Army Clause

I. Introduction

The power to raise an army was the among the most controversial military provisions of the Constitution. The military weakness of the federal government during and after the Revolutionary War convinced many Framers that the federal government needed power to raise professional forces. Yet, the Framing generation also widely accepted traditional British anti-army ideology and feared that a standing army could lead to domestic tyranny.

Today, the power to raise armies has eclipsed the importance of the Militia Clauses. After ratification of the Constitution, the federal government became dissatisfied with how the Constitution limited federal power over the militia. As a result, the federal government explored ways to exercise plenary control over all land forces. Ultimately, the federal government settled on using Congress's plenary power under the Armies Clause to raise all forms of land forces. Congress's efforts to consolidate the militia into the army, however, has raised difficult constitutional questions. These include the constitutionality of conscription into the national army and the near-plenary control that the federal government exercises over land forces, such as the Army Reserve, whose members are "nonprofessional" soldiers (i.e., civilians except when called to active service).

II. History before 1787

From the Norman Conquest to the seventeenth century, English armies were temporary institutions.[1] Armies were raised for specific conflicts, after which they were disbanded. Beginning around 1660, however, Britain began keeping a standing army—that is, a permanent corps of soldiers that continued to exist in peacetime.[2] Unlike the short enlistments of a temporary army, soldiers in a standing army enlist for long periods, essentially making military service their career.[3]

British political thought traditionally shunned standing armies because they were thought to be dangerous to civil liberty and limited government. Professional soldiers constituted their own special interest faction in society.[4] They lived under military law and lacked the civil liberty and common-law rights of English subjects. Making them more dangerous, the soldiers were armed and capable of acting against the civil government or against the population that they were supposed to protect. Many feared that such an unrepresentative armed faction of society might overthrow the government or be used by an executive officer to oppress the population.[5]

Despite these fears, Britain gradually accepted the existence of a standing army. For much of English history, the keeping of a standing army was thought unconstitutional.[6] Yet, the British constitution is conventional, not binding legally, so Parliament could still authorize the keeping of a standing army by statute—which Parliament ultimately did. Beginning in the late seventeenth century, the standing army existed in Britain because Parliament annually reauthorized the keeping of troops

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[1] *See, e.g.*, Michael Prestwich, *The English Medieval Army to 1485*, *in* THE OXFORD HISTORY OF THE BRITISH ARMY 1, 11 (David Chandler & Ian Beckett eds., 1996) [hereinafter OXFORD HISTORY].

[2] CORRELLI BARNETT, BRITAIN AND HER ARMY 1509–1970: A MILITARY, POLITICAL AND SOCIAL SURVEY 115 (1970).

[3] H.C.B. ROGERS, THE BRITISH ARMY OF THE EIGHTEENTH CENTURY 59 (1977)

[4] DAVID C. WILLIAMS, THE MYTHIC MEANINGS OF THE SECOND AMENDMENT 26–28 (2003).

[5] *Id.*; Letter from Samuel Adams to James Warren (1776), http://www.samuel-adams-heritage.com/documents/samuel-adams-to-james-warren-1776.html (last visited June 6, 2022); Simeon Howard, *A Sermon Preached to the Ancient and Honorable Artillery Company in Boston*, *in* 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1760–1805, at 185, 199 (Liberty Fund, 1983) (1773).

[6] JOHN PHILLIP REID, IN DEFIANCE OF THE LAW: THE STANDING-ARMY CONTROVERSY, THE TWO CONSTITUTIONS, AND THE COMING OF THE AMERICAN REVOLUTION 6–7 (1981); 1 WILLIAM BLACKSTONE, COMMENTARIES *408.

through the Mutiny Act.[7] But the fiction was maintained that these acts authorized the existence of a temporary army for one year only.[8] Moreover, although in Britain the Crown could raise armies and declare war, only Parliament could consent to the keeping of a peacetime army.[9]

When the American colonies were first settled, a standing army was an unknown institution. The colonists "were much too poor to permit a class of able-bodied men to devote themselves solely to war and preparation for war."[10] Nor did the British station any significant quantities of troops in America during the seventeenth and early eighteenth centuries.

