Michigan Law Review

Volume 17 | Issue 2

1918

# War Legislation Pertaining to the Army

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# WAR LEGISLATION PERTAINING TO THE ARMY

## I. The Selective Draft.

AT the time we entered the present war, we had approximately 100,000 men actually in the federal service. We were confronted with the problem of raising and training a large army in a short time. There were in general two possible courses of action open before us. The first, which might seem to be the traditional method, was that of voluntary enlistment. But for a number of years, there had been a growing sentiment among our people that the system of voluntary enlistment was neither right in principle nor in accord with the best interests of the nation. The plan these people favored was the other alternative; namely, that of the draft. The draft had never before in our history been really adopted in principle. At the time of the Civil War, it is true, a certain number of troops were raised by conscription, but the draft used then was fundamentally different from our present system. To begin with, the principle of universal liability to military service was never adopted. The system of voluntary enlistment was still the chief means of raising troops, and the draft was used solely as a club to encourage enlistment. The Civil War plan too, contained another very pernicious feature, which is expressly excluded from our present program: that was the provision whereby a man drafted, by paying a certain sum of money, could be excused from military service. We were then to raise an army in a way in which we had never raised one before. But in so doing, we were not after all departing radically from our past traditions; on the contrary we were putting in practice as we have never done before in similar circumstances, the basic ideas of democracy on which our government was originally founded and on which it has been maintained.

With these considerations before it, Congress after due deliberation adopted the draft. In the first instance, the principle of universal liability to military service of all males within the prescribed ages was adopted outright. Section 5 of the Selective Service Act of May 18, 1917, reads in part:

> "That all male persons between the ages of twenty-one and thirty, both inclusive, shall be subject to registration in accordance with regulations to be prescribed by the President; * * * and all persons so registered shall be and remain subject to draft into the forces hereby authorized, unless exempted or excused therefrom as in this act provided."

But Congress did not stop here. The next step necessary before we could have our present system in its entirety was to adopt the selective draft. By this we mean the plan of taking men for military service in the order in which their removal from civil life will least interfere with the economic needs of the nation. Section 70 of the Selective Service Regulations prescribed by the President under the authority vested in him by the terms of the Selective Service Law reads in part:

> "The military needs of the Nation require that there be provided in every community a list of names of men who shall be ready to be called into service at any time. The economic needs of the nation, while deferring to the paramount military necessity, require that men whose removal would interfere with the civic, family, industrial, and agricultural institutions of the Nation, shall be taken in the order in which they best can be spared. For this reason the names of all men liable to selection shall be arranged in five classes in the inverse order of their importance to the economic interests of the Nation, which include the maintenance of necessary industry and agriculture and the support of dependents."

Provost Marshall General Crowder in a pamphlet setting forth the aims of the selective draft says:

> "The selective principle must be carried to its logical conclusion and we must meet Prussian efficiency with a greater American effectiveness. We must arrange them in the order in which they can be taken with the least disturbance and thus place behind our battle lines sources of recruitment that will furnish men as they are needed."

Such is the theory on which our present selective draft is based. The system is set forth in detail by the Selective Service Law,[1] which is the act of Congress of May 18, 1917, entitled "An Act to Authorize the President to Increase Temporarily the Military Establishment of the United States," and the Selective Service Regulations[2] prescribed by the President under the authority vested in him by the terms of this act. The act itself authorizes among other things the raising of 500,000 men immediately by selective draft,

[1] The Selective Service Act will hereafter be referred to in the notes as S. S. A.

[2] The Selective Service Regulations will hereafter be referred to in the notes as S. S. R.

the raising of an additional force of 500,000 men by selective draft,[3] and the filling out, by selective draft or voluntary enlistment, of regular army and national guard organizations to the maximum strength authorized by law.[4] On the first draft, 625,000 men were called. Of these 500,000 approximately form the first body of the National Army. The other 125,000 men were used to fill out other organizations as indicated.

