Memorandum: Power to Conscript a Police Force
Date: June 12, 2020
***Prepared by** Robert J. DeNault, Research Assistant to Maj. Gen. Charles Dunlap, USAF

Introduction

State and city police forces across the United States are experiencing significant political and civil backlash for what many perceive as unnecessarily violent behavior toward persons of color. As citizens lose confidence in police forces, questions about community involvement in policing systems are being raised amongst activists and experts alike. Here, the legal authority of both the federal and State governments to utilize conscription—a draft—in order to engage citizens in their own policing systems is analyzed.

There are two conclusions. First, the federal government would be limited in establishing a compulsory police force because its intrinsic police powers are few. Furthermore, the federal government's power to conscript individuals has traditionally been curtailed to the spheres of military and foreign policy, both traceable to specific constitutional grants and not a common law police power. Second, State governments may be able to establish a draft for a compulsory civilian police force if they are able to point to historically similar uses of the common law police power. States may encounter particularly salient due process and Thirteenth Amendment challenges from citizens who desired to avoid service, but a regime that accommodated such challenges with alternative forms of service may survive constitutional scrutiny.

Questions Presented

Question 1: Whether federal conscription of citizens to serve as police or public safety officers is lawful.

Question 2: Whether State conscription of citizens to serve as police or public safety services is lawful.

Analysis

A. Federal Conscription Powers

The federal government's power to compel citizens to act, such as serving in the military or on juries, is limited. Of course, the federal government possesses the ability to raise an army through use of a draft.[1] There are two sources for the limitations on the government's power in such an instance: federalism concerns and due process rights under the U.S. Constitution. The Thirteenth Amendment prohibition on involuntary servitude[2] has not been interpreted to prohibit conscription for "duties which individuals owe to the State . . . such as services in the army, militia, on the jury, etc."[3]

---

[1] Military Selective Service Act, 50 U.S.C. app. §§451–470 (2006).
[2] U.S. Const. Am. XIII.
[3] Butler v. Perry, 240 U.S. 328, 332–33.

But tensions between the federal government's right to conscript citizens for constitutional purposes and the States' exclusive rights to raise and train militias have given rise to legal battle. For example, in *Perpich v. Department of Defense*, the Governor of Minnesota challenged the federal government's use of State National Guard members for an emergency foreign training exercise as a violation of his authority to regulate his own militias under Article I of the Constitution.[4] The premise of this argument—which failed in *Perpich*—was that the federal government cannot conscript a militia for purposes outside the scope of suppressing insurrection, rebellion or foreign invasion. It failed because the Government was not conscripting *militia* members, but rather wholly federal reserve members of the U.S. National Guard, a division of the U.S. Army. When a citizen is called upon to wear his "army hat," then the militia clauses and their restrictions on the federal government do not apply.[5]

The same panacea would not apply to a federally-conscripted police force, because such a force could not be a part of the army.[6] While the Court in *Perpich* noted the Constitution's Militia Clauses are not limits on Congress's ability to raise armies and provide for the common defense[7] it also acknowledged that militias are, by definition, part-time forces which "may not be kept on service" like armies.[8] The Court enumerated the three roles belonging to a citizen in a State-militia and a National Guard reserve: "a civilian hat, a State militia hat, and an army hat."[9] The Court's extrapolation implies that the federal government may raise an army, but not a police force; the State may form a body of armed citizens it can train, but not a standing force under the Militia Clauses.

Given significant historical evidence reserving the police powers to States, a federal conscription system for a police force seems unlikely to survive a challenge by Governors or citizens who assert both a State's right to police itself and limitations on the federal government's authority in this space to military and foreign affairs.[10]

B. State Conscription Powers

1. State Authority

A State's power to conscript for military service exists in a somewhat-limited fashion, but its police power is broadly left to its own judgment.[11] Although the Supreme Court has resisted defining the limits of that power, it has recognized that it covers "all laws that relate to matters completely

---

[4] *See* Perpich v. Dep't of Def., 496 U.S. 334, 347–48 (1990) ("The Governor's attack on the Montgomery Amendment relies in part on the traditional understanding that 'the Militia' can only be called forth for three limited purposes that do not encompass either foreign service or nonemergency conditions, and in part on the express language in the Militia Clause reserving to the States 'the Authority of training the Militia'"

[5] Perpich, 496 U.S. at 348.