Britain's military policy in the colonies changed during the French and Indian War. At the conclusion of that war, the British kept a permanent military presence in the colonies.[11] To provide for these troops, the British imposed taxes and quartered the troops in private homes. Colonials resented both the troops and the means of providing for them. Resistance to taxation and quartering became major contributing causes of the American Revolution.[12]

Once war broke out between the United States and Britain, Americans raised their own regular forces—the Continental Army. Under the Articles of Confederation, Congress had a power to raise and support an Army but it had to rely on the states to exercise this power. The Articles provided that a "Committee of the States," consisting of one delegate from each State, would have to "agree upon the number of land forces" needed and then "make requisitions from each state for its quota, in proportion to the number of white inhabitants in such state."[13] Each state then would "appoint the regimental officers, raise the men, and clothe, arm, and equip them, in a soldierlike manner," but all of this would done "at the expense of the united states."[14] Thereafter, "the officers and men so clothed, armed, and equipped, shall march to the place appointed, and within the time agreed on by the united states in congress assembled."[15]

But these powers left Congress with inadequate military authority. The interposition of states into the process of raising regular forces permitted the states to obstruct Congress.[16] During the Revolution, the United States frequently lacked sufficient regular soldiers in the field.[17] Moreover, Congress had difficulty paying and providing for the troops.[18]

As the war closed, the army began to mutiny. The most serious incident occurred in March 1783. Frustrated army officers, backed by public creditors and some nationalist political figures, threatened to march on Congress.[19] An anonymous officer at the army's camp in Newburgh, New York circulated a letter calling for the officers to meet and plot their actions against Congress, a plan that may have included overthrowing it.[20] Washington, who caught wind of the plot, attended the officers' meeting and, through sheer force of personality, defused the conspiracy in a famous address to his officers.[21] While Washington succeeded in preventing the army from attacking Congress, the incident

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[7] REID, *supra* note 6, at 6–9.
[8] *Id.*
[9] *An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown* (1689).
[10] RUSSELL F. WEIGLEY, A HISTORY OF THE UNITED STATES ARMY 4 (enlarged ed. 1984).
[11] REID, *supra* note 6, at 10.
[12] *Id.* at 67–69.
[13] ARTICLES OF CONFEDERATION of 1781, art. IX, para. 5.
[14] *Id.*
[15] *Id.*
[16] 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1178 (1833).
[17] JOHN K. MAHON, HISTORY OF THE MILITIA AND THE NATIONAL GUARD 44 (1983).
[18] RICHARD H. KOHN, EAGLE AND SWORD 19 (1975).
[19] *Id.* at 25, 29
[20] *Id.* at 29–30.
[21] *Id.* at 30–32.

"was the closest an American army has ever come to revolt or coup d'etat,"[22] and it reinforced the dangers that regular forces posed to civilian control of the government.

Following the conclusion of the Revolution, Congress largely disbanded the army. The army was left with a residual force of "eighty men and a few officers."[23] But this force was neither sufficient for national defense nor to respond to domestic turmoil, such as Shays's Rebellion. Moreover, once peace with Britain concluded, the Framing generation repeatedly squabbled over whether the Articles conferred upon Congress the power to keep a standing army in peacetime.[24] The need to strengthen national military power was a major motivating force behind calling the Constitutional Convention.

III. Constitutional Convention

At the Constitutional Convention, delegates widely agreed on the need for professional troops. The Army Clause in the Constitution originated in a draft discussed by the Committee of Detail, which met from June 19 through July 23. The Clause provided the Congress shall have the power "To make war (and) raise armies. (& equip Fleets.)."[25] From here, the Convention split into two main camps.