The execution of this new system is placed in the hands of a number of different instrumentalities. To begin with, we have what we may style "general agencies." At the head is the President of the United States,[5] who constitutes a reviewing officer of certain decisions of district boards. Then the Provost Marshall General is charged with the supervision of all matters relating to the selective draft.[6] Lastly, the state governors, acting through the state adjutants general, are charged with general supervision over all matters arising in execution of the selective draft within their states.[7] After the general agencies come the local agencies, the district and local boards. One or more district boards of five members each is assigned to each federal judicial district.[8] These boards have plenary appellate jurisdiction over the final decisions of local boards in all cases within the original jurisdiction of such local boards, and original jurisdiction over all claims for deferred classification on industrial grounds.[9] One or more local boards of three members each is assigned to each county or similar division and one for approximately each 30,000 of population in each city of 30,000 or over.[10] The local boards have jurisdiction in the unit to which assigned or such part thereof as the governor may designate, over all registrants and all questions properly coming before it.[11] Such questions might be of almost any type except claims for deferred classification on industrial grounds, but would be for the most part questions of physical fitness and claims for deferred classification on the ground of dependencies. Finally there are what we may call auxiliary agencies: the medical and legal advisory boards.[12] A medical advisory board is composed largely of specialists and is assigned to counties, cities, or other proper units, and is located at

[3] S. S. A., Sec. 1, Par. 3 and 4.
[4] S. S. A., Sec. 1, Par. 5, Sec. 2.
[5] S. S. R., Secs. 20 and 21.
[6] S. S. R., Sec. 22.
[7] S. S. R., Secs. 26-31.
[8] S. S. R., Sec. 32.
[9] S. S. R., Secs. 35 and 36.
[10] S. S. R., Sec. 37.
[11] S. S. R., Secs. 39 and 40.
[12] S. S. R., Sec. 44.

such places as to be convenient to hospitals and local boards. The province of its jurisdiction (geographically) is not necessarily coincident with that of any one local or district board. It constitutes a board of reexamination of doubtful cases as to physical fitness.[13] "Doubtful" cases would as used in this sense, include two sorts: first all cases rejected as physically disqualified for general military service by the examining physician of the local board; second all cases accepted by the examining physician as physically qualified for general military service, where the registrant desires a reexamination. A legal advisory board is composed of a number of disinterested lawyers presided over if possible by a judge of a county court, court of common pleas, or similar court.[14] In addition all members of the bar are *ipso facto* associate members of the proper legal advisory board. Similarly a number of laymen are also selected as associate members.[15] The function of the legal advisory board is to inform registrants of their rights under the selective service system, and to assist them in making out their questionnaires, or to act in such other ways as they can be of service.[16]

Having thus outlined the instrumentalities in whose charge the execution of the selective draft is placed, let us turn now to the consideration of the system of classification. By the machinery to be outlined later, the registrants are grouped in five classes in the "inverse order of their importance to the economic needs of the nation."[17] In the first class are placed in general men without dependents who have not especially fitted themselves for industrial or agricultural pursuits so that our only incursion into the labor supply will affect but a small percentage.[18] In the second class are placed the skilled laborers without dependents.[19] In the third class are placed persons with remote dependents, and specialists or persons occupying important municipal offices.[20] In the fourth class are the persons who are to be taken only as a last resort—the men with dependent wife or children, mariners and necessary sole managing, controlling, or directing heads of necessary agricultural or industrial enterprises.[21] In the fifth class are placed the absolute ex-

[13] S. S. R., Sec. 123.
[14] S. S. R., Sec. 45.
[15] S. S. R., Secs. 45 and 46.
[16] S. S. R., Sec. 45.
[17] S. S. R., Sec. 70.
[18] S. S. R., Secs. 72, 83, 86, 268; "The Selective Service System: Its Aims and Accomplishments; Its Future", By Provost Marshal Crowder, Pg. 5.
[19] S. S. R., Secs. 74, 83, 87, 268; "Selective Service System," pp. 5 and 6.
[20] S. S. R., Secs. 75, 77, 84, 88, 268; "Selective Service System", p. 6.
[21] S. S. R., Secs. 76, 78, 85, 89, 268; "Selective Service System", p. 6.

