established the Constitution, expressly "in order to form a more perfect Union, establish justice, ensure domestic tranquility, provide for the common defence, and secure the blessings of liberty for themselves and their posterity." It is an historical fact that during the later stages of the war the armies of the country were raised, not alone by voluntary enlistment, but also by coercion; and that the liberties and independence sought to be secured by the Constitution were gained by soldiers made such, not by their own voluntary choice, but by compulsory draft. Chief Justice Marshall, himself a soldier of the Revolution, than whom no one was better acquainted with Revolutionary history, in his life of Washington (vol. 4, page 241), when describing the mode in which the armies of the government were raised, makes the following statement: "In general the assemblies (of the States) followed the example of Congress, and apportioned on the several counties within the States the quota to be furnished by each. This division of the State was again to be subdivided into classes, and each class was to furnish a man by contributions or taxes imposed on itself. In some instances a draft was to be used in the last resort." This mode of recruiting the army by draft, in Revolutionary times, is also mentioned in Ramsey's Life of Washington (vol. 2, page 246), where it is said, "When voluntary enlistments fell short of the proposed numbers, the deficiencies were, by the laws of the several States, to be made up by drafts, or lots from the militia."

Thus it is manifest that when the members of the Convention proposed to confer upon Congress the power to raise armies, in unqualified terms, and when the people of the United States adopted the Constitution, they had in full view compulsory drafts from the population of the country, as a known and authorized mode of raising them. The memory of the Revolution was then recent. It was universally known that it had been found impossible to raise sufficient armies by voluntary enlistment, and that compulsory draft had been resorted to. If, then, in construing the Constitution, we are to seek for and be guided by the intentions of its authors, there is no room for doubt. Had any limitation upon the mode of raising armies been intended, it must have been expressed. It could not have been left to be gathered from doubtful conjecture. It is incredible that when the power was given in words of the largest signification, it was meant to restrict its exercise to a solitary mode—that of voluntary enlistment, when it was known that enlistments had been tried and found ineffective, and that coercion had been necessary. The members of the Convention were citizens of the several States, each a sovereign, and each having power to raise a military force by draft, a power which more than one of them had exercised. By the Constitution, the authority to raise such a force was to be taken from the States partially, and delegated to the new government about to be formed. No State was to be allowed to keep troops in time of peace. The whole power of raising and supporting armies, except in time of war, was to be conferred upon Congress. Necessarily, with it was given the means of carrying it into full effect.

I agree that Congress is not at liberty to employ means for the execution of any powers delegated to it that are prohibited by the spirit of the Constitution, or that are inconsistent with the reserved rights of the States, or the inalienable rights of a citizen. The means used must be lawful means. But I have not been shown, and I am unable to perceive, that compelling military service in the armies of the United States, not by arbitrary conscription, but, as this act of Congress directs, enrollment of all the able bodied male citizens of the United States, and persons of foreign birth who have declared their intention to become citizens, between the ages of twenty and forty-five, (with some few exceptions,) and by draft by lot from those enrolled, infringes upon any reserved rights of the States, or interferes with any constitutional right of a private citizen. If personal service may be compelled—if it is common duty—this is certainly the fairest and most equal mode of distributing the public burdens.

It was urged in the argument that coercion of personal service in the armies is an invasion of the right of civil liberty. The argument was urged in strange forgetfulness of what civil liberty is. In every free government the citizen or subject surrenders a portion of his absolute rights in order that the remainder may be protected and preserved. There can be no government at all where the subject retains unrestrained liberty to act as he pleases, and is under no obligation to the State. That is undoubtedly the best government which imposes the fewest restraints, while it secures ample protection to all under it. But no government has ever existed, none can exist, without a right to the personal military service of all its able-bodied men. The right to civil liberty in this country never included a right to exemption from such service. Before the Federal Constitution was formed, the citizens of the different States owed it to the governments under which they lived, and it was exacted. The militia systems of the States then asserted it, and they have continued to assert it ever since. They assert it now. No one doubts the power of a State to compel its militia into personal service, and no one has ever contended that such compulsion invades any right of civil liberty. On the contrary, it is conceded that the right to civil liberty is subject to such power in the State governments, and the history of the period immediately antecedent to the adoption of the Federal Constitution shows that it was then admitted. Is civil liberty now a different thing from what it was when the Constitution was formed? Is it better protected by the provisions of the Constitution, but are the obligations of a citizen to the Government any less now than they were then? This cannot be maintained. If, then, coercion into military service was no invasion of the rights of civil liberty enjoyed by the people of the States before the Federal Constitution had any existence, it cannot be now.