The first camp wanted a strong professional army on the European model. One-third of the delegates were veterans of the Revolutionary War, and they understood the advantage of having trained professionals conduct war.[26] Many were also disenchanted with the incessant debates about whether Congress could maintain a standing army under the Articles of Confederation. They wished the controversy concluded in favor of national power.[27]

The second camp generally feared a standing army. They begrudgingly acknowledged its necessity in some cases (e.g., manning garrisons and guarding the frontier). But this camp sought various limitations, including limiting the size of the army during peacetime.[28]

At the Convention, the first camp prevailed. The Convention expanded the power to "raise armies" into the power to "raise *and support* Armies."[29] The Convention also rejected all substantive limitations on Congress's power, such as limiting the army's size.[30] The Constitution, thus, spoke of Congress's power to raise regular forces in the broadest terms.[31]

The only significant limitation was the two-year appropriation requirement. This limitation prevented Congress from establishing a perpetual standing army. Much like how Parliament had to pass an annual Mutiny Act to keep the British standing army active, Congress would need to affirmatively consent to the continued existence of the army by funding the troops. If Congress did nothing, the army would cease to exist for lack of funding.[32]

The Constitutional Convention made a few changes from British practice. In Britain, the Crown raised armies. Under the Constitution, however, the raising of an army was assigned to Congress. In British practice, Parliament passed the Mutiny Act annually to consent to a standing army. The

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[22] *Id.* at 17.

[23] ALLAN R. MILLETT & PETER MASLOWSKI, FOR THE COMMON DEFENSE: A MILITARY HISTORY OF THE UNITED STATES OF AMERICA 86 (1984); WEIGLEY, *supra* note 10, at 81.

[24] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 287 (Max Farrand ed., 1911) [hereinafter RECORDS]; KOHN, *supra* note 18, at 77.

[25] 2 RECORDS, *supra* note 24, at 143.

[26] KOHN, *supra* note 18, at 77.

[27] THE FEDERALIST NO. 23, *supra* note **Error! Bookmark not defined.**, at 153–54 (Alexander Hamilton).

[28] 2 RECORDS, *supra* note 24, at 323, 329–30, 633.

[29] *Id.* at 329; KOHN, *supra* note 18, at 77.

[30] 2 RECORDS, *supra* note 24, at 329–30.

[31] *The Federalist No. 23* Hamilton)

[32] KOHN, *supra* note 18, at 78; *see also* THE FEDERALIST NO. 26, *supra* note **Error! Bookmark not defined.**, at 168 (Alexander Hamilton).

Constitutional Convention, in contrast, allowed army appropriations for two-year increments because Congress was elected every two years and might not have a session each year.[33]

IV. The Ratification Debates

During the ratification debates, the Anti-Federalists objected to Congress's unlimited power to create a standing army. These objections followed traditional British Whiggish political theory.[34] The Anti-Federalists complained that the creation of an army would lead to domestic tyranny because government officials could use the army to enforce domestic law through force, not by consent.[35] They also recognized that a standing army would be expensive to maintain, and they feared that burdensome taxation and invasive search and seizure policies might be necessary to support the forces.[36] Finally, the Anti-Federalists emphasized the complete lack of limits on Congress's authority to keep standing forces. There were no limits on the number of troops, and there were no substantive limits on Congress's power. Congress could decide, for example, to quarter soldiers in private homes.[37] Anti-Federalists sought several amendments to limit Congress's power to keep a standing army, including requiring Congress to have a supermajority to authorize a standing army.[38] They also sought declarations that "standing armies in time of peace are dangerous to liberty."[39]

The Federalists offered several defenses of Congress's power. They noted that regular forces were militarily superior to the militia.[40] Federalists acknowledged that armies were expensive to maintain, but they used that to their rhetorical advantage. Because professional forces were expensive, the American army would also be naturally limited in size. Congress could not raise enough revenue to have a large standing army.[41] The Federalists also emphasized the democratic checks on the power to raise armies. Unlike in England where the executive had the power to raise armies and declare war, the Constitution assigned those powers to the legislature composed of the people's representatives.[42] Finally, they noted that Americans had the right to bear arms, making it unlikely that the standing army could be deployed against the civilian population to usurp the government or oppress the population.[43]

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[33] 2 RECORDS, *supra* note 24, at 509.