empts.[22] These include officers—legislative, executive, or judicial of the United States or of a state, territory or District of Columbia; regular or duly ordained ministers of religion; students who on May 18, 1917, were preparing for the ministry in a recognized school; persons in the military or naval service of the United State; alien enemies; resident aliens (not an enemy) who claim exemption; persons totally and permanently physically or mentally unfit for military service; persons morally unfit to be soldiers of the United States; licensed pilots actually employed in the pursuit of their vocation; members of well-recognized religious sects or organizations, organized and existing on May 18, 1917, whose then existing creed or principles forbid its members to participate in war in any form, and whose religious convictions are against war or participation therein. The classification thus outlined is accomplished by means of a questionnaire. The questionnaire is a sixteen page document mailed to every registrant.[23] It contains twelve series of questions which the registrant is required to fill out, designed to cover every possible detail as to his qualifications or disqualifications for military service.[24] On the cover page is a blank form in which the registrant, after having answered the questions within, is to indicate the class and subdivision of the class or the classes and subdivisions in which he thinks he is included.[25] For instance, a skilled industrial laborer with dependent wife and children would indicate Division D of Class II as a skilled industrial laborer and Division A of Class IV as a man with a dependent wife and children. This questionnaire is returned to the local board within seven days, and on the basis of the answers given and other evidence touching the answers as the board choses to consider, the man is classified as is explained in detail later on.[26]

Let us now trace through the procedure followed in the operation of the selective draft. The first step was the registration of all persons within the prescribed ages on June 5, 1917. The registration card contained a number of questions designed to identify the man. The cards of the men within the jurisdiction of a local board were then numbered consecutively from 1 to 10,000, or as far towards10,000 as there were registrants. Then at Washington the numbers from 1 to 10,000 were drawn by lot, and as each number was drawn it was

[22] S. S. R., Secs. 79, 268; "Selective Service System", p. 6.

[23] S. S. R., Secs. 91, 268.

[24] "Instructions as to Selective Service Regulations and Questionnaire", Compiled by the Legal Advisory Board for the City of New York and approved and officially issued by the Adjutant General of the State of New York: General Instructions No. 1.

[25] S. S. R., Secs. 94, 268; "Instructions as to Selective Service Regulations," etc. General Instructions No. 5.

[26] S. S. R., Sec. 96.

given its order number. Thus the first one drawn would be "1", the second, "2", etc. Thus each registrant came to have two numbers, his serial or "red ink" number, given to him at the time of registration, and his order number given to him on the basis of the draft at Washington. Within a given class of the classification previously explained, the men were to be chosen in accordance with the precedence of their order numbers.

The next step in the system is the mailing of the questionnaires already described, to the registrants.[27] One questionnaire is mailed to each registrant within the jurisdiction of the local board in question, and is mailed with the name, address, telephone number, serial number, order number and stamp of the local board, and the date of mailing filled in, and the notice informing the registrant that the questions must be answered and the questionnaire returned to the board within seven days, signed by one of the members of the board. At the time of mailing, notices are posted also informing registrants that the questionnaires must be returned properly filled out within seven days.[28] The registrant, on receiving his questionnaire, should go with it to the rooms of the legal advisory board, and there, with the men on duty, make out his answers to the questions and indicate on the cover page the class or classes in which he thinks he is included.[29] The questionnaire, thus properly filled out is returned to the local board within seven days of the date of mailing.[30] Failing to do this, the board places the name of the registrant and notifies the adjutant general of the state of the fact.[31] The adjutant general then issues an order inducting the registrant into military service on a date not less than ten days distant from the date of the order. If the registrant reports before the ten days are up either to the adjutant general or the local board, the adjutant general may at his discretion rescind the order of induction into military service. But after the date set for induction into military service, the order can only be rescinded by a discharge from military service by the President.

On the return of the questionnaires properly filled out to the office of the local board, the local board goes over them and arrives at its decision as to the class in which each registrant should be placed.[32] To arrive at this decision, the board may summon witnesses, put them on oath, and examine any evidence available to throw fur-

[27] S. S. R., Sec. 92.
[28] S. S. R., Sec. 92.
[29] S. S. R., Secs. 94-96.
[30] S S. R., Sec. 96.
[31] S. S. R., Secs. 129, 130.
[32] S. S. R., Sec. 100.

ther light of the answers to the questionnaire.[33] Having made up its mind, it indicates its decision on the cover page of the questionnaire, and also after the registrant's name on a classification list.[34] It then notifies the registrant of its decision.[35] Within five days, if he wishes, he can appeal from the decision of the local board to the district board.[36] If the registrant should on the questionnaire claim deferred classification on the ground of industrial or agricultural occupation,[37] the local board will temporarily disregard that part of it, and place him in such class as he would otherwise be placed in, and then send the questionnaire with its recommendation to the district board for final decision. If in either of these cases, the registrant feels that he hasn't had justice done him by the district board, within five days after he receives notification of the district board's decision, provided he has been placed by it in Class I, he can appeal to the President; or if he has been placed in a class more deferred than Class I, within ten days after all the men in the previous classes have been exhausted, he can appeal to the President. [38]

