Democrat and Sentinel.

THE BLESSINGS OF GOVERNMENT, LIKE THE DEWS OF HEAVEN, SHOULD BE DISTRIBUTED ALIKE, UPON THE HIGH AND THE LOW, THE RICH AND THE POOR.

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reme Court of Pennsylvania.

F CONGRESS OF 3d MARCH, 1863, MMONLY CALLED THE "CONSCRIP- N LAW,' DECLARED UNCONSTITU- IONAL.

ry S. Kneedler, vs. d M. Lane, et al. ues B. Smith vs same. m. F. Nickels vs same.

Three bills in equity. And on a motion in each case for special injunction.

WOODWARD, J.—On the 3d day of rch, 1863, the Congress of the United tes passed an act for "enrolling and lling out the National forces, and for her purposes," which is commonly called Conscription law. The plaintiffs, o are citizens of Pennsylvania, have forth the act fully in their bills, and ey complain that they have been d af- d into the *military service* of the Gov- rnment in pursuance of said enactment, t that the same is unconstitutional and oid, and that the defendants, who are gaged in executing the act, have viola- d the rights and are about to invade the rsonal liberty of the plaintiffs, and there- on they invoke the equitable interposi- n of this Court to enjoin the defendants ainst a further execution of the said ct.

For the jurisdiction of this Court to set ide an act of Congress as unconstitu- nal, and to grant the relief prayed for, refer myself to the views of the Chief stice in the opinion he has just deliver- d in these cases, and I come at once to e constitutional question.

The Act begins with a preamble which ates the existing insurrection and rebel- n against the authority of the United ates, the duty of the Government to press insurrection and rebellion, to arantee to each State a republican form government, and to preserve the public nquility, and declare that for these high rposes a military force is indispensable, to raise and support which all persons ght willingly to contribute," and that service is more praiseworthy and honor- ble than the maintenance of the Consti- tion and Union; and then goes on to ovide for the enrolling of all the able- died male citizens of the United States, d persons of foreign birth, who have de- ared their intention to become citizens, tween the ages of twenty-one and forty- e years, and these able-bodied citizens d foreigners, with certain exceptions terward enumerated, are declared "*the rional forces,*" and made liable to per- rm military duty when called out by e President. The act divides the coun- y into military districts, corresponding th the Congressional districts, provides r provost marshals and enrolling boards, d regulates the details of such drafts as e President shall order to be made from e national forces so enrolled. The pay- ent of $300 excuses any drafted person, t that it is, in fact, a law providing for a mpulsory draft or conscription of such tizens as are unwilling or unable to pur- ase exemption at the stipulated price. It is the first instance, in our history, of gislation forcing a great public burthen on the poor. Our State legislation, which exempts men who are not worth more than $300 from paying their own debts, is in striking contrast with this Conscrip- tion law, which devolves upon such men the burthen which belong to the whole "national forces," and to which "all persons ought willingly to contribute." This, however, is an objection to the spirit of the enactment rather than to its con- stitutionality.

The description of persons to be en- rolled, able-bodied citizens, between twenty and forty-five years of age, is substantially the description of the militia as defined in our Pennsylvania statutes and probably in the statutes of all the States. The na- tional forces, then, mean the militia of the States—certainly include the militia of Pennsylvania. This expression, "nation- al forces," is modern language, when so applied. It is not found in our Constitu- tions, either State or Federal, and if used in commentaries on the Constitution, and in history, it will generally be found ap- plied to our land and naval forces in actual service—to what may be called our standing army. It is a total misnomer when applied to the militia, for the mili- tia is a State institution. The General Government has no militia. The State militia, always highly esteemed as one of the bulwarks of our liberties, are recogni- zed in the Federal Constitution, and it is not in the power of Congress to obliterate them or to merge them in "national for- ces."

Unless there is more magic in a name than has ever been supposed, this con- script law was intended to act upon the State militia, and our question is, there- fore, whether Congress has power to im- press or draft the militia of the State. I cannot perceive what objection can be taken to this statement of the question, for surely it will not be argued that calling the militia national forces makes them something else than the militia. If Con- gress did not mean to draft the militia un- this law, where did they expect to find the national forces? "All able-bodied white male citizens between the ages of twenty-one and forty-five years, residing in this State, and not exempted by the laws of the United States," with certain specified exceptions, constitute our State militia. Will it be said that the conscript law was not intended to operate on these? I think it will not. Then if it does touch and was framed and designed to draft this very class of citizens, no possible objec- tion can be taken to the above statement of the question we have to decide.