[34] REID, *supra* note 6, at 4.

[35] *See, e.g.*, 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1270–71, 1494 (John P. Kaminski et al. eds., 2000).

[36] *The Address and Reasons of Dissent of the Minority of Pennsylvania to their Constituents*, *in* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 35, at 639.

[37] 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 35, at 1299–1300.

[38] *See, e.g.*, *The New York Convention, Saturday 26 July 1788*, *in* 22 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 35, at 2088 (proposed supermajority amendment to the constitution); *North Carolina*, *in* 30 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note **Error! Bookmark not defined.**, at 27 (citing Article IX of the constitution).

[39] *See, e.g.*, *The New York Convention, Saturday 26 July 1788*, *in* 22 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 35, at 2088 (proposed supermajority amendment to the constitution); *North Carolina*, *in* 30 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 35, at 27 (citing Article IX of the constitution).

[40] *See, e.g.*, THE FEDERALIST NO. 25, at 162 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("War, like most other things, is a science to be acquired and perfected by diligence, by perseverance, by time, and by practice."); Debates of the Virginia Convention (June 14, 1788), *in* 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 35, at 1258, 1278–79 (statement of Nicholas) (questioning the adequacy of "men unacquainted with the hardships, and unskilled in the discipline of war");

[41] THE FEDERALIST NO. 46, *supra* note 40, at 321 (James Madison); THE FEDERALIST NO. 28, *supra*, at 180.

[42] THE FEDERALIST NO. 24, *supra* note 40, at 152–53 (Alexander Hamilton).

[43] THE FEDERALIST NO. 46, *supra* note 40, at 321 (James Madison).

Again, the Federalists prevailed. The first eight Amendments contained two provisions primarily on the military. Neither broadly limited Congress's power to create a standing army. The Second Amendment granted a general right to bear arms, preventing Congress from investing a standing army with a monopoly of the means of force. The Amendment did not, however, limit Congress's power to raise an army. Nor did it contain any invective directly against the standing army. Instead, Anti-Federalists secured only the milder declaration that "[a] well regulated Militia" is "necessary to the security of a free State."[44] And the Third Amendment prevented Congress from quartering troops in private homes without consent in peacetime.[45] The Amendment thus relieved homeowners of the financial obligation of subsidizing the housing for regular forces, and it prevented the government from quartering troops in private homes as a means to intimidate the civilian population.[46]

V. Controversies, Judicial Precedent, and Open Questions

The Constitution does not define the difference between an "army" and a "militia." Yet, the distinction between them is critical because the Constitution creates separate regulatory regimes for these two species of land forces. The Armies Clause gives the federal government plenary authority over the armies of the United States. It stands in contrast to the Militia Clauses, which divided control over the militia between the federal and state governments and limited the ability of the federal government to call forth the militia to domestic defensive conflicts.

The use of the Army Clause instead of the Militia Clauses to raise land forces dates all the way to the quasi-War with France. In 1799, Federalists in Congress authorized the president to create a provisional army, and part of that law authorized the President to accept individuals and associations that volunteered for service.[47] The president, not the states, would appoint the officers for the volunteers.