Having thus completed the work of classification, all the men in Class I are summoned to appear for physical examination.[39] They are first examined by the examining physician of the local board and such other assistants as may be employed. On the basis of this examination they are placed by the examining physician in one of three classes: either they are recommended as physically qualified for general military service, or not being so physically qualified for limited military service, or physically disqualified for any military service. If a registrant is placed in one of the last two classes, he is reexamined by the Medical Advisory Board; or if, being placed in the first class, the registrant desires a reexamination by the medical advisory board, he is entitled to it, provided he asks for it as soon as he is notified of the decision of the examining physician of the local board.[40] The local board then on the basis of the report of the physical examination by the examiner of the board, and, if there is one, on that of the advisory board, arrives at its decision and places the man in one of the three classes mentioned.[41] If the board does not accept the decision of the advisory board, the case is ap-

[33] S. S. R., Secs. 10, 100.
[34] S. S. R., Sec. 102.
[35] S. S. R., Sec. 103.
[36] S. S. R., Sec. 104.
[37] S. S. R., Sec. 101, Rules XXXII, and XXXIII.
[38] S. S. R., Sec. 111.
[39] S. S. R., Sec. 122.
[40] S. S R., Sec. 123.
[41] S. S. R., Sec. 124.

pealed by the government appeal agent to the district board.[42] Or the registrant has the right, if he wishes, of appealing to the district board within five days of his notification of the decision of the local board.[43]

We have thus sifted out a number of men, physically qualified for military service, whose situation in regard to industrial occupation and dependencies renders them immediately available for military service. The next step is mobilization.[44] The government notifies the several states of their quotas for a given draft, and the state authorities assign to each local board its quota. This quota is usually called for in four installments, not necessarily equal in size. The board is notified a short time in advance of the size of the next installment and the date of entrainment. It then selects from class 1 the number called for, taking the men in the order assigned by the draft at Washington. If not sufficient men are left in class 1, class 2 must be physically examined as above described, and enough men from class 2 taken to complete the installment.[46] It orders the men so selected into military service on a date and hour which shall be not less than twelve and not more than twenty-four hours before the hour of entrainment. At the time so specified the men are assembled and informed that they are then in the military service of the United States and subject to the orders of the local board as military superiors until the time of entrainment. Any man failing to report at such time, being from then on in the military service, is classed as a deserter.[47] If apprehended he is taken before a nearby local board, preferably the one having jurisdiction over him, and the board then decides whether or not the offense was willful. If it decides it was, the man is turned over to the police and ordered to be brought before the nearest army post, and is reported as a deserter. If it decides it was not, he is physically examined and sent to the proper mobilization camp.

At the time when the men are assembled by the local board, one man from the number is chosen as leader, and for each eight men an assistant leader is chosen.[48] Between the time of first assembly and entrainment, the local board is responsible for the care of the men, including their board and lodging. At least an hour before entrainment, plus a sufficient allowance of time to get to the railroad station, the men are again assembled. They report by squads to the

[42] S. S. R., Sec. 125.
[43] Ibid.
[44] S. S. R., Sec. 157.
[46] S. S. R., Secs. 157, 158.
[47] S. S. R., Sec. 140.
[48] S. S. R., Secs. 161-163.

assistant leaders, who in turn report for the squads to the leader. The men are marched to the station under the supervision of the local board. When the men entrain they are put in charge of the leader and assistant leaders.[49]

It was predicted at the beginning that this system could not be put into operation without riots all over the country. It is a matter of common knowledge that no such thing has been the case. On the contrary, it seems as if there was a growing popular acceptance of the system, if not satisfaction with it. The success which has attended it, I think we may attribute in a large measure to the patriotic efforts of the local boards. The big problem before them outside of the technical problem of classification was to inculcate the proper spirit of patriotism and feeling of confidence not only in the men themselves, but as well in their friends and their relatives. A member of one local board writes: "The great problem that our board have kept in mind was to furnish on the minute, the demands of the government and yet to do it with such a sympathetic spirit towards the men taken for the emergencies of war, that we might create an enthusiastic American spirit." And this task must continue after the men have left, in the form of sustaining the confidence and spirits of their friends and relatives. Such being the case, it is essential that the government exercise the greatest care to select for service on local and district boards the highest type of men available.