I, therefore, repeat the question with great confidence in its accuracy, has Con- gress the constitutional power to impress or draft into the military service of the United States the militiamen of Pennsyl- vania?

This question has to be answered by the Constitution of the United States, be- cause that instrument, framed by deputies of the people of the States and ratified and put into effect by the States themselves in their respective corporate capacities, dele- gates to Congress all the powers that body can exercise. These delegations are either express or such implications as are essential to the execution of expressly dele- gated powers.

There are but three provisions in the Constitution of the United States that can be appealed to in support of this legisla- tion. In ordinary editions they stand numbered as clauses 13, 16 and 17 of the VIII section of Act 1, of the Constitution:

"13. Congress shall have power to raise and support armies, but no appro- priations of money to that use shall be for a longer term than two years.

"16. Congress shall have power to provide for calling forth the militia to exe- cute the laws of the Union, to suppress insurrection and repel invasions.

"17. Congress shall have power to provide for organizing, arming and disci- plining 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 pre- scribed by Congress."

"To raise armies"—these are large words! what do they mean? There could be limitation upon the number or size of the armies to be raised, for all possible contingencies could be foreseen; but our question has not reference to numbers or size, but to the *mode* of raising armies. The framers of the Constitution, and the States who adopted it, derived their ideas of government principally from the exam- ple of Great Britain—certainly not from any of the more imperial and despotic governments of the earth. What they meant to make was a more free Constitu- tion than that of Great Britain—taking that as a model in some things—but en- larging the basis of popular rights in all respects that would be consistent with order and stability. They knew that the British army had generally been recruited by voluntary enlistments, stimulated by wages and bounties, and that the few in- stances of impressments and forced con- scriptions of land forces had met with the disfavor of the English nation and had led to preventive statutes. In 1704, and again in 1707, conscription bills were at- tempted in Parliament but laid aside as unconstitutional. During the American Revolution a statute, 19, Geo. III C. 10, permitted the impressment of "idle and disorderly persons not following any law- ful trade or having some substance suffi- cient for their subsistance," and this was as far as English legislation had gone when our Federal Constitution was planned. Assuredly the framers of our Constitution did not intend to subject the peo ple of the States to a system of con- scription which was applied in the mother country only to paupers and vagabonds. On the contrary, I infer that the power conferred on Congress was the power to raise armies by the ordinary English mode of voluntary enlistments.

The people were justly jealous of stan- ding armies. Hence, they took away most of the war power from the Execu- tive, where, under monarchial forms, it generally resides, and vested it in the legislative department, in one branch of which the States have equal representa- tion, and in the other branch of which the people of the States are directly represen- ted according to their numbers. To these representatives of the States and the peo- ple this power of originating war was committed, but even in their hands it was restrained by the limitation of biennial ap- propriations for the support of the armies they might raise. Of course, no army could be raised or supported which did not command popular approbation, and it was rightly considered that voluntary en- listments would never be wanting to re- cruit the ranks of such an army. The war power, existing only for the protec- tion of the people, and left, as far as it was possible to leave it, in their own hands, was incapable of being used with- out their consent, and, therefore, could never languish for enlistments. They would be ready enough to recruit the ranks of any army they deemed necessary to their safety. Thus the theory of the Constitution placed this great power, like other govermental powers, directly upon the consent of the governed.

The theory itself was founded on free and fair elections—which are the funda- mental postulate of the Constitution. If the patronage and power of the Govern- ment shall ever be employed to control popular elections, the nominal representa- tives of the people may cease to be their real representatives, and the armies which may be raised may not so command pub- lic confidence as to attract the necessary recruits, and then conscript laws and other extra constitutional expedients may be- come necessary to fill the ranks. But govermental interference with popular elections will be subversion of the Consti- tution, and no constitutional argument can assume such a possibility.