[6] U.S. CONST. Art. I Cl. 11–14.

[7] Perpich, 496 U.S. at 349–350.

[8] *Id*. at 348.

[9] *Id*.

[10] *See* Perpich, 496 U.S. at 353. "[S]everal constitutional provisions commit matters of foreign policy and military affairs to the exclusive control of the National Government . . . [giving] rise to a presumption that federal control over the armed forces was exclusive."

[11] Jacobson v. Massachusetts, 197 U.S. 11, 24–5. (1905). "The authority of the State to enact [a statute compelling vaccination] is to be referred to what is commonly called the police power."

within its territory and which do not by their necessary operation affect the people of other States."[12] Critically, when addressing the powers of the State to protect public health and safety, the Court has stated the "mode or manner in which those results are to be accomplished is within the discretion of the State," subject only to the limits that it not contravene the Constitution or individual rights guaranteed by it.[13]

The police power is the root of a significant amount of government authority in the United States.[14] A common law doctrine that predates the founding of the United States, the police power applies to anything relating to general welfare and is responsible for government's authority to require vaccinations,[15] land regulation,[16] and, of course, State policing. The only power a judiciary has to strike down a statute affecting general welfare is where it "has no real or substantial relation to those objects, or is, beyond all question, a plan, palpable invasion of rights secured by the fundamental law."[17] The Court held in *Jacobson* that, whatever the problems with mandatory vaccination, it could not determine beyond question that the statute was in "palpable conflict" with the Constitution.[18]

However, that logic was supported by findings in courts of law that vaccination "strongly tends to prevent the transmission or spread of [smallpox],"[19] suggesting some evidence is required to trigger the deference the Court applies in *Jacobson*. The Court entertained the notion that it was not *certain* vaccination against smallpox would be effective. But it dismissed the persuasiveness of that argument on the grounds that vaccination "finds strong support in the experiences of this and other countries" and that a court is never entitled to disregard an action of the legislature simply because that particular method was "not the best either for children or adults."[20]

States would need to elaborate on their view of the historical police power in a way they have avoided for centuries in order to justify establishing conscription for a State police force. But this is far from impossible. In *Butler v. Perry*,[21] the Supreme Court held that traditional common law understanding of the States' rights to require highway work meant that compulsory labor in that instance did not amount to a deprivation of liberty or property. If States could point to a common law tradition where conscription in a militia meant local policing was performed by required volunteering, they could make an argument similar to the ones in *Butler* and *Jacobson* that, for the public safety of the community, a universal draft for a State police force was an appropriate use of the State's authority to police itself and is not a violation of due process or the Thirteenth Amendment.

---

[12] *Id*. at 25.
[13] *Id*.
[14] *See id.* at 30–32 (holding that a legislature "could not properly abdicate its function to guard the public health and safety" in the instance of vaccination against smallpox, limiting courts' ability to judge the soundness of decisions made pursuant to those objectives); *Commonwealth v. Alger*, 61 Mass. 53 (1851) (holding government authority to designate a wharf resulted from the local government's authority under the police power to regulate privately-owned tidelands).
[15] Jacobson, 197 U.S. 11.
[16] Alger, 61 Mass. 53.
[17] Jacobson, 197 U.S. at 31.
[18] *Id*.
[19] *See id.* (citing Viemeister v. White, 88 App. Div. 44 (N.Y. Ct. App. 1903)).
[20] *Id*. at 36.
[21] 240 U.S. 328.

There is some historical evidence that militias functioned as State police forces until the 1850's.[22] Relatedly, 18th century sheriffs had the ability to summon "posses"—groups of civilians ready to respond to the call of a local Sheriff when necessary to enforce the law.[23] But those forms of policing did not resemble the current system of beat cops or law enforcement in a meaningful way. They may be challenged as too dissimilar to justify a twenty-first century policing system that compels citizens to join absent further evidence from a State legislature justifying this use of the police power.

