Men, Military, and the Law: An Examination of Conscription During World War I and Its Legal Challenges

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As noted in the case syllabus for the *Selective Draft Law Cases* 245 U.S. 366,

> Compelled military service is neither repugnant to a free government not in conflict with the constitutional guarantees of individual liberty. Indeed, it may not be doubted that the very conception of a just government and its duty to the citizen includes the duty of the citizen to render military service in case of need and the right of the government to compel it.[1]

Mandatory military service, called conscription for the rest of this paper, was first used during the American Civil War. It became clear that reliance upon volunteerism and the existing militia system would not serve the military needs of the Union beyond 1862. Decades later, as the United States again needed to quickly amass and maintain a sizable military, conscription was used to quickly increase the size of the standing military through a federal form of conscription. Similar to the American Civil War, the US Congress responded with a conscription bill in 1917 to create another federally controlled system of manpower procurement.

Republican Representative Julius Kahn introduced the Selective Service Act. The members of Congress, supportive of conscription, believed that men were required to serve the nation during its times of need. They argued further of the need for an effective plan to muster and train the requisite number of men into the military. In their view, reliance upon volunteerism would not ensure the military would expand to the size required to participate in this current conflict. Opponents of conscription expressed their concerns regarding the growing expanse of the military within American society. In their view, conscription represented yet another extension of power beyond what is granted in the US Constitution. David Hollingsworth (R-OH) was vocal regarding his concerns of conscription since he viewed conscription as a step toward militarism within the United States. Hollingsworth said, "I would rather resign and let the people back home send to Washington a more subservient tool of militarism."[2] According to Hollingsworth, conscription and its large standing military represented

> The end of free institutions in America, destructive of that form of government which Lincoln in his inspired words at Gettysburg said our forefathers had brought forth on this

[1] Selective Draft Law Cases 245 U.S. 366 (1917).

[2] Representative David Hollingsworth, speaking on Increase of the Military Establishment: Extension of Remarks, 65th Cong., 1st sess., Congressional Record (April 28, 1917): HR: 155.

> continent and which he and other sturdy, unflinching American patriots have ever since maintained without foreign cooperation or entanglements.[3]

Hollingsworth's caution was shared by other members of Congress since they feared conscription created military fervor.

Despite its critics, President Woodrow Wilson supported the measure, then signed the bill into law on May 18, 1917. Wilson additionally issued a proclamation on that same day. This proclamation, Proclamation 1370, restated the requirements of self-registration of men, penalties for those that did not register and comply with conscription, and penalties for men that committed fraud. Wilson, in a similar tact to that of President Abraham Lincoln, made pleas to a man's patriotism to encourage compliance. Both of these presidents used patriotism to measure and determine loyalty and obedience among the American male population. Wilson, however, took this idea a step further, knowing that conscription was an unpopular policy. He discussed how compliance for conscription represented unity within the United States. He likened obedience and compliance with conscription to that of service in the military since the United States now united service of soldiers and actions by civilians around compliance. While conscription had been used before, Wilson explained the uniqueness of this time since it fostered a new requirement of service to the nation and a duty for all Americans. Previously, Americans (including civilians) were not united around a common purpose of service to the state and toward compliance for conscription law.

Assignment into their proper roles of service, according to Wilson, would take place through this new legislation by the US Congress. "Congress," as Wilson explained, "has provided that the Nation shall be organized for war by selection, that each man shall be classified for service in the place to which it shall best serve the general good to call him."[4] Wilson emphasized the significance of this moment since "it is a new manner of accepting and vitalizing our duty to give ourselves with thoughtful devotion to the common purpose of us all"; further, "it is in no sense a conscription of the unwilling" because it represented "selection from a Nation which has volunteered."[5] For Wilson, this time represented "the day which the manhood of the country shall step forward in one solid rank in defense of the ideals to which this Nation is consecrated" since it was vital "that there be no gaps in the ranks."[6] Wilson, in an effort to again stress the new requirement of self-registration of men, referred to registration day "as a great day of patriotic devotion and obligation" for America's men.[7] Registration, once completed by provost marshals in districts at the state level, was called a man's individual responsibility and deemed his "duty."[8] While this sense of duty was reserved for the draft eligible male population, all Americans were expected to participate since the success of conscription relied on total cooperation and participation of Americans. As Wilson explained, every man was being called on "whether he is

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[3] Representative David Hollingsworth, speaking on Increase of the Military Establishment: Extension of Remarks, 65th Cong., 1st sess., Congressional Record (April 28, 1917): HR: 155.