Supposing that the people are always to be fairly represented in the hall of Con- gress, I maintain that it is grievous injus- tice to them to legislate on the assumption that any war honestly waged for constitu- tional objects will not always have such sympathy and support from the people as will secure all necessary enlistments. Equally unjust to their intelligence is it to suppose that they meant to confer on their servants the power to impress them into a war which they could not approve.

When to these considerations we add the ability of a great country, like ours, to stimulate and reward enlistments, both at home and abroad, by bounties, pen- sions and homesteads, as well as by poli- tical patrocage in countless forms, we see how little necessity or warrant there is for implying a grant of the imperial power of conscription.

There is nothing in the history of the Constitution nor in those excellent con- temporaneous papers called the Federal- ists, to justify the opinion that this vast power lies wrapped up in the few plain words of the 13th clause, whilst the sub- sequent clauses, concerning the militia, absolutely forbid it.

If the very improbable case be suppo- sable, that enlistments into the Federal armies might become so numerous in a particular State as sensibly to impair its own proper military power, is it not much more improbable that the States meant to confer upon the General Government the power to deprive them, at its own pleasure altogether of the militia, by forced levies? Yet this might easily happen if the power of conscription be conceded to Congress. There are no limitations expressed—noth- ing to compel Congress to observe quotas and proportions as among the several States—nothing to prevent their raising armies wholly from one State, taking every able-bodied citizen out of it to the endangering, if not utter undoing of all its domestic interists.

And besides, if we concede this danger- ous power to the language of the thirteenth clause, we destroy the force and effect of the words of the sixteenth and seventeenth clauses. We make the instrument self- destructive, which is violative of all can- ons of construction. Congress shall have power to provide for calling forth the mi- litia in the manner and subject to the limitations prescribed in clauses sixteen and seventeen, and therefore, I argue Con- gress has not the power to draft them. Is an express rule of the Constitution to give way to an implied one? If the thirteenth clause confers power to draft the militia, the words of the sixteenth and seventeenth clauses are the idlest that were ever writ- ten. But if the eighteenth conferred only the power to enlist volunteers, then the subsequent clauses become very intelligi- ble—stand well with the thirteenth, and add essentially to the martial faculties of the Federal Government Look at those clauses. The militia are to be called forth to execute the laws of the Union, suppress insurrections and repel invasions, to be organized, armed and disciplined by the State, but according to the laws of Congress, and such part of them as may be employed in the service of the United States are to be governed by the Presi- dent but officered by the respective States. Now this Conscription law recites an "existing insurrection and rebellion" as the ground and reason, not for calling forth the militia under the above provisions, but for *drafting* them into the military service of the United States. The very case has occurred in which the Constitution says the militia shall be called out under State officers, but Congress says they shall be drafted, in contempt of State authority. General Washington and the men of his day, did not so read the Constitution, when in suppressing the whisky insurrec- tion in this State they paid the most scru- pulous regard to the rights and powers of the State. Under pressure of a foreign war, a Conscript Bill was reported in Congress in 1814, but it did not pass, and if it had, it would have been no prece- dent for this law, because we are dealing with an insurrection, and insurrections are specially provided for in the Constitution. If to support a foreign war Congress may draft the militia, which I do not admit, the power of draft to suppress insurrec- tions is not to be implied, since another mode of suppressing insurrections is ex- pressly provided. When a State is called on for its quota of militia, it may deter- mine, by lot, who of the whole number of its enrolled militia shall answer the call, and thus State drafts are quite regular, but a Congressional draft to *suppress insur- rection* is an innovation that has no war- rant in the history or text of the Constitu- tion. Either such a law, or the Constitu- tion, must be set aside. They cannot stand together.

And, happily, no ill consequences can flow from adhering to the Constitution, for the standing army of the Federal Gov- ernment, recruited by enlistments in the ordinary way, with the State militia, called forth according to the Constitution, are a force quite sufficient to subdue any rebellion that is capable of being subdued by force of arms. Such a formidable force, wisely wielded, in connection with a paternal and patriotic administration of all other constitutional powers, will never fail to put down refractory malcontents, and preserve peace and good order among the American people. This Conscript law, therefore, not sanctioned by the Con- stitution, is not adapted to the exigencies of the times, nor likely to have success as a war measure.