Again, it is insisted that if the power given to Congress to raise and support armies be construed to warrant the compulsion of citizens into military service, it must with equal reason be held to authorize arbitrary seizures of property for the support of the army. The force of the objection is not apparent. Confessedly the army must be raised by legal means. By such means it must also be supported. It has already been shown that enrollment and draft are not illegal; that to make them illegal a prohibition must be found in the letter or in the spirit of the Constitution. Arbitrary seizures of private property for the support of the army are illegal and prohibited. Not only does the Constitution point out the mode in which provisions shall be made for the support of the army, but in numerous provisions it protects the people against deprivation of property without compensation and due course of law. Exemption from such seizures was always an asserted and generally an admitted right, while exemption from liability to being compelled to the performance of military service was, as has been seen, never claimed. There are, therefore, limitations upon the means which may be used for the support of the army, while none are imposed upon the means of raising it.

Again, it is said this act of Congress is a violation of the Constitution, because it makes a drafted man punishable as a deserter before he is mustered into service. The contrary was declared by Chief Justice Marshall, when delivering the judgment of the Supreme Court of the United States in Houston vs. Moore, 5 Wheaton. Under the act of 1795 the drafted men were not declared to be subject to military law until mustered into service. This is the act of which Judge Story speaks in his commentaries. But in the opinion of Judge Marshall, Congress might have declared them in service from the time of the draft, precisely what this act of Congress does. Judge Marshall's opinion, of course, explodes this objection.

The argument most pressed in support of the alleged unconstitutionality of the act of Congress is that it interferes with the reserved rights of the States over their own militia. It is said the draft takes a portion of those who owe militia service to the States, and thus diminishes the power of the States to protect themselves. The States, it is claimed, retain the principal power over the militia, and therefore the power given to Congress to raise armies must be so construed as not to destroy or impair that power of the State. If, say the complainants, Congress may draft into their armies, and compel the service of a portion of the State militia, they may take the whole, and thus the entire power of the States over them may be annulled, for want of any subject upon which it can act. I have stated the argument quite as strongly as it was presented. It is more plausible than sound. It assumes the very matter which is the question in debate. It ignores the fact that Congress has *also* power over those who constitute the militia. The militia of the States is also that of the General Government. It is the whole able-bodied population capable of bearing arms, whether organized or not. Over it certain powers are given to Congress, and others are reserved to the States. Besides the power of calling it forth, for certain defined uses, Congress may provide for its organization, arming and discipline, as well as for governing such portion as may be employed in its service. It is the material, and the only material, contemplated by the Constitution, out of which the armies of the Federal Government are to be raised.—Whether gathered by coercion or enlistment, they are equally taken out of those who form a part of the militia of the States. Taking a given number by draft no more conflicts with the reserved power of the States than does taking the same number of men in pursuance of their own contract. No citizen can deprive a State of her rights without her consent. None could, therefore, voluntarily enlist, if taking a militiaman into military service in the army of the United States is in conflict with any State rights over the militia. Those rights, whatever they may be, it is obvious, cannot be affected by the mode of taking. It is clear that the States hold their power over the militia, subordinate to the power of Congress to raise armies out of the population that constitutes it. Were it not so, the delegation of the power to Congress would have been an empty gift. Armies can be raised from no other source. Enlistments in other lands are generally prohibited by foreign enlistment acts, and even where they are not, they may, under the law of nations, involve a breach of neutrality.

