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Conscription, the Constitution, and the Framers: An Historical Analysis

Cover Page Footnote

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CONSCRIPTION, THE CONSTITUTION, AND THE FRAMERS: AN HISTORICAL ANALYSIS

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I. INTRODUCTION

THE constitutionality of a military draft—long accepted without question—has recently been challenged in two important but poorly publicized federal court cases. In the first of these, the district court case of *United States v. Zimmerman*,¹ the American Civil Liberties Union (ACLU) submitted a 174 page brief which purported to be the first complete analysis of the intentions of the framers of the Constitution with respect to conscription. As a result of this analysis, the conclusion was drawn that the framers never intended to give Congress the power to draft men into the national army. The ACLU thus directly challenged the landmark Supreme Court decision in *The Selective Draft Law Cases*,² which the high court has reaffirmed as recently as 1968.³ According to the ACLU brief, “there is not a single part of the [*Selective Draft Law Cases*] decision which stands up to historical analysis.”⁴

Similar arguments were used before the Eighth Circuit in *United States v. Crocker*.⁵ The court in *Crocker* dismissed these historical arguments without serious consideration, suggesting that the ultimate decision should be left to the Supreme Court.⁶ Subsequently, however, the Supreme Court denied petitioner’s writ of certiorari⁷ despite the fact that the Court has never been presented with evidence of the framers’ intentions. Any challenge to the constitutionality of the draft, therefore, would seemingly have to overcome the strong precedent of *The Selective Draft Law Cases*. If the thesis of the ACLU brief is correct, however, this precedent very well may have been deprived of much of its intellectual force. If the 1918 Court’s interpretation of the power to raise armies clearly contradicts the intentions of the framers, that interpretation may prove to be no more acceptable than the 1918 Court’s interpretation of the power to regulate commerce.

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1. Criminal No. 68-675 (S.D.N.Y., Oct. 20, 1969), 2 *Selective Service Law Reporter* 3506 (1970).

2. 245 U.S. 366 (1918).

3. See *United States v. O'Brien*, 391 U.S. 367 (1968).

4. Brief for Defendant at 92, *United States v. Zimmerman*, Criminal No. 68-675 (S.D.N.Y., Oct. 20, 1969).

5. 420 F.2d 307 (8th Cir.), cert. denied, 397 U.S. 1011 (1970).

6. *Id.* at 308-09.

7. *Crocker v. United States*, 397 U.S. 1011, denying cert. to 420 F.2d 307 (8th Cir. 1970).

The question that must then be answered is whether the historical analysis of the ACLU brief is correct. Does the evidence show that the framers would have prohibited Congress from adopting a policy of conscription? Despite the fact that the Supreme Court denied certiorari to *Crocker*, one cannot assume that the issue is foreclosed. For one thing, we are cautioned against reading too much into such denials.⁸ In addition, for practical reasons to be given below, the issue will not simply disappear on its own. As a result, the questions raised by the ACLU brief should be answered directly, instead of being sidestepped as they have been by the federal courts.

There are two major reasons why the issue will not disappear. First, the ACLU apparently has no intention of letting this new research lay in a closed file. On the contrary, the brief has been given wide circulation by the publication of an article by Leon Friedman, the principle defense lawyer in the *Zimmerman* case.⁹ The ACLU apparently intends to use the arguments in Friedman's article as the basis for future legal challenges to be brought at some indeterminate time¹⁰—if not now, before the Burger Court, then at a later date before what the ACLU considers to be a more receptive Court. Second, it cannot be doubted that appropriate cases will be available to test these legal arguments, despite the current support for an all-volunteer armed forces. Virtually every proposal now being discussed for a volunteer army assumes the continued existence of some kind of selective service system which would register young men and issue them draft cards in case there is any future need for conscription.¹¹ As long as such a system exists, the likelihood is great that constitutional objections to conscription (to draft registration, etc.) will continue to be raised. Should these objections lead to litigation, the Friedman article will undoubtedly be cited as authority in an historical challenge to the opinion of Mr. Chief Justice White in *The Selective Draft Law Cases*. In fact, within months after its publication, the article was cited by the First Circuit in *United States v. Diaz*.¹²

Both because of its intent, then, and because of its intrinsic importance, the historical argument against the constitutionality of the draft deserves a response to the basic question it poses—did the framers intend to give

8. E.g., *Griffin v. United States*, 336 U.S. 704 (1949); *House v. Mayo*, 324 U.S. 42 (1945).

9. Friedman, *Conscription and the Constitution: The Original Understanding*, 67 Mich. L. Rev. 1493 (1969) [hereinafter cited as Friedman] (the article is virtually identical to the ACLU brief).

10. See *id.*

11. See, e.g., Report of the President's Comm'n on an All-Volunteer Armed Force 119-27 (1970).

12. 427 F.2d 636, 639 (1st Cir. 1970).

Congress the power to raise armies by conscription? This article will show that the historical analysis of the ACLU was incorrect and that the holding in *The Selective Draft Law Cases* should be reaffirmed, although for reasons not presented in the opinion of Mr. Chief Justice White. The evidence proves conclusively that the framers intended to grant Congress broad discretionary powers to conscript or not to conscript, as Congress saw fit.

II. THE ISSUE PRESENTED

An analysis of the constitutionality of the draft turns on an interpretation of the language of the Constitution itself: "The Congress shall have Power to . . . raise and support armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years."¹³ From the language used in this clause, it would seem apparent that the granting of a power to raise armies must necessarily include the power of conscription. This interpretation of the plain meaning of the words—alluded to by Mr. Chief Justice White in his opinion in *The Selective Draft Law Cases*¹⁴—was stated most forcefully by President Lincoln in his 1863 "Opinion on the Constitutionality of the Draft:"¹⁵

[T]he constitution provides that the congress shall have power to raise and support armies; and, by this [1863 draft] act, the congress has exercised the power to raise and support armies. This is the whole of it. It is a law made in literal pursuance of this part of the United States Constitution

. . . The power is given fully, completely, unconditionally. It is not a power to raise armies *if* State authorities consent; nor *if* the men to compose the armies are entirely willing; but it is a power to raise and support armies given to congress by the constitution, without an *if*.¹⁶

According to Lincoln, then, the power of conscription is directly derived from the "raise and support armies" clause. The clause cannot be read as a restrictive one, limiting Congress to raising an all-volunteer army. The verb "to raise" clearly includes within its ambit both the ideas of enlistment and conscription. As Lincoln viewed it, the debate over the constitutionality of the 1863 act was not even a repetition of the intellectually respectable dispute over the implied power of Congress, since the full power of raising armies was "plainly and distinctly written down in the constitution."¹⁷

13. U.S. Const. art. 1, § 8, cl. 12.

14. 245 U.S. at 377-78.