[4] Proclamation 1370 – Conscription, May 18, 1917

[5] Proclamation 1370 – Conscription, May 18, 1917

[6] Proclamation 1370 – Conscription, May 18, 1917

[7] Proclamation 1370 – Conscription, May 18, 1917

[8] Proclamation 1370 – Conscription, May 18, 1917

himself to be registered or not, to see to it that the name of every male person of the designated ages is written on the lists of honor."[9]

The Legislative and Executive Branches, as detailed in the US Constitution, are allocated different powers regarding the militia. The militia system had been the primary system since militia units were permitted to be federalized for specific objectives. According to Article I, Section 8, the Congress has the right "to provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions."[10] Congress, additionally, was permitted "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 discipling proscribed by Congress."[11] As per the duties outlined in Article II, Section 2, "The President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several states, when called into actual service of the United States."[12] As shown through the US Constitution, the raising, arming, and training of the militia was the power of the Congress. Control of troops in active service of the United States was then the power of the President. This demonstrates and affirms this separation of powers between the branches regarding the militia or military.

The existing militia system and volunteerism were effective to provide for the military needs of the nation until 1862. Several militia acts changed the requirements of presidents to require court orders to summon militiamen for federal service, changed the requisite size of the standing military, and expanded the president's ability to federalize militiamen. In 1862, to compensate for the small size of the Union military during the American Civil War, the Militia Act of 1862 lengthened the terms of service for militia. President Lincoln was then able to summon an additional 100,000 militiamen for federal service by requiring states to muster in different quota of men for federal service based upon their state's population. This proved difficult since many state governors often intentionally disrupted this process or did not supply their state's mandated quota. The US Congress responded with the Enrollment Act in 1863, which created a federal system of conscription that was overseen by a network of federal agents. Opponents of the Enrollment Act echoed concerns around its perceived abuse of personal liberty, that it violated freedom of choice, and disagreed that the Congress had the ability to raise armies outside of using the existing militia system. The creation of this federal system of conscription then drastically changed notions of service to the federal state as it also changed notions regarding the requirements of citizenship.

During the American Civil War, the Supreme Court of Pennsylvania heard a case of challenge regarding a draft summons. Conscription calls took place within districts of limited volunteerism. The complainants of this case questioned Congress's ability to bypass enrollment into state militias by permitting men to be enrolled into the regular army. This raised questions about whether men in militia units were to wait to be federalized rather than be directly conscripted into a federal

[9] Proclamation 1370 – Conscription, May 18, 1917

[10] U.S. Const., Art. I, Sec. 8.

[11] U.S. Const., Art. I, Sec. 8.

[12] U.S. Const., Art. II, Sec. 2.

system of manpower procurement. While the US Congress had the authority to use the militia, Justice C. J. Lowrie wrote, "it is apparent that it is not founded on the power of 'calling forth the militia,' for those who are drafted under it have not been armed, organized, and disciplined under the militia law, and are not called forth as militia under state officers, as the constitution requires."[13] These justices in Pennsylvania ultimately placed an injunction against further conscription from taking place in the state. Despite these efforts to curb and restrict conscription in the state of Pennsylvania, the injunction was soon lifted following a motion by the US government. This turn of events resulted in part because the composition of the justices had changed by the time the motion was received. These new justices determined that "the state court could not interfere by injunction, even if the draft law were unconstitutional."[14] This remains the only time when conscription was reviewed by the courts at this time. The US Supreme Court did not hear a case on the legality of conscription during the American Civil War.

Despite the efforts of President Wilson to eliminate resistance, resistance against conscription persisted during World War I much as it had during the American Civil War. While the tactics and means of resistance differed, conscription remained a detested policy. Legal questions were raised during World War I regarding the use of conscription to increase the size of the military at this time of war and national emergency when troops would be sent overseas. Could the Congress create another or new system of federal conscription? Would this violate provisions regarding the Congress's responsibility to the notion of militias? Would this mandatory military service violate a man's personal liberty? Does a man have a requirement of service to the federal state in this time of war and national emergency?