In its political bearings, even more than in its military aspects, it is subversive of the Constitution and of the rights of citi- zens that depend upon State authority. A few thoughts will make this plain. It is impossible to study our State and Federal Constitutions, without seeing how mani- festly the one was designed to guard and maintain the personal and social rights of the citizen—the other to take care of his external relations.

Nurture, education, property, home, wife, and children, servants, administra- tion of goods and chattles after death, and a graveyard in which to sleep the sleep of death, these are among the objects of State solicitude, for the protection of which the State provides civil authorities and back of them the *posse comitatus* and the military to make the civil administration effectual. Now, if the principle be admitted that Congress may take away the State mili- tia, who does not see that the ultimate and final security of every man's domes- tic and personal rights is endangered. To the extent delegated in the Constitu- tion nobody questions the right of Con- gress to control the State militia, but if to the extent to which this enactment goes, the States will be reduced to the condition of mere counties of a great Common- wealth, and the citizen of the State must look to the Federal Government for the enforcement of all his domestic rights as well as for the regulation of his external relations.

The citizens of the States need protec- tion from foreign foes and Indian tribes—peaceful intercourse and commerce with all the world—a standard of values and of weights and measures that shall be com- mon to all the States, and a postal system that shall be co-extensive with interest at trade and commerce. To adjust and maintain these external relations of the citizen, are high duties which the Consti- tution has committed to the Federal Gov- ernment, and has furnished it with all ne- cessary civil functionaries, and with power to levy and collect taxes from the people of the States, to raise and support armies, to provide a navy, and to call forth the militia to execute the laws.

Thus the American citizen amply pro- vided, by means of Constitutions that are written, with protection for all his rights natural and artificial, domestic and for- eign: but as the war power of the Gene- ral Government is his ultimate security for his external, so is the militia his ulti- mate security for his internal or domestic rights.

Could the State Government strike at the war power of the Federal Govern- ment without endangering every man's rights? In view of the existing rebellion, no man would hesitate how to answer this question, and yet is it not equally apparent that when the Federal Govern- ment usurps a power over the State mi- litia which was never delegated, every man's domestic rights (and they are those which touch him most closely) are equally endangered.

The great vice of the conscript law is that it is founded on an assumption that Congress may take away, not the State rights of the citizen, but the security and foundation of his State rights. And how long is civil liberty expected to last after the securities of civil liberty are destroyed? The Constitution of the United States committed the liberties of the citizen in part to the Federal Govern- ment, but expressly reserved to the States and the people of the States all it did not delegate. It gave the General Govern- ment a standing army, but left to the States their militia. Its purposes in all this balancing of powers were wise and good, but this legislation disregards these distinctions, and upturns the whole system of government when it converts the State militia into "national forces" and claims to use and claims to and govern them as such.

Times of rebellion, above all others, are the times when we should stick to our fundamental law, lest we drift into anar- chy on one hand or into despotism on the other. The great sin of the present re- bellion consists of violating the Constitu- tion whereby every man's civil rights are exposed to sacrifice. Tuless the Govern- ment be kept on the foundation of the foundation of the Constitution, we imitate the sin of the rebels, and thereby encour- age them, whilst we weaken and dis- hearted the friends of constitutional order and government. The plaintiffs in these bills have good right, I think, as citizens of Pennsylvania, to complain of the act in question, not only on the grounds I have indicated, but on another to which I will briefly allude.

The 12th section provides that the drafted person shall receive ten days' no- tice of the rendezvous at which he is to report for duty, and the 13th section enacts "that if he fails to report himself in pursuance of such notice, without fur- nishing a substitute or paying the required sum therefor, he shall be deemed a de- serter, and shall be arrested by the pro- vost marshal, and sent to the nearest mili- tary post for trial by court martial." The only qualification to which this provision is subject is, that upon proper showing that he is not able to do military duty the board of enrollment may relieve him from the draft.

One of the complainants, Kneedler, has set forth the notice that was served on him in pursuance of this section, and by which he was informed that unless he ap- peared on a certain day, he would be "deemed a deserter, and would be sub- ject to the penalty prescribed therefor, by the rules and articles of war." I believe the penalty of desertion, by the military code is any corporeal punishment a court- martial may choose to inflict, even to that of being put to death.