15. VI The Collected Works of Abraham Lincoln 446 (R. Basler ed. 1953).

16. *Id.* Also quoted in A. Kelley & W. Harbison, *The American Constitution* 422 (4th ed. 1970).

17. VI The Collected Works of Abraham Lincoln 446 (R. Basler ed. 1953).

Lincoln's argument seems to compel acceptance of the conclusion that the "plain meaning of the words" implies a congressional power to conscript men into the national army. Any one who would urge another conclusion must offer some reason for departing from this seemingly natural interpretation of the words. He must prove that the verb "to raise" does in fact have a more restrictive meaning in Article I than it has in ordinary usage; that, as used in Article I, "to raise" was meant to refer only to the process of raising armies by voluntary enlistment. Proponents of the anti-draft thesis have relied on their analysis of the intentions of the framers in order to prove this point.

What should one expect to find in a study of the framers' intentions? First, it should be noted that the records of the Constitutional Convention contain no explicit discussion of whether or not to permit conscription.¹⁸ As a result, it is necessary to turn to the underlying purposes and principles of the convention debates to see if these give any indication of what the framers would have concluded had the issue of conscription been debated explicitly. If these purposes are to be used to support a restrictive interpretation of the power to raise armies, however, they will have to be based on something a good deal more substantial than the framers' general reservations about the role of the military. Similarly, a restrictive interpretation cannot be proved by showing that some of the framers expressed doubts about the wisdom of conscription—the framers did not prohibit Congress from passing laws whose wisdom they doubted. Because of the presumption created by the language of the clause, it must be assumed that Congress has the power to conscript unless there is evidence to prove that, if the issue had been considered explicitly, the framers would have prohibited Congress from even *considering* a military draft, no matter what the domestic or international situation. Mr. Chief Justice Marshall phrased this rule of constitutional construction in the *Dartmouth College* case:

It is not enough to say, that this particular case was not in the mind of the Convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go farther, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception.¹⁹

The inevitable conclusion, of course, is that where the evidence is ambiguous, ordinary usage must be accepted.

The thesis of this article, however, is more ambitious than the logic of

18. Friedman suggested that a portion of one speech made such an explicit debate. See note 25 *infra*.

19. *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 644 (1819).

the issue requires, because the evidence favoring the discretionary powers of Congress is not at all ambiguous. Among those factors supporting this proposition are: (1) The framers gave no affirmative indication of an intention to limit the use of the words "to raise;" (2) The lack of any stated intention to limit the power to raise armies came within the context of a situation in which the framers clearly knew something about the principle of conscription; (3) The decision to use broad language permitting discretion was fully consistent with, and perhaps even required by, their overall view of the foreign policy powers of the government. When these three factors are taken together, the logical problem of the burden of proof becomes secondary. Far from being ambiguous, the evidence clearly demonstrates beyond any reasonable doubt the intended range of discretion.

III. THE CONSTITUTIONAL CONVENTION

A. *The Randolph Speech*

In analyzing the intention of the framers one must first examine the primary source material—the Constitutional Convention itself. The subject of conscription was mentioned explicitly only once during the three months of the Convention, and that brief reference was in a context not directly related to the "raise and support armies" clause. The draft was mentioned in Governor Edmund Randolph's important speech during the opening days of the Convention, in which he presented the Virginia Plan to the assembled delegates. Randolph's speech was a general one, covering a number of important themes. His most important argument was that the Articles of Confederation, which the delegates had come to Philadelphia to revise, were failing to fulfill several of the most basic reasons for their existence. The purpose of any revision, he said, must be at least to establish a government strong enough to satisfy those purposes set forth by the Articles themselves—the provision of a common defense, the securing of the blessings of liberty, and the promotion of the general welfare.²⁰ To satisfy these purposes, Randolph urged the assembled delegates to adopt fifteen resolutions—the Virginia Plan—which would have replaced the Confederation with a national government empowered to remedy the defects of the Articles.²¹

Since one of the important objectives which was not satisfied by the Confederation was that of providing the thirteen states with a common

20. Articles of Confederation art. III. For an excellent discussion of the relationship between the Articles and the Virginia Plan, see M. Diamond, W. Fisk & H. Garfunkel, *The Democratic Republic* 36-38, 52-53 (2d ed. 1970).

21. I *The Records of the Federal Convention* 20-23 (M. Farrand ed. rev. ed. 1937) [hereinafter cited as *Farrand*].

defense, an important portion of Randolph's speech was devoted to this problem. As he saw it, the inability of the Confederation to raise a national army under the Articles, and the Confederation's consequent reliance on the militia of the several states for military force, were sources of a serious potential weakness. For this reason, he urged the delegates to amend the system of raising armies. It was in this section of his speech that the Convention's only mention of the word "draft" appears. James Madison summarized it in his notes in this way:

[T]he confederation produced no security agai[nst] foreign invasion; congress not being permitted to prevent a war nor to support it by th[eir] own authority—Of this he cited many examples; most of whi[ch] tended to shew, that they could not cause infractions of treaties or of the law of nations, to be punished; that particular states might by their conduct provoke war without controul; and that neither militia nor draughts being fit for defense *on such occasions*, enlistments only could be successful, and these could not be executed without money.²²

James McHenry's slightly different report of this same passage gives some further guidance in determining what Randolph actually said:

[The i]mbecility of the Confederation [is] equally conspicuous when called upon to support a war. The journals of Congress [are] a history of expedients. The States [are] in arrears to the federal treasury . . . What reason [is there] to expect that the treasury will be better filled in [the] future, or that money can be obtained under the present powers of Congress to support a war. *Volunteers* [are] not to be depended on for such a purpose. *Militia* [are] difficult to be collected and almost impossible to be kept in the field. *Draughts* stretch the strings of government too violently to be adopted. Nothing short of a regular military force will answer the end of war, and this [is] only to be created and supported by money.²³

What Randolph was saying in this speech was that it is unwise to rely on either a mustering of volunteers or on a draft of a nationalized militia in times of national emergency. He was *not* urging the prohibition of the then accepted practice of drafting men into the militia, but was warning against relying *exclusively* on the militia draft or on rapidly mustered volunteers as the only answers to our military manpower needs. In times of immediate emergency, he argued, it would be far more prudent to rely on a standing army that could be deployed directly by the national government without waiting for newly recruited volunteers to be trained and organized, and without waiting for the intermediate state governments to supply militia units. For this reason, he concluded, the government to be created by the Convention should be given at least the power to raise a standing national army, and to support that army out of public funds raised directly by the national government.

22. *Id.* at 19 (emphasis added).

23. *Id.* at 25.

Randolph's speech did *not* suggest that a future national legislature should be limited in the ways in which it could seek to raise a national army. In fact, the legislature of which he spoke in the Virginia Plan was to have an extraordinarily wide range of discretionary power to legislate for the common good on all subjects which it deemed appropriate.²⁴ As a result, it is impossible to read the sole reference to the draft in the Convention as in any way indicating a desire on the part of the framers to limit the powers of Congress, despite claims to the contrary by some proponents of the anti-draft thesis.²⁵

Two important points, however, do emerge from the Randolph speech. First, it is clear that the framers were aware of the *principle* of raising armies by conscription. It is true that the draft mentioned by Randolph was a draft imposed by the state governments working through the militia, such as the drafts used by many of the states during the Revolution. It is also true that such a drafted militia is not identical to a drafted national army. (Drafted national armies were not considered as a practical possibility in this country until after they were used by Napoleon—*i.e.*, until the War of 1812.) But, for the purposes of the issue being considered in this article, the similarities between the two forms of conscription far outweigh the differences. Both assume the legitimacy of using draftees in the army. A man drafted into a militia unit which is then nationalized is in exactly the same position as a man drafted directly into the army.²⁶ Furthermore, the principles embodied in the then existing militia drafts, which were based on assumptions about the obligations of citizenship, were well known principles not disputed at the Convention. If anything, the evidence suggests that the failure of the framers to reject the principle of the draft after it was first mentioned constitutes an implicit *acceptance* of that principle—at least, it suggests this conclusion more than it suggests the opposite. Actually, the single explicit mention of the draft at the Conven-

24. *Id.* at 21.

25. Friedman, for example, thought that the Randolph speech was an explicit indication that "the idea of a direct draft of citizens into the national military was rejected on the very first day of the Convention as a matter too impossible to consider." Friedman 1514. There are at least two reasons why it is impossible to accept this conclusion. First, it is an inaccurate reading of Randolph's speech, as is shown by the interpretations given in the main body of this article. Second, even if Friedman did read Randolph correctly, it is impossible to read one man's speech as the equivalent of a definitive vote on the draft by the body of delegates assembled—especially in light of the fact that the speech was delivered in support of the Virginia Plan.

26. The reader should note that Article I gives the Congress the full and complete power to call up the militia for stated purposes, without consulting any other branch of the federal or state governments. See U.S. Const. art. I, § 8, cl. 15.

tion is a thin reed on which to base such an important conclusion. It is necessary to rely on indirect evidence for corroboration.

The second major inference to be drawn from the Randolph speech has to do with one aspect of the indirect evidence to be studied, *viz.*, the attitude of the framers toward standing armies. The Randolph speech shows that whatever suspicions the framers may have had about the military, at least some of the delegates to the Convention were willing to put up with the existence of standing armies. It is clear, for example, that Randolph thought standing armies were better than the available alternatives in times of immediate national emergency. Randolph's thoughts on standing armies were not accepted without debate by his colleagues at the Convention, however, and the resulting debate provides much of the material on which current anti-draft thesis proponents rely.

B. *The Standing Army Issue*

In order to use the standing army issue to support their thesis, proponents of the restrictive reading of the Constitution use a circuitous argument which, in its basic structure, comes down to this: since the framers feared that a large standing army would pose a threat to the liberties of the citizen body, it follows by analogy that they would have opposed a draft, which additionally threatens the liberty of citizens by taking them into service against their will.²⁷ The analogy, however, is faulty. The threat to liberty which the framers thought would develop from the existence of a large standing army was a threat raising entirely different problems from those raised by conscription.

This can be explained by reproducing a few of the quotations used by Friedman to show early opposition to standing armies.

[Samuel Adams:] [A] standing army, *however necessary it may be at some times*, is always dangerous to the liberties of the people. Soldiers are apt to consider themselves as a body distinct from the rest of the citizens.²⁸

[James Madison:] A standing military force, with an overgrown Executive will not long be safe companions to liberty. The means of defense ag[ain]st foreign danger, have been always the instruments of tyranny at home. . . . Throughout all Europe, the armies kept up under the pretext of defending, have enslaved the people.²⁹

27. See Friedman 1502, 1519-20, for specific instances in which the two issues are treated as identical. Friedman is not alone in claiming that the framer's libertarian views were in opposition to a program of conscription. The Gates Commission Report asserted without any historical basis that "[t]he Founding Fathers feared conscription by the central government would lead to an unnecessary abridgment of personal freedoms." Report of the President's Comm'n on an All-Volunteer Armed Force 166 (1970).