By the end of 1917, just months after Wilson signed the Selective Service Act into law, the US Supreme Court decided a case that dealt with many of these legal questions. This case, known as the *Selective Draft Law Cases*, addressed legal issues from conscription cases in the states of New York and Minnesota. According to the case, "The service which may be exacted of the citizen under the army power is not limited to the specific purpose for which Congress is expressly authorized, by the militia clause, to call the militia."[15] As Chief Justice White explained in the opinion,

> It is said, the right to provide is not denied by calling for volunteer enlistments, but it does not and can not [*sic*] include the power to exact enforced military duty by the citizen. This however but challenges the existence of all power, for a governmental power which has no sanction to it and which there can only be exercised provided the citizen consents to its exertion is in no substantial sense a power.[16]

Chief Justice White provided a historical explanation of how military expectations and regulations had changed through history, which included a survey of military rules and regulations before American independence. In this survey, White exposed the expectations of military service for all

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[13] Kneedler v. Lane, 45 Pa. Stat. 238 (1863) 241, 242.

[14] J.L. Bernstein, "Conscription and the Constitution: The Amazing Case of *Kneedler v. Lane,*" *ABA Journal* 53 (August 1967): 708. In 1917, the US Supreme Court drew on Kneedler to declare the World War I era draft constitutional.

[15] Selective Draft Law Cases 245 U.S. 366.

[16] Selective Draft Law Cases 245 U.S. 366.

citizens "wherever the public exigency exacted, whether at home or abroad."[17] Following independence, the Articles of Confederation rendered minimal powers to the unicameral legislature. At this stage of American political development, "Congress had no such power, as its authority was absolutely limited to making calls upon the States for the military forces needed to create and maintain the army, each State being bound for its quota as called."[18] Despite this limitation upon the legislature as designed by the Articles of Confederation, "The duty of the citizen to render military service and the power to compel him against his consent to do so was expressly sanctioned by the constitutions of at least nine of the States."[19]

Justice White wrote,

> We are unable to conceive upon what theory the exaction by government from the citizen of the performance of his 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, can be said to be the imposition of involuntary servitude in violation of the prohibitions of the Thirteenth Amendment, we are constrained to the conclusion that the contention to that effect is refuted by its mere statement.[20]

In addition to legal issues being raised in relation to the Thirteenth Amendment, the Fourteenth Amendment was also mentioned in the opinion. As White wrote, the Fourteenth Amendment "broadened the national scope of the Government under the Constitution by causing citizenship of the United States to be paramount and dominant, instead of being subordinate and derivative, and therefore, operating as it does upon all the powers conferred by the Constitution."[21]

There were several cases during the American Civil War, in the Confederate States of American, that sought to determine the legality of conscription. The state supreme courts of Texas, Alabama, Mississippi, North Carolina, Georgia, and Virginia, in contrast to the state of Pennsylvania, upheld the legality of conscription. In the state of Georgia, the court argued that the Confederate Congress had been afforded the authority to require the service of men, and men were then expected to serve.[22] Unlike the case in the state of Pennsylvania, the courts in these Confederate States affirmed their Congress's ability to introduce a new federal system of conscription. It is worth noting that service within the Confederate States of America's conscription system was restricted to white male citizens between a certain age range. In contrast to this, conscription in the Union did not bear this same citizenship restriction. In the Union, by contrast, those that had begun the process of naturalization were liable for service. This raises significant legal questions regarding the requirements of service to a federal state devoid of citizenship.

We see the affirmation of requirements of mandatory service in the *Selective Draft Law Cases* opinion. According to the Court,

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[17] Selective Draft Law Cases 245 U.S. 366.

[18] Selective Draft Law Cases 245 U.S. 366.

[19] Selective Draft Law Cases 245 U.S. 366.

[20] Selective Draft Law Cases 245 U.S. 366.

[21] Selective Draft Law Cases 245 U.S. 366.

[22] Barber v. Irwin 34 Ga. 28.

> The seceding States wrote into the constitution which was adopted to regulate the government which they sought to establish, in identical words, the provisions of the Constitution of the United States which we here have under consideration. And when the right to enforce under that instrument a selective draft law which was enacted, not differing in principle from the one here in question, was challenged, its validity was upheld, evidently after great consideration.[23]

This ruling reaffirmed the Confederate States of America state courts' decisions from the American Civil War. By upholding these earlier rulings, the US Supreme Court reaffirmed the authority for the Congress to implement conscription. This text from the opinion showcases that the rights and powers of the Confederate Congress are identical to those of the Congress in the United States. Given that these branches of government were identical in structure and responsibility, the US Supreme Court used these state cases to justify conscription during World War I. While the US Supreme Court would hear other cases upon issues related to conscription beyond World War I, the *Selective Draft Law Cases* opinion affirmed the legal grounding of conscription in the United States.

[23] Selective Draft Law Cases 245 U.S. 366.