The law occasioned great debates in Congress about whether Congress had the power to create the provisional army. The Federalists argued that the Armies Clause authorized Congress to create it. The Democratic-Republicans countered that the provisional army was an unconstitutionally organized militia.[48] Early nineteenth-century legal commentators were also divided on the status of war volunteers.[49]

As part of this debate, Federalists and Democratic-Republicans clashed on how to distinguish an "army" from a "militia." The Federalists argued that army soldiers were volunteers, while militiamen were conscripts. Because the provisional army comprised volunteers, Federalists argued that it was an "army." The Democratic-Republicans had a different conception: the militia were part-time forces, in contrast to armies, which consisted of regular forces. Because the provisional army comprised nonprofessional soldiers, the Democratic-Republicans argued that the provisional army was a militia.

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[44] U.S. CONST. amend. II.

[45] U.S. CONST. amend. III.

[46] WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 123 (1825).

[47] An Act authorizing the President of the United States to raise a Provisional Army, ch. 47, § 1, 1 Stat. 558, 558 (1798).

[48] On the debate in Congress, see 1 DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789–1801, 248–50 (1997).

[49] *Compare* 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA app. D at 311 (Phila., William Young Birch & Abraham Small 1803) (arguing that the provisional army was an unconstitutional militia), *with* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §1187, at 75–76 (1833) (contending that the question of whether war volunteers were part of the army had liquidated in favor of their being part of the national army).

And this militia was unconstitutionally organized because the federal government would appoint the officers and could call forth the units for purposes outside those enumerated in the Constitution.[50]

The correct constitutional classification of these nonprofessional forces remains important for the modern structure of the Armed Forces. In the early twentieth century, Congress created organized reserve forces for the Armed Forces. These reserve forces are composed of nonprofessional citizen-soldiers, who generally train a minimum of a weekend a month and two weeks a year (although many have much longer periods of active duty). If the correct distinction between an "army" and a "militia" is a professionalism-based distinction, then these reserve forces amount to an unconstitutional national militia. On the other hand, if the distinction involves volunteerism, then the reserve forces are part of the armies because its members are volunteers.

The army/militia distinction is also relevant to the constitutionality of conscription. The efforts toward national conscription were prompted by constitutional limits on the militia that federal policymakers often found intolerable. The Constitution federalized the militia, and during wartime, the federal government had difficulty working through the states to secure necessary forces. Moreover, the Constitution limited the authority of the federal government to call forth the militia to domestic defensive conflicts. Particularly in the twentieth century, the federal government wanted to be able to conscript soldiers for offensive and overseas operations that fell outside its authority to call forth the militia.[51]

The United States first experimented with conscription during the Civil War and enacted its first workable system of conscription during World War I.[52] Conscription gave the federal government the power to call forth the entire able-bodied manpower of the country. But because the Armies Clause gives Congress plenary power to raise, govern, and deploy armies, conscription permitted Congress to raise this military manpower without the legal restrictions on militia service. These efforts to evade the Militia Clauses using national conscription prompted constitutional challenges on the theory that it constituted an unconstitutional calling forth of the militia.

Debates over the constitutionality of conscription look both to linguistic interpretation and to construction across the document as a whole. These methods of interpretation point in different directions. Linguistically, the power to "raise" armies could include the power to compel service into the army. But looking across provisions, the Constitution limits the federal government's authority to call forth and govern the militia. Those limits do not have much substance if Congress may avoid them simply by drafting citizens into the army.[53]

Challengers to conscription have also relied on history. England did not recognize any general obligation of inhabitants to perform military service in the army.[54] The general duty of inhabitants to bear arms was a duty to perform defensive military service in the militia. Impressment into the army "was normally illegal" and, during the rare times it occurred, fell only upon marginalized groups (e.g.,

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[50] *See, e.g.*, 8 ANNALS OF CONG. 1704–06, 1725–26, 1730, 1733, 1759–60, 1765 (Joseph Gales ed., 1851) (1798)

[51] For a discussion, see Robert Leider, *Deciphering the "Armed Forces of the United States,"* 57 WAKE FOREST L. REV. 1195, 1228–34 (2022).