28. Friedman 1510, quoting from R. Weigley, *History of the United States* 75 (1967) (emphasis added).

29. Friedman 1514-15, quoting from I Farrand 465.

[Pennsylvania Anti-Federalist Pamphlet, "Reasons of Dissent":] A standing army in the hands of a government placed so independent of the people, may be a fatal instrument to overturn the public liberties; it may be employed to enforce the collection of most oppressive taxes, and to carry into execution the most arbitrary measures. An ambitious man who may have the army at his devotion, may step up into the throne, and seize absolute power.³⁰

Running through each of these quotations, and through every other statement made in opposition to large standing armies, is a common thread of concern—a fear that the army will develop into a professional soldier class, distinct from the citizen body as a whole. This was something the framers wished to avoid for at least two reasons. First, there is a constant threat that such an army will not remain loyal to the idea of a civilian democratic government and will thus overthrow the government in a *coup d'état*. Second, the government might choose to use the army as an internal police force to oppress the citizens and deprive them of their liberty. Both of these threats must be avoided in the formation of a republic, and both were necessarily in the minds of the framers, as can be seen from the above quotations. But these threats to the stability of liberal democracy have little to do with the question of individual liberty raised by conscription. The word "liberty" may be the same in both cases, but the issues are very different—the issue of liberty raised by conscription has to do with the freedom of the individual to avoid doing something he does not wish to do, while the issue raised by a large standing army has to do with the ability of a free people to withstand domination by a large professional soldier class.

This is not to say, however, that the standing army debate gives no insight at all into the conscription issue. It was noted above that there was opposition to Governor Randolph's willingness to permit Congress to raise standing armies at its discretion. The major debate on this issue took place on August 18th, when Elbridge Gerry and Luther Martin proposed that the "raise and support armies" clause be amended to read as follows: "Congress shall have the power . . . to raise and support armies, provided that in time of peace the army shall not consist of more than _____ thousand men."³¹ Gerry had a figure of about three thousand men in mind for the blank space, which would have sufficed for the defense of the borders against the Indian raids. This motion, which brought about the *only* serious discussion of the "raise and support armies" clause in the Convention, was defeated after a short debate, primarily because of a feeling that the rep-

30. Friedman 1527, quoting from J. McMaster & F. Stone, *Pennsylvania and the Federal Constitution, 1787-1788*, at 480 (1888).

31. II Farrand 330.

representatives of the people should be trusted to make such determinations as they saw fit.³² Thus, even if there is an analogy to be made between standing armies and conscription, the key fact to note about standing armies is that the Convention refused to deny Congress the discretionary power to raise them.³³

It should be noted that this vote did *not* mean that the framers were not apprehensive about the possibility of large standing armies. In fact they were, but they did not want to write their concerns into the Constitution. The reason for this is simple, and quite instructive—a limitation on the size of the army would have been, in fact, a limitation on the substance of foreign policy, and the one thing the framers did not want to do was to limit the power of the government to conduct foreign policy in the future. They realized that they were framing a constitution designed to meet “the various crises of human affairs,”³⁴ and that they could not predict the nature of future international crises with certainty. For this reason, the framers decided to give full military and foreign policy powers to the national government they were founding. They placed no *substantive* checks on the powers of the government to deal with these matters. Instead, they placed a number of *procedural* checks on the exercise of this great power by dividing it into parts, and entrusting the different parts to Congress and the President. Perhaps the most important of these checks was the separation of the powers of sword and purse—the power of Congress to raise armies was separated from the power of the Commander-in-Chief to deploy the armies thus raised.³⁵ The *full* power to raise armies was given to Congress, with the limitation of military appropriations to two years in the “raise and support armies” clause designed to insure that Congress would not delegate this power to the President. This and the other divisions of foreign and military powers between the branches of the federal government clearly cannot by themselves guarantee wise policy, but they represented what the framers thought was the best way to combine republican principles with effective, energetic government. They represent a system of procedural checks and balances which were specifically designed to serve as an *alternative* to any substantive limitation on either the size of standing armies or the pursuit of foreign policy.

As the analysis thus far indicates, the relationship between the standing army debate and the conscription issue is quite different from that posited

32. *Id.* at 329-30.

33. See Madison's speech of Sept 14, 1787, at II Farrand 617. See also Luther Martin's speech before the Maryland legislature, at III Farrand 207-09.

34. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

35. U.S. Const. art. II, § 2, cl. 1.

by the proponents of the anti-draft thesis. By refusing to limit the size of standing armies, by refusing to restrict the meaning of the verb "to raise" in the "raise and support armies" clause, and by refusing to replace substantive limitations on the conduct of foreign policy, the framers clearly indicated an intention to leave Congress with broad discretionary powers to raise armies as circumstances might dictate. And, as several efforts to raise wartime volunteer armies have demonstrated, circumstances may occasionally call for conscription.

IV. THE PROCESS OF RATIFICATION

A. *The Federalist Papers*

A broad reading of the discretionary powers given to the government is the same as the one offered by the *Federalist Papers* which were written during the New York debate over ratification of the Constitution. Hamilton spoke most directly about the relationship between these discretionary powers and the "raise and support armies" clause in Federalist No. 23:

The authorities essential to the care of the common defence are these—to raise armies—to build and equip fleets—to prescribe rules for the government of both—to direct their operations—to provide for their support. These powers ought to exist without limitation: *Because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent & variety of the means which may be necessary to satisfy them.* The circumstances that endanger the safety of nations are infinite; and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. . . .