## II. Legislation Designed to Improve the Circumstances of the Soldiers.

There are two important acts which have been passed which we may style as legislation designed to improve the circumstances of the soldiers. These are the Soldiers' Insurance Act and the Soldiers' and Sailors' Civil Rights Act.

The former of these provides in the first place for the support during the war of the families and dependents of enlisted men by allotments of the soldier's pay to his dependents, and family allowances paid by the government over and above this; and in the second place for the protection of officers and enlisted men and their dependents from the hazards of injury, disease, and death, by providing for compensation by the government to be paid in monthly installments, and for a system of insurance to be operated by the government on the basis of normal peace time rates.

[49] S. S. R., Sec. 164.

The allotments of pay is the first feature of the act.[50] If the soldier has a wife or a child dependent on him for support, the government holds out from his pay, provided the wife does not file a written statement supported by sufficient evidence waiving the right for herself and her children, a certain portion, which shall not be less than $15, nor more than half his pay, but unless so limited, shall be $15 if there be a wife and no child, $25 if there be a wife and one child, $32.50 if there be a wife and two children, and so on, varying according to the number and relationship of dependents. In the case of other relatives, the soldier may make such allotments as he desires, but if he wishes to secure the benefit of the family allowances described later, he must make an allotment equal to the family allowance, provided that he shall not be required to allot more than half his pay, and that he must allot at least $15.

In the case of the close relationships such as wife and child, provided the right is not waived as mentioned above, the government each month pays a family allowance, the amount of which is the same as the allotment, except that if a soldier is not required to make the full allotment because it would exceed his pay, or if he is required to make more than the full allotment, because it would be less than $15, the family allowance shall be equal to what the allotment would be if not so limited.[51] In the case of other relatives, if it be shown that such relatives are actually dependent upon the soldier for support, and he has made an allotment equal to the family allowance proper for his dependents, or half his pay, provided such allotment is not less than $15, such family allowance is paid by the government in monthly payments as in the previous case.

Turning now to the matter of protection from hazards of injury, disease, or death, the matter of compensation is very simple.[52] In case the soldier is killed or dies in the service, or is disabled through injury or disease, provided such death or disability is not due to the soldier's own willful misconduct, his dependents, if he has any, are paid monthly compensations, varying in amount according to the degree of relationship. Such compensations continue until the death of the dependent, or until the state of dependency ceases, as for instance when a widow remarries, or when a child attains majority or marries.

In addition to the above, a system of insurance is provided by the government, which the soldier may take up if he wishes.[53] Within

[50] War-Risk Insurance Act, Article II.
[51] War-Risk Insurance Act, Article II.
[52] War-Risk Insurance Act, Article III.
[53] War-Risk Insurance Act, Article IV.

a hundred and twenty days after enlistment, or, if the soldier were in the service at the time of the publication of the terms of the contract, within a hundred and twenty days after such publication, the soldier may apply for the benefits of the act. The face values of the insurance policies are to be in multiples of $500, not less than $1,000, nor more than $10,000. The premiums are to be based on the American Experience Table of Mortality, and of such amounts that the interest on them will amount to 3½%. In case of death or disability, the insurance is payable in two hundred and forty monthly installments. In case the soldier dies before the one hundred and twenty days are up, it is to be assumed that he has taken out such insurance as to yield two hundred and forty monthly installments of $25 each, and his nearest relative is to be paid accordingly. The insurance is payable only to a spouse, child, grandchild, parent, brother, or sister.

The second of the principal acts which may be styled as legislation to better the circumstances of the soldiers, is the Soldiers' and Sailors' Civil Relief Act. This act provides for a temporary suspension of legal proceedings and transactions which may prejudice rights of persons in service, in order to enable more successful prosecution of the war.