Can a citizen be made a deserter before he has become a soldier? Has Congress the constitutional power to authorize pro- vost marshals, after drawing the name of a freeman from a wheel and serving him with a ten days' notice, to seize and drag him before a court-martial for trial under military law? This question touches the foundations of personal liberty.

In June 1215, the Barons of England and their retainers, "a numerous host en- camped upon the srassy plain of Runny- meade," wrung from King John that Great Charter which declared, among other securities of the rights and liberties of Englishmen, that "that no freeman shall be arrested, or imprisoned, or de- prived of his freehold, or his liberties, or free customs, or be outlawed or exiled, or in any manner harmed; nor will we (the King) proceed against him, nor *send any one against him by force of arms,* unless ac- cording to the sentence of his peers (which includes trial by jury) or the common law of England." Here was laid the strong foundation of the liberties to which we belong. And yet not here for Magna Charta *created* no rights, but only reas- serted those which existed long before at common law. It was for the most part, says Lord Coke, merely declaratory of the principal grounds of the fundamental laws of England. Far back of Magna Char- ta, in the customs and maxims of our Saxon ancestry, those principles of liberty lay scattered which were gathered to- gether in that immortal document, which four hundred years afterwards were again reasserted in two other great declaratory statutes, "The Petition of Rights" and "The Bill of Rights," and which were transplanted into our Declaration of In- depenence, the Bill of righhts to our State Constitution and the Amendments to our Federal Constitution, and which have thus become the heritage of these plaintiffs. Says the 5th article of these Amendments: "No person shall be held to answer for a capital or otherwise in- famous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger." What is the scope of this exception? The land or naval forces mean the regular military organization of the Government—the standing army and navy—into which citi- zens are introduced by military education from boyhood or by enlistments, and be- come, by their own consent, subject to the military code and liable to be tried and punished without any of the forms or safeguards of the common law. In like manner the militia when duly called out and placed "in actual service" are subject to the rules and articles of war, all their common law rights of personal freedom being for the time suspended. But when are militiamen in actual ser- vice? When they have been notified of a draft? Judge Story, in speaking of the authority of Congress over the mili- tia, says: "The question when the au- thority of Congress over the militia be- comes exclusive, must especially depend upon the fact when they are to be deemed in the actual service of the United States. There is a clear distinction between cal- ling forth the militia and their being in actual service. These are not contempo- raneous acts nor necessarily identical in their constitutional leaning. The Presi- dent is not Commander-in-Chief of the militia, except when in actual service, and not merely when they are ordered into service. *They are subjected to martial law only when in actual service, and not merely when called forth before they have obeyed the call* The acts of 1795 and other acts on the subject manifestly contemplate and and recognise this distinction. *To bring the militia within the meaning of being in the actual service there must be an obedience to the call, and some acts of organization, mus- tering, rendezvous, or marching done in obe- dience to the call in the public service.*" (Story's Con. Law, vol. 3, sec. 1208.)

If it be suggested that this plain rule of common sense and constitutional law is not violated by the Conscription act be- cause it applies to the "national forces," I reply as before, that this is only a new name for the militia, and that the constitutional rights of a citizen are not to be sacrificed to an unconstitutional name. When Judge Strorg was endeav- oring to mark with so much distinctness the time at which the common law rights of the citizen ceased and his liability to military rule began—the time, in a word, when he became a soldier—why did it not occur to his fertile mind that Congress could render this distinction valueless and unmeaning by a new nomenclature—by calling the militia "national forces?" It is not difficult to conceive now such a sug- gestion would have fared had it occurred or been made to him. But it is difficult in the presence of the grave issues of the the present day, to treat so frivolous a suggestion with the dignity and forbear- ance the occasion demands. I have shown what rights of personal liberty these plaintiffs inherited from a remote ancestry, and how they are guarranteed to them by our constitutions, and at what time they are to give place to martial law; and surely if a wheel set in motion by Congress, can crush and grind those rights out of existence, without regard to the limitations of the Constitution, some weightier reason should be found for it

[CONTINUED ON FOURTH PAGE.]