[U]nless it can be shewn, that the circumstances which may effect the public safety are reducible within certain determinate limits; unless the contrary of this position can be fairly and rationally disputed, it must be admitted, as a necessary consequence, that there can be no limitation of that authority, which is to provide for the defence and protection of the community, in any manner essential to its efficacy; that is, in any manner essential to the *formation, direction or support* of the NATIONAL FORCES.³⁶

This language is in direct support of the contention that the authors of the *Federalist Papers* would agree with the argument presented in this

36. The Federalist No. 23, at 147-48 (J. Cooke ed. 1961) (A. Hamilton). Friedman put a novel interpretation on the quoted passage: "Hamilton is simply declaring that any traditional or accepted way of forming a professional army (in terms of the number or manner of enlisting men) or directing it (through any command structure decided by the authorities) or supporting it (by any system of pay scales deemed desirable) must be allowed." Friedman 1524. Thus, Friedman transformed a passage arguing in favor of unlimited legislative discretion into something very different. In order to do this, he had to import some concepts not found in the Hamiltonian original. Hamilton never restricted himself to "traditional" or "accepted" ways of raising armies, did not say he was speaking only of "professional" armies, and never once mentioned either the notions of conscription or voluntary enlistment. Instead, the passage spoke broadly of the formation (not enlistment) of the national forces (not professional army).

article. There are also some additional passages from the *Federalist Papers* which make the Hamilton-Madison position even more clear. The problem of raising armies was discussed in detail in Federalist Nos. 8, 23, and 41. In Federalist No. 24, Hamilton replied to anti-Federalists who, sharing the concern of Luther Martin and Elbridge Gerry, would have preferred a constitutional limitation on the size of peacetime standing armies. Hamilton thought that the clause placing the power to raise armies in the hands of Congress instead of the Commander-in-Chief and limiting military appropriations to a period not to exceed two years provided adequate protection for the liberties of the people.³⁷ As for placing any further restrictions on the congressional power to raise armies, such as those in the Gerry-Martin amendment, Hamilton's views were consistent with the majority of the convention delegates. He noted with respect to such restrictions "that restraints upon the discretion of the Legislature in respect to military establishments . . . would be improper to be imposed, and if imposed, from the necessities of society would be unlikely to be observed."³⁸ Since it would be a mistake to write a clause into the Constitution which, given the facts of life of international politics, would most likely not be observed, the only wise alternative was to rely on the discretion of the legislature. "Here is a simple view of the subject," Hamilton said toward the end of Federalist No. 24, "that shows us at once the impropriety of a constitutional interdiction of such [military] establishments, and the necessity of leaving the matter to the discretion and prudence of the legislature."³⁹

Of course, these passages on the question of standing armies cannot be used as affirmative proof of the proposition that the framers would have endorsed a program of conscription. However, they do indicate that the framers wrote the military clauses of the Constitution in very broad terms so as to provide a basic framework within which a legislature and a chief executive could act prudently. Hamilton made this point in more general terms in Federalist No. 26:

The idea of restraining the Legislative authority, in the means of providing for the national defence, is one of those refinements, which owe their origin to a zeal for liberty more ardent than enlightened. . . . [C]onfidence must be placed some where; . . . the necessity of doing it is implied in the very act of delegating power; and . . . it is better to hazard the abuse of that confidence, than to embarrass the government and endanger the public safety, by impolitic restrictions on the Legislative authority.⁴⁰

Hamilton returned at the end of No. 26 to this theme of the impossibility

37. The Federalist No. 24, at 152-53 (J. Cooke ed. 1961) (A. Hamilton).

38. Id. at 155.

39. Id. at 157.

40. The Federalist No. 26, at 164-65 (J. Cooke ed. 1961) (A. Hamilton).

of avoiding danger in the act of placing trust in a government. The very idea of representation implies the delegation of trust on important issues, and the only sure solutions to this problem of delegation would, for one reason or another, be suicidal.

Few persons will be so visionary, as seriously to contend, that military forces ought not to be raised to quell a rebellion, or resist an invasion; and if the defence of the community, under such circumstances, should make it necessary to have an army, so numerous as to hazard its liberty, this is one of those calamities for which there is neither preventative nor cure. It cannot be provided against by any possible form of government⁴¹

Madison developed a similar line of argument in his well known essay on the military power in Federalist No. 41:

But was it necessary to give an INDEFINITE POWER of raising TROOPS, as well as providing fleets; and of maintaining both in PEACE, as well as in WAR?

. . . With what colour of propriety could the force necessary for defence, be limited by those who cannot limit the force of offence? If a Federal Constitution could chain the ambition, or set bounds to the exertions of all other nations: then indeed might it prudently chain the discretion of its own Government, and set bounds to the exertions for its own safety.

. . . It is in vain to oppose constitutional barriers to the impulse of self-preservation. It is worse than in vain; because it plants in the Constitution itself the necessary usurpations of power, every precedent of which is a germ of unnecessary and multiplied repetitions. If one nation maintains constantly a disciplined army ready for the service of ambition or revenge, it obliges the most pacific nations, who may be within the reach of its enterprizes, to take corresponding precautions. . . .

. . . A standing force therefore is a dangerous, at the same time that it may be a necessary provision. On the smallest scale it has its inconveniences. On an extensive scale, its consequences may be fatal. On any scale, it is an object of laudable circumspection and precaution. A wise nation will combine all these considerations; and whilst it does not rashly preclude itself from any resource which may become essential to its safety, will exert all its prudence in diminishing both the necessity and the danger of resorting to one which may be inauspicious to its liberties.

. . . .
Next to the effectual establishment of the Union, the best possible precaution against danger from standing armies, is a limitation of the term for which revenue may be appropriated to their support.⁴²

It can thus be seen that both Hamilton and Madison supported the contention that any sovereign government must have broad, discretionary military powers, and that the Constitution provides the federal government with the broad latitude it needs to exercise these powers. Their views on the need for discretionary foreign policy powers, and the implication of these views for the understanding of the congressional power to raise

41. *Id.* at 170.

42. *The Federalist* No. 41, at 270-73 (J. Cooke ed. 1961) (J. Madison).

armies, are identical with the interpretation placed on the Convention debates in the previous section.