To begin with,[54] it is established by the act that the defendant is not to be prejudiced by his non-acceptance at court if he is hindered from appearing by reason of being in the military service. In any case in which the defendant does not appear, the plaintiff must show either that the man is not in the military service, or, being in the service, is not hindered thereby from appearance at court. In case such evidence is not forthcoming, the plaintiff must give a bond to indemnify the defendant if the judgment should later be set aside. A counsel is appointed to represent the man, but such counsel may not waive any of the rights of his client. In the discretion of the court, it may stay any proceedings on non-appearance of either party, the execution of any judgment or order, or any contractual obligations, or may vacate or stay any attachment or garnishment of property, money, or debts, if it be shown that the party is prejudiced in respect thereto by the fact of his being in the military service.

Similarly no eviction or distress for non-payment of rent of $50 per month or less shall be made, in case the person renting the property, or anyone upon whom such person is dependent, is in the military service, unless in the opinion of the court before which the case is brought, the ability of the tenant to pay is not materially affected

[54] Soldiers' and Sailors' Civil Relief Act, Article II.

by reason of such military service.[55] Nor can a person who has sold any real or personal property, to be paid for in installments, exercise any right or option to rescind or terminate the contract for non-payment of installments, provided such failure to pay is materially affected by such military service. In the case of obligations contracted before the approval of the act, a court may stay any mortgage proceedings or make other equitable disposition, to protect the rights of soldiers or sailors.

A third feature of the act deals with the matter of insurance.[56] If any soldier or sailor holding a policy of life insurance apply for the benefits of the act, he may not be required to forfeit such policy for non-payment of premiums. In case he defaults, either wholly or in part, in the payment of any premium, the government will give the insurance company as a surety, its bond of a face value of the nearest number of hundreds of dollars to the deficit. In case the person dies in the military service before the expiration of the war, the face value of the policy, minus the aggregate of unpaid premiums and interest at the rate provided for in the policy, shall be paid to the beneficiary. Otherwise, in case within one year after his discharge from military service or the termination of the war, if he fails to pay the unpaid premiums with interest at the prescribed rate, the government shall then pay them, and receive in return the cash surrender value of the policy.

Of the same nature as the matter of rent, is the last feature of the act which provides that there shall be no ejectment nor sale of property for non-payment of taxes, in case the party is materially prejudiced in so paying by reason of his military service.[57]

The former of these two acts in no way invades any constitutional guarantees or liberties, and as such raises no constitutional question. The second, however, in that it materially affects the property rights of land-owners and creditors, brings up a very pointed issue as to the extent of war power, which will be discussed later.

## III. Constitutional Questions.

The war power vested in our government, is set forth in Article I, Section 8, and reads as follows:

> "The Congress shall have Power * * * To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; To raise and support

[55] Soldiers' and Sailors' Civil Relief Act, Article III.
[56] Soldiers' and Sailors' Civil Relief Act, Article IV.
[57] Soldiers' and Sailors' Civil Relief Act, Article V.

> Armies, but no appropriation of Money to that Use shall be for a longer term than two years; * * * 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, reserving to the States, respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress; * * * To make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or officer thereof."

About the interpretation of the power herein granted, many interesting questions have arisen, and most of them have been brought up afresh by the legislation described in the preceding pages. Eliminating the several questions which have arisen from certain peculiar features of the acts before us, we may say that these issues center about the questions, Does the power of raising armies include the power of conscription? Is the power of conscription limited by the Militia clause? How far does the national government's control over the militia extend? In developing the answer to these questions, I shall follow the reasoning of Chief Justice WHITE in his decisions of the only cases based on the present conscription law which have come before the Supreme Court,[58] supplementing it by Judge Bradford's opinion in the District Court of the United States for the District of Delaware, in the case of *U. S.* v. *Stephens.*[59] The cases coming before the Supreme Court were submitted, argued and decided together, and are known as the *Selective Draft Law Cases,* reported in 245 U. S., 366.

The major premise of the answer to the first of the questions raised may be stated thus: The power to draft men into the army is an essential attribute of sovereignty.[60] The controversy in England over the question as to whether it rested in Parliament or the King, rather than in any way casting doubt as to its existence, at the outset recognized it as part of the power of the British government, but

[58] Numerical references in the notes for these cases will be to pages of the United States Reports, Vol. 245.

[59] Numerical references in the notes for this case will be to pages of No. 13 of the Department of Justice's series of Bulletins on the Interpretation of War Statutes.