[52] An Act for Enrolling and Calling Out the National Forces, and for Other Purposes, ch. 75, § 1, 12 Stat. 731, 731 (1863); An Act to Authorize the President to Increase Temporarily the Military Establishment of the United States, Pub. L. No. 65-12, § 2, 40 Stat. 76, 77–78 (1917).

[53] *See* Leon Friedman, *Conscription and the Constitution: The Original Understanding*, 67 MICH. L. REV. 1493, 1497–98 (1969); Robert Leider, *Federalism and the Military Power of the United States*, 73 VAND. L. REV. 989, 1037–50 (2020).

[54] Prestwich, *supra* note 1, at 15.

criminals and the poor).[55] The "cherished principle"[56] of raising a British army was that "every soldier was supposed to be a volunteer."[57]

Yet, the courts have generally upheld conscription. During the Civil War, state courts generally upheld conscription, both under the U.S. Constitution and analogous provisions of the Confederate Constitution.[58] There were, however, strong opinions from judges holding that conscription was unconstitutional.[59]

The constitutionality of conscription reached the U.S. Supreme Court during War World I. In the *Selective Draft Law Cases*, the Supreme Court unanimously upheld the constitutionality of conscription.[60] The Court treated Congress's power to raise armies as an additional and separate authority from its power to organize the militia. The decision grounded conscription in the power to raise armies, the power to declare war, and the Fourteenth Amendment's primacy of national citizenship.

Although the Supreme Court has described Congress's power to raise armies in broad terms, the Court has never explored its limits. During the Vietnam War, lower courts expanded the holding in the *Selective Draft Law Cases* by upholding the constitutionality of conscription without a declared war. The Supreme Court did not to grant certiorari to decide whether those decisions were correct.[61]

As the doctrine now stands, tension exists between the justification of the military reserves and the constitutionality of conscription into the national army. If the Federalists were right that the militia is defined by compulsion, then conscription into the federal army should be unconstitutional because a conscripted land force, by definition, would be a militia. On the other hand, if the Democratic-Republicans were right that the line between an "army" and a "militia" is professionalism, then conscription into a regular army might be constitutional; but the Army Reserve—a nonprofessional land force—would be constitutionally suspect. And if Congress ever attempted to impose conscription into the Army Reserve, it would be unconstitutional under either definition.[62]

Finally, the courts have broadly deferred to congressional power over the composition and means of raising the army. The Supreme Court has, for example, rejected challenges to male-only draft registration.[63] The Supreme Court has also upheld a requirement that universities accepting federal funds make their campuses available for military recruiting.[64]

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[55] BARNETT, supra note 2, at 140.
[56] *Id.* at 397.
[57] Alan J. Guy, *The Army of the Georges 1714–1783*, *in* OXFORD HISTORY, *supra* note 1, at 92, 97.
[58] *See, e.g.*, *Ex parte* Hill, 38 Ala. 429, 433–44 (1863); Jeffers v. Fair, 33 Ga. 347, 349–50 (1862); Parker v. Kaughman, 34 Ga. 136, 142–43 (1865); Simmons v. Miller, 40 Miss. 19, 22–24 (1864); Gatlin v. Walton, 60 N.C. 325, 331–34 (1864); *Ex parte* Coupland, 26 Tex. 386, 392–94 (1862); Burroughs v. Peyton, 57 Va. (16 Gratt.) 470, 473–78 (1864).
[59] *See, e.g.*, Kneedler v. Lane, 45 Pa. 238 (1863).
[60] Arver v. United States (*Selective Draft Law Cases*), 245 U.S. 366, 376–78 (1918).
[61] Holmes v. United States, 391 U.S. 936, 936 (1968) (denying certiorari); *id.* at 936–49 (Douglas, J., dissenting); on the peacetime draft, see also Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245, 265–66 (1934) (Cardozo, J., concurring).
[62] *See* Leider, *supra* note 53, at 1050–57.
[63] Rostker v. Goldberg, 453 U.S. 57 (1981).
[64] Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47 (2006).