B. *Conscientious Objection and the Second Amendment*

Other state ratification debates besides the one in New York mentioned the problem of raising armies. As a result of these debates some states were moved to urge immediate amendment of the military clauses of the Constitution as part of a proposed Bill of Rights. Two of these proposed amendments dealt with the problems of conscientious objectors—problems which could arise only in the context of a program of conscription. Virginia and North Carolina both suggested an amendment which read as follows:

That any person religiously scrupulous of bearing arms ought to be exempted, upon payment of an equivalent to employ another to bear arms in his stead.⁴³

This amendment made no mention of either the militia or the national army. When James Madison presented the amendment to the First Congress on June 8, 1789, along with the rest of the Bill of Rights, the conscientious objection clause was joined to what we now know as the Second Amendment:

The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms shall be compelled to render military service in person.⁴⁴

This amendment was accepted by the House of Representatives after some debate and a close vote,⁴⁵ but the conscientious objector clause was deleted from the amendment by the Senate.⁴⁶

Probably the most important problem connected with the conscientious objector clause, when that clause is viewed from the perspective of the conscription issue, can be seen from an examination of Madison's proposal: Why did Madison limit the application of the clause to militia drafts, when the state proposals specified neither the militia nor the national army? Was Madison merely stating what was implicit in the state proposals, or did he narrow their scope? The ACLU brief took the position that Madison merely made explicit the universally held assumption that only state militias could draft, and therefore, only they could conceivably endanger the status of conscientious objectors. Under this view, the conclusion is drawn that no comparable clause was offered to protect conscientious ob-

43. 3 J. Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 659 (2d ed. 1836) [hereinafter cited as *Elliot's Debates*]; 4 *id.* at 244.

44. 1 *Annals of Cong.* 434 (1789) [1789-1824].

45. *Id.* at 751, 779.

46. 1 S. *Jour.* 71 (1820) [1st Sess., March 4, 1789].

jectors from being drafted into the national army because, quite simply, such a clause would have been redundant in light of the fact that Congress did not have the power to draft *anyone* into the army, whether he was a conscientious objector or not.⁴⁷

In order to make this connection between the conscientious objector clause and the conscription issue, proponents of a restrictive reading of the Constitution are forced to make one critically important assumption, *i.e.*, that Madison would have proposed a similar clause to protect conscientious objectors against an army draft had he thought such a draft possible. However, this assumption is not so self-evident as to require acceptance without argument. There are any number of possible reasons why Madison might have been more concerned with protecting conscientious objectors from state militia drafts than from army drafts. For example, he might have thought religious dissidents needed more protection from the states than from the national government. In fact, there is a strong case to be made for this proposition.⁴⁸

In what way, then, does the above aid one's understanding of the conscientious objector clause? Can one conclude (1) that the original Virginia and North Carolina proposals were intended to protect conscientious objectors from an army draft as well as from a militia draft, (2) that Madison deliberately narrowed these proposals because of his views about the special need for protecting conscientious objectors from state governments, leaving the problem of conscientious objectors in any army draft to the discretion of Congress, and (3) that, therefore, the evidence indicates that the framers anticipated and accepted the possibility of conscription into the national army? Since the evidence gives no clear explanation of the reason for the differences between the Madison, Virginia, and North Carolina proposals, such a conclusion would seem to be without adequate support. At the very least, however, it can be seen that the wording of Madison's proposed amendment is just as consistent with the proposition that the framers were aware of a conscription power and accepted it, as it is with the proposition that they either rejected or were ignorant of it.

It has previously been shown that the framers did not reject conscription. The essential interpretive choice must thus be between envisioning the framers as being unaware of national army (as opposed to state militia) drafts, or as silently accepting this possibility. Of course, even if they had

47. Cf. Friedman 1536.

48. For an interesting treatment of the connection between Madison's "extended republic" argument of Federalist No. 10 and his views about religious freedom see J. Burnam, *Religion and American Political Society: The Contemporary Supreme Court and the American Founding* (1964) (unpublished thesis in University of Chicago Library).

not anticipated conscription, this would not be sufficient proof of the draft's unconstitutionality, especially in light of the framers' views about the need for the government to maintain flexibility. One piece of evidence taken from one year after the Bill of Rights debate, however, strongly suggests that the framers expected Congress to have the power to pursue something similar to a policy of conscription.

When Rhode Island decided to join the union in 1790, it not only became the third state to call for the adoption of the conscientious objector amendment, but it also became the first to call for the following:

That no person shall be compelled to do military duty otherwise than by voluntary enlistment, except in cases of general invasion; any thing in the second paragraph of the sixth article of the Constitution [the Supremacy Clause], or any law made under the Constitution, to the contrary notwithstanding.⁴⁹

Rhode Island's concern here seems to have been that Congress had the power to compel men to do military service either by drafting them into nationalized militia units or by drafting them directly into the national army. An interpretation which limits Rhode Island's concern to one over the state militia drafts does not seem to explain all of the language in the proposed amendment. Rhode Island might not have clearly anticipated modern programs of conscription, but its amendment does suggest a general awareness that the powers given to Congress, if left unamended, were broad grants of authority giving Congress a great deal of leeway to raise military forces as circumstances might dictate.

V. LATER VIEWS ON THE CONSTITUTIONALITY OF CONSCRIPTION

A. *Conscription in the War of 1812*

The first time the Congress ever considered a draft was in 1814, at the end of the War of 1812. Although it is difficult to draw inferences about 1787 opinions from actions taken twenty-seven years later, some of the same people were still politically important when both houses of Congress passed conscription bills in 1814.

The legislative history of the 1814 bill began with a letter written on September 23d by William Giles of Virginia, Chairman of the Senate Military Affairs Committee, to President James Madison's Secretary of War, James Monroe, asking Monroe for suggestions on improving the state of the army.⁵⁰ Monroe's long reply, written on October 17th, concentrated on the army's manpower needs and suggested four alternative plans for increasing the size of the military establishment.⁵¹ He appeared to favor the first of the four, a complicated plan involving a conscription

49. 1 Elliot's Debates 336.

50. 1 American State Papers, Class V, Military Affairs 514 (1832) [1814].

51. *Id.* at 514-17.

program as one of its several parts. Monroe's letter also included a long argument in favor of the constitutionality of the draft, as he correctly anticipated that the constitutional issue would be raised by the New England representatives who were opposed to the war.

Giles supported Monroe's first plan, and on November 5th introduced a bill embodying most of its major provisions.⁵² The Giles bill was passed by the Senate on November 22d,⁵³ and was sent to the House, where it was also passed after a few amendments.⁵⁴ Daniel Webster led the New England opposition to the bill in the House, but was defeated at every turn by the bill's supporters.