Justly, therefore, may it be said the objection now under consideration begs the question in debate. It assumes a right in the State which has no existence, to wit: a right to hold all the population that constitutes its militia men exempt from being taken, in any way, into the armies of the United States. When it is said, if any portion of the militia may be coerced into such military service, the whole may, it is but a repetition of the common but very weak argument against the existence of a power because it may possibly be abused. It might with equal force be urged against the existence of any power in either the State or General Governments. It applies as well to a denial of power to raise armies by voluntary enlistment. It is as conceivable that high motives of patriotism, or inducements held out by the Federal Government, might draw into its military service the entire able bodied population of a State, as that the whole might be drafted. We are not to deny the existence of a power because it may possibly be unwisely exercised, nor are we to presume that abuses will take place. Especially are we not at liberty to do so in this case, in view of the fact that the General Government is under constitutional obligations to provide for the common defence of the country, and to guaranty to each State a republican form of government. That would be to impose a duty and deny the power to perform it.

These are all the objections worthy of notice that have been used against the power of Congress to compel the complainants into military service in the army.—I know of no others of any importance. They utterly fail to show that there is anything in either the letter or the spirit of the Constitution to restrict the power to "raise armies," given generally, to any particular mode of exercise. For the reasons given, then, I think the provisions of the act of Congress, under which these complainants have been enrolled and drafted, must be held to be such as it is within the constitutional power of Congress to enact. It follows that nothing has been done, or is proposed to be done, by the defendants, that is contrary to law or prejudicial to the rights of the complainants.

An attempt was made on the argument to maintain that those provisions of the act of Congress which allow a drafted man to commute by the payment of $300 are in violation of the Constitution. But this is outside of the cases before us. By these provisions the complainants are not injuriously affected, and the bills do not complain of anything done, or proposed to be done, under them. It is the compulsory service which the plaintiffs resist; they do not complain that there is a mode provided of ridding themselves of it. If it be conceded Congress cannot provide for commutation of military service, by the payment of a stipulated sum of money, or cannot do it in the way adopted in this enactment, the concession in no manner affects the directions given for compulsion into service. Let it be that the provision for commutation is unauthorized, those for enrollment and draft are such as Congress had power to enact. It is well settled that part of the statute may be unconstitutional and the remainder in force. I by no means, however, mean to be understood as conceding that any part of this act is unconstitutional. I think it might easily be shown that every part of it is a legitimate exercise of the power vested in Congress, but I decline to discuss the question, because it is not raised by the cases before us.

Nor while holding the opinions expressed, that no rights of the complainants are unlawfully invaded or threatened, is it necessary to consider the power or propriety of interference by this court, on motion, to enjoin Federal officers against the performance of a duty imposed upon them in plain terms by an act of Congress. Upon that subject I express no opinion. I have said enough to show that the complainants are not entitled to the injunctions for which they ask, and I think they should be denied.

TAKING THE STARCH OUT.—A capital example, writes a reader, of what is often termed "taking the starch out," happened recently in a country bank in New England. A pompous, well dressed individual entered the bank, and, addressing the teller, who is somewhat of a wag, inquired:

"Is the cashier in?"

"No sir," was the reply.

"Well, I am dealing in pens, supplying the New England banks pretty largely, and I suppose it will be proper for me to deal with the cashier."

"I suppose it will," said the teller.

"Very well; I will wait."

The pen-peddler took a chair, and sat composedly for an hour, waiting for the cashier. By that time he began to grow uneasy, but sat twisting in his chair for about twenty minutes, and seeing no prospect of a change in his circumstances, asked the teller how soon the cashier would be in.

"Well, don't know exactly," said the waggish teller, "but I expect him in about six weeks. He has just gone to Lake Superior, and told me that he thought he would come back in that time."

Peddler thought he should not wait.

"Oh, stay if you wish," said the teller, very blandly. "We have no objection to you sitting here in the day time, and you can probably find some place in town where they will be glad to keep you nights."

The pompous peddler disappeared without another word.

☞ Mrs. Trollope, the novelist, who once abused us Yankees, and was herself well abused in return, recently died at her residence in Florence. She was over eighty years old.

☞ Heaven gives us enough when it gives us opportunity.