[60] Selective Draft Law Cases, 377.

merely questioned what department of that government should exercise it. During the Revolution it was commonly recognized that it existed in the colonies. Nor can the full extent of this statement be challenged on the ground of the urgent appeals necessary from Congress and from General Washington to induce the colonies to exercise this power. "A default in exercising a duty may not be resorted to as a reason for denying its existence." And as the counsel for the United States pointed out in the argument, although no mention of it was made in the opinion, "Compulsory service is now exacted by practically all the nations of the globe."[61]

Nor can it be argued that this inherent attribute of sovereignty is in any wise limited or abridged by the 13th Amendment, Section 1, which reads:

> "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

Military service is the "supreme and noble duty of contributing to the defense of the rights and honor of the nation, as the result of a war declared by the great representative body of the people," and its exaction by the government from the citizen, cannot in any sense be regarded as involuntary servitude.[62]

By the constitution, this essential attribute of sovereignty is placed in the federal, and not in the state governments.[63] One of the reasons for forming the new government in 1787-9, was to give the central government power to compel military service, operating directly on the individual citizens, and not having to rely on the several states for their quotas. It necessarily follows from the power of raising armies for "the mind cannot conceive an army without the men to compose it," and "on the face of the Constitution the objection that it does not give power to provide for such men would seem to be too frivolous for further notice." Under the present government the power has been exercised, and where challenged sustained. Toward the close of the War of 1812, at the instigation of President Monroe, a bill was introduced into Congress providing for a draft. The bill was opposed on grounds of incompatibility with free government, but not on constitutional grounds, and the War was ended before it passed. The power was exercised by both sides in the Civil War, and sustained in Circuit Court in the case of *Kneedler* v. *Lane*,

[61] Selective Draft Law Cases, 369.
[62] Ibid. 390.
[63] Selective Draft Law Cases 381-9.

45 Pa. St. 238. The question never directly came before the Supreme Court, but in the cases of *U. S.* v. *Scott,* 3 Wall., and *U. S.* v. *Murphy,* 3 Wall., the draft act was construed, no question of constitutionality being raised. Under a similar clause in the Confederate States constitution, the power was sustained in a number of decisions of the Confederate Courts. The power, being thus an appropriate means adapted to the end of raising armies, is further sustained by the necessary and proper clause.

But it is argued[64] that the power of raising armies is merely coterminous with national citizenship, and as the control of the militia, i. e. the able-bodied male population of military age, is vested with the states, except insofar as the President or Congress may exercise control over them, or call them to their assistance as specified in the militia clause, the power of conscription must be regarded as limited and abridged by the militia clause. There are two fallacies to this objection. The first is a matter of interpretation of the meaning of the word "militia." As used in the militia clause of the constitution, the word applies only to the organized militia, which we know now as the national guard. The second fallacy rests in a failure to recognize that by the Fourteenth Amendment, national citizenship was made supreme over state citizenship, and by Article VI., Par. 2, which reads:

> "This Constitution, and the Laws of the United States which shall be made In Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

that power, being delegated, is made supreme.

A number of constitutional objections were raised to specific provisions of the act.[65] It was opposed as a delegation of federal power to state officials; Chief Justice WHITE quickly disposed of this as "too wanting in merit to require further notice." It was then argued that it vested administrative officers with legislative discretion and judicial power; the answer to this is that the primary function of these officers being administrative, they might be vested with certain discretionary and quasi-judicial powers, if these were incidental to the discharge of their administrative functions. Because

[64] Selective Draft Law Cases 381-9; *U. S.* v. *Stephens,* 3.
[65] Selective Draft Law Cases 389, 390; *U. S.* v. *Stephens,* 5-11.

it exempted conscientious objectors, it was contended that it therein contained an establishment of a religion, in that it granted special privileges to members of certain religious sects because of their membership therein; this objection the chief justice passed with no more than a statement, for "its unsoundness is too apparent to require us to do more." Lastly it was contended that even if Congress might draft men for home service, it couldn't send them abroad without their consent; but having been once enlisted, it mattered not how their services were obtained; they were all on an equal basis with the regular army, and this had in a number of instances been used abroad.

Let us pass now to the last of the constitutional questions touching the extent of war power, namely the control which the federal government may exercise over the organized militia or national guard.[66] Prior to the passage of the National Defense Act of June 3, 1916, there were two main constitutional limitations on the control and use of the national guard by the President or Congress, namely those of divided control and limited use.