The bill passed by the House and Senate was similar in most important respects, but a disagreement over the maximum length of service led the House to call for the establishment of a conference committee on December 22d. Because the Senate wanted to fix the maximum length of service at two years, while the House wanted to limit it to one, the issue was put off until after the Christmas recess.⁵⁵ Meanwhile, unknown to the legislators, the peace treaty with Britain had been signed on December 1st. Because of the treaty, which became known in Washington by the time Congress returned from its recess, the need for conscription had disappeared, and with it the need for a conference committee. As a result, there was no conscription bill enacted into law during the War of 1812. Nevertheless, the important fact is that both houses did agree on the basic idea of the draft—an agreement clearly more significant for our constitutional inquiry than the circumstances which prevented the bill from becoming law.⁵⁶

B. *Mr. Chief Justice Taney, the Draft, and the Militia*

The most important proponent of the anti-draft thesis in our history was Chief Justice Roger B. Taney.⁵⁷ Taney put together a set of notes

52. 28 Annals of Cong. 38 (1814) [1789-1824].

53. *Id.* at 109.

54. *Id.* at 929.

55. *Id.* at 131 (Senate); *id.* at 972-75 (House).

56. Despite the obvious and overwhelming significance of the fact that both houses passed Monroe's bill, Friedman put the following interpretation on the congressional action of 1814: "[T]he most significant aspect of the Monroe Plan [was] not the fact that it was introduced, but the fact that Congress never passed the proposal because a substantial number of congressmen did not believe that the federal government had power to conscript." Friedman 1541. It is true that the Monroe Plan never became law, and it is also true that the plan's constitutionality was the subject of vigorous debate in the House. But, as the legislative history indicates, the claim that the constitutional debate was the cause of the bill's failure to become law is, to say the least, a gross distortion of the facts.

57. The anti-draft argument received a hearing at about this time in the Pennsylvania Civil War case of *Kneedler v. Lane*, 45 Pa. 238 (1863). The Pennsylvania supreme court in

for an opinion on the draft which he never had an opportunity to use but which, fortunately, has been preserved and reproduced in an historical journal.⁵⁸ Lincoln's "Opinion on the Constitutionality of the Draft"⁶⁰ was a response to many of Taney's views which, even though not published, were widely known in Washington at the time.

The most interesting, and most powerful, argument in Taney's opinion had to do with the relationship between the state militia and the national army. "The constitution," Taney said, "establishes and recognizes two kinds of military force entirely different from each other in their character, obligations and duties."⁶⁰ One of these, the national army, is made up of "a body of men separate from the general mass of citizen,"⁶¹ while the other, the state militia, is made up of "the people" or the citizen body as a whole.⁶² According to Taney, the basic problem with the assumption of a power of conscription is that it necessarily implies the power to raise an army which, like the militia, would be drawn from the body of the people as a whole. But, if it could be drawn from the whole citizen body or, to put it another way, if the militia could be drafted into the army, why did the framers include the militia clauses in the Constitution at all? The very idea that a citizen army could be created at the discretion of Congress would seem to render the militia clauses "of no practical value . . . [to] be set aside and annulled whenever Congress may deem it expedient."⁶³ Such an interpretation of the power to raise armies would violate all rules of constitutional construction:

this case first found the Civil War draft unconstitutional by a 3-2 vote in November, 1863, and then reversed itself within two months. (The Chief Justice, who was in the majority, retired and was replaced by a Lincoln Republican who favored the draft). As a result, the case is of historical interest, but it has almost no value as a legal precedent. Even more important for our purposes, none of the many opinions in *Kneedler* presented new arguments against the constitutionality of the draft. The anti-draft arguments were essentially similar to Taney's, which is discussed below.

For these reasons, it is sufficient here to refer the interested reader to material dealing specifically with the case. The best discussion of the case is in a memorandum by Senior District Judge John Delehant, attached to *United States v. Richmond*, 274 F. Supp. 43, 66-75 (C.D. Cal. 1967). Judge Delehant was refuting Bernstein, *Conscription and the Constitution: The Amazing Case of Kneedler v. Lane*, 53 A.B.A.J. 708 (1967), an article which tried to use the *Kneedler* case to support the anti-draft thesis.

58. Taney, *Thoughts on the Conscription Law of the U. States—Rough Draft Requiring Revision*, 18 *Tyler's Quarterly Historical and Genealogical Magazine* 74 (1937) [hereinafter cited as *Taney*].

59. See notes 15-17 *supra* and accompanying text.

60. *Taney* 78.

61. *Id.*

62. *Id.* at 79.

63. *Id.* at 80.

[N]o inference can be drawn from these general words [of the "raise and support armies" clause] that would render null and inoperative the plain and specific provisions in regard to the militia, to which I have above referred. No just rule of construction can give any weight to inferences drawn from general words, when these inferences are opposed to special and express provisions, in the same instrument.⁶⁴

The key to Taney's argument lies in his conclusion that the militia is the *only permissible* citizen armed force under the Constitution. This in turn rests on the premise that the existence of a citizen army would "abrogate" the militia clauses, rendering them "null and inoperative." The conclusion, and the premise on which it rests, can both be refuted, however, on two distinct grounds. The first of these is best seen by looking closely at what Taney's thesis implies about the role of the army. The federalized militia was limited by the Constitution to the performance of three, and only three, basic tasks,⁶⁵ while the army was not limited at all in this way, and presumably could be used to do any job for which an armed force might be needed.⁶⁶ Since the federal government could use the militia "only in the contingencies specified in the Constitution,"⁶⁷ Taney's conclusion is the equivalent of saying that the United States must not use a citizen armed force for any purpose other than these contingencies. This would mean, for example, that the United States would have to limit the conduct of its foreign policy to the pursuit of those goals that could be supported by a small professional army backed up by a militia. But, as was noted earlier, the framers definitely wished to avoid placing such arbitrary limits in the Constitution on either the size of the army or the conduct of foreign policy.

This answers part of Taney's argument, but it does not completely refute his assertion that the power of conscription would "abrogate" the militia power, rendering it "of no value," "null and inoperative." To respond to this, it is necessary to answer the question of why the framers would have written militia clauses into the Constitution at all if they also gave Congress the discretionary power to create a large citizen army directly through the "raise and support armies" clause.

The answer to this was suggested in the earlier discussion of standing armies. It was noted above that the army created by the framers was left unlimited in its function, to be used by the federal government to perform

64. *Id.* at 81.

65. "The Congress shall have Power . . . [t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions. . . ." U.S. Const. art. I, § 8, cl. 15.

66. *Id.* art. I, § 8, cls. 11-12; *id.* art. II, § 2, cl. 1.

67. Taney 79.

any task for which an armed force might be needed. Among the many functions thus included, the three which require the constant maintenance of a large reserve armed force are those mentioned in the militia clauses. Nothing in the army clause *prohibits* the central government from using the army to do these three jobs, but if the federal government were to rely *solely* on the army to perform these functions, it would almost necessarily have to create a large, permanent standing army. While there would be nothing unconstitutional about the establishment of such an army, the framers did think this kind of an army dangerous, to be avoided if at all possible. In order to minimize this danger, they gave the national government the additional power to use the militia in three of the situations that might otherwise tempt Congress to build up large standing armies. This deliberate duplication of function was designed to reduce the likelihood of the government's needing large standing armies—it was not designed to outlaw standing armies entirely.⁶⁸

One can thus readily concede Taney's claim that the establishment of a large citizen armed force would create an area of overlap and redundancy between the army and the militia. But this does not imply that a citizen army reduces the militia to "no practical value," as he claimed, nor does the redundancy prove that a citizen army would "abrogate" the militia clauses. The militia debate at the Constitutional Convention gives one no reason to believe that the framers wished these clauses to limit the discretionary power of Congress to raise armies, although it did perhaps indicate a hope that the militia provisions would lessen the need for using this discretionary power to create citizen armies.⁶⁹

68. This connection between the standing army and militia questions was made clear by James Madison in a speech made during the August 23d militia debate at the Constitutional Convention. II Farrand 388; see *id.* at 617; IV *id.* at 59.

69. Friedman argued one additional point about the relationship between the militia and the army. The Constitution leaves the states with the power to arm, organize, discipline, and, when necessary, use the militia. The reason for this, Friedman claimed, was that the framers did not want to place the militia under full national control because they did not want the federal government to have any citizen armed force completely at its disposal. Friedman 1519. Friedman thus differed from Taney, who at least recognized the fact that the Constitution unequivocally gave Congress the power to call up the militia for stated purposes, without consulting any other branch of the national or state governments. Cf. notes 26 & 65 *supra*.

Debate in the Convention over standing armies and the militia actually saw the delegates split into at least three different groups. Friedman's interpretation was way off the mark as an interpretation of the sentiments of the Convention as a whole, but it did portray accurately the opinions of the later anti-Federalists, Luther Martin and Elbridge Gerry. III Farrand 207-09 (Martin); II *id.* at 332, 386, 388 (Gerry). Some of the other delegates wanted to see full national control over all aspects of the militia. II Farrand 332, 387 (Madison); *id.* at 331, 386 (Langdon); *id.* at 331 (Butler); *id.* at 332 (Pinckney). The rest of those who partici-

VI. CONCLUSION

Recent opposition to the constitutionality of the draft has stemmed in part from opposition to the substance of our foreign policy. This is not a new thing in our history; much (although not all) of the opposition to the draft in 1814, 1863, and 1917 was in fact opposition to the policies being supported by the draft. People who argue against the draft today for these reasons seek to limit foreign policy "adventurism" by making it impossible for the government to pursue any policy that would require a conscripted citizen army.⁷⁰

The thesis of this article has been that this type of limitation—a limitation on the substance of foreign policy—is plainly inconsistent with some of the most basic principles of our Constitution. Those who dislike the trend of our foreign policy should not try to place arbitrary limits on the power of the government as a whole to deal with international relations. Instead, they should bend their efforts toward revitalizing the system of checks and balances the framers provided. The congressional power to raise armies is in fact a significant procedural check on the conduct of foreign policy. Congress was given this power not because it was expected to act as a rubber stamp for the President, but because it was expected to use the power to play a role in determining the substance of policy. The "raise and support armies" clause was supposed to be a procedural lever; it was *not* supposed to limit the substance of policy. Congress was given the *whole* power to raise armies including, if necessary, the discretionary power to conscript.

The framers intended to leave us with the burden of discretionary

pated in the debate wanted the states to share in organizing the militia, not because of a fear of national control, but because the states might need to use the militia for their own purposes. *Id.* at 331 (Ellesworth); *id.* at 331, 332, 388 (Sherman); *id.* at 330-31 (Mason); *id.* at 331 (Dickenson); *id.* at 391 (Wilson).

70. Another argument against the constitutionality of the draft is based on the view that the draft leads to a form of "involuntary servitude" analogous to the slavery abolished by the 13th Amendment. This argument was specifically rejected by *The Selective Draft Law Cases*, 245 U.S. 366, 390 (1918).

That conscription leads to forced involuntary service is inherent in its definition. But is this involuntary service a form of servitude? The Radical Republicans who framed the amendment apparently thought not, since they also supported the Civil War draft. More important, the logic of the analogy is faulty. It is based on the assumption that "they" (the government) are forcing "us" to serve against our will. What this statement overlooks, however, is that there is no mysterious "they" imposing military service on "us"—we impose it on ourselves through our elected representatives in Congress. Moreover, the distinction between slavery and a self-imposed duty is decisive even if Congress is not perfectly "representative" and even if the duty is imposed on some who do not support the draft personally.

power; we should face up to this burden squarely, without relying on faulty constitutional arguments to make our decisions for us. The problem of the wisdom of conscription at any given time must be faced on its own terms, and the evidence of history cannot be used to save us from considering it. On the contrary, the historical evidence shows the framers' deep concern for preserving a broad sphere of discretionary power within which prudential judgment could operate.