The first, that of divided control, rests on the following part of Article I Section 8:

> "The Congress shall 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."

Freedom of control was hereby expressly limited, with the result that the National Guard became, as it has so frequently been characterized, nothing more than forty-eight different armies varying in their state of discipline and efficiency according to the measures adopted by the several states. Just how much control was left to Congress over the discipline and training by this clause was not very definitely fixed, and a considerable difference of opinion on this point, as well as on the matter of limited use, obtained; but granting the contentions of the most liberal constructionists, federal control was sufficiently fettered to make the clause extremely inconvenient, and the cause of a good deal of the inefficiency of the guard.

[66] In Vol. 53 of the Congressional Record is published an argument and brief by the military council of Missouri presenting a broad construction of federal power over the militia. In the same volume is published an opinion of Ex-Secretary of War Stimson presenting the opposite point of view. The views brought out in these two briefs have been followed in this discussion of limitations on federal control over the militia.

The difficulty as to limited use is found in the following words of the same section of the Constitution:

> "The Congress shall have Power * * * To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."

As was above stated, the exact extent of the limits of this power are not very definitely fixed, and a great deal of difference of opinion has arisen in regard to it. It seems pretty well established that as the power existed before the passage of the National Defense Act, the government could use the National Guard units outside of their respective states for proper purposes, and that in order to successfully repel an invasion, the enemy territory itself might be actually invaded with national guard troops. The power however clearly and distinctly falls short of enabling the use of the national guard outside the United States except to repel invasion, and no one has ever seriously contended that it did.

To remedy this difficulty, the National Defense Act was passed federalizing the national guard among other things. Obviously under the Constitution, the National Guard as such could not be Federalized except by a constitutional amendment. It was necessary then, in federalizing it, to give it an additional character of part of the national forces, Congress is authorized to raise. This was done by two provisions. The first required all enlisted men to take a federal oath of enlistment, thereby constituting them soldiers of the United States as well as of their state.[67] Similarly by the same provision, officers were to be appointed in accordance with requirements to be fixed by the federal government, and were to be passed by a federal board of examiners, and when commissioned, were to take a federal oath, thereby constituting them federal as well as state officers.[68] The second gave the president power, in such exigencies as should move Congress to authorize the raising of other troops than the regular army, to draft the National Guard into the federal service, the draft to operate not on organizations, but on individuals, and to discharge such individuals from their status as national guardsmen.[69]

These two provisions successfully removed all constitutional objections on the ground of divided control and limited use, but gave rise to certain new questions, which however have been fairly readily disposed of. These all may be grouped into the one main question, suggested in a somewhat similar form in connection with the

[67] National Defense Act, Sec. 70; Congressional Record, Vol. 53, pp. 4625 ff.
[68] National Defense Act, Secs. 73, 74, 75; Cong. Record, 53 : 4625 ff.
[69] National Defense Act, Sec. 111; Cong. Record 53 : 4625 ff.

draft, as to whether the power of raising and supporting armies enabled Congress by legislation to this effect, to infringe upon the right of the states to maintain their control and rights over the organized militia.[70] This is thus carrying the previous objection one step further in contending that even if Congress may exercise any control it pleases over the unorganized militia, it cannot on any pretext abridge the states' rights over the organized militia or national guard. The two objections, however, are both met in the same way, namely on the basis of Article VI, Sec. 2, which declares the supremacy of federal over state laws, and the XIV Amendment, which declares the supremacy of national over state citizenship. Granting, then, the power of the national government to draft persons into the military service, all constitutional objections are thus successfully disposed of.

One other constitutional question remains, somewhat different from those mentioned. Does the power to raise and support armies give Congress the power to suspend certain civil rights in order to avoid undue interference with the military service? The question is in this case brought to an issue by the War Risk Insurance Act, stated in the previous section. The position which the court has previously taken on such questions has been that inasmuch as no rights are abrogated but merely suspended, the legislation is constitutional, provided it be necessary to prevent interruption or undue interference with the military service. No case has as yet arisen on the present act, but if it arises the act will doubtless be sustained on these grounds.

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[70] Cong. Rec. 53 : 4625 ff.; Selective Draft Law Cases 389; *U. S.* v. *Stephens*, 3, 4.