Evidence from other societies could help bolster a State's assertion that a modern day "posse" is an appropriate exercise of the police power. Other countries, like Israel, have required mandatory service from all citizens in a variety of capacities, albeit mainly related to its military.[24] A number of studies have also shown that an increase in police officers reduces crime rates and levels of incarceration.[25] Similar studies show less overtime and more backup officers reduce violent interactions between officers and citizens.[26] These are the evidentiary building blocks of a legal theory that could support a mandatory citizen police force should a State pursue that option.

2. Constitutional Issues

Like any State action, a State police force conscription system would be subject to challenge by individuals claiming it violated their due process rights, or even the prohibitions in the Thirteenth Amendment about involuntary servitude. Conscientious objectors to military service have been forced to perform civilian labor as an alternative, a process deemed constitutional by at least some federal courts.[27] However, the constitutionality of compulsory labor hinges on the coexistence of a constitutional alternative—a military draft—that the individual does not wish to perform.

States could not conscript men under that logic because they cannot justify it as an alternative to an otherwise lawful system of compulsory service in the national army. Their rights to establish militias via conscription are more limited than the federal government's prerogatives to raise an army, given that militias are defined as "part-time" entities.[28] If a State were to pursue a mandatory-service police force, paralleling it to federal conscription for military service would not be a particularly powerful legal argument against claims that it violated due process or other individual constitutional rights.

---

[22] Jeffrey Rogers Hummel, *The American Militia and the Original of Conscription: A Reassesment*, THE JOURNAL OF LIBERTARIAN STUDIES, Oct. 5 2017. "[T]he militia functioned as a standby local police force . . . The New England colonies merged the militia with the night watch while the Southern colonies assigned it to the mission of slave patrolling. All such additional militia tasks imposed further compulsory duties upon the citizens."
[23] David Kopel, *Sheriffs and the posse comitatus*, THE WASH. POST, May 15 2014, *available at*, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/05/15/sheriffs-and-the-posse-comitatus/.
[24] Yossi Yehoshua, *Number of IDF Recruits to hit 20-year low in 2013*, Y Net News, Jan. 11 2013, *available at* https://www.ynetnews.com/articles/0,7340,L-4331273,00.html.
[25] Matthew Yglesias, *The Case for Hiring More Police Officers*, VOX, Feb. 13 2019, *available at*, https://www.vox.com/policy-and-politics/2019/2/13/18193661/hire-police-officers-crime-criminal-justice-reform-booker-harris.
[26] *Id*.
[27] Howze v. United States, 272 F.2d 146, 148 (9th Cir. 1959) ("Compulsory civilian labor does not stand alone but is the alternative to compulsory civilian military service.")
[28] Perpich, 496 U.S. at 348.

Jacobson v. Massachusetts[29] offers separate support the constitutionality of State conscription for a police force. The petitioner insisted his liberty was unconstitutionally infringed when the State threatened him with fine or imprisonment if he refused a smallpox vaccination.[30] The Court held there are "manifold restraints" to which every person is subject for the common good and that real liberty cannot exist unless some burdens are imposed on the general public.[31] The Court in *Jacobson* refers openly to conscription, acknowledging that while a person has a litany of freedoms,

> "he may be compelled, by force if need be, against his will and without regard to his personal wishes or pecuniary interests or even his religious or political convictions to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense."[32]

It is critical to note that in *Jacobson*, the Court gave weight to a determination by the Massachusetts Board of Health that vaccination was necessary for public safety.[33] It is unclear whether a similar government entity could conclude a police force staffed by required service by State citizens is necessary for public safety.

Conclusion

The States' authority to govern themselves is rooted in a long tradition of reasonable legislation passed in good faith, whereas the federal government is limited by the contours of the Constitution's specific grants of power and prohibitions against infringements on States' rights. A system of conscription issued by a State—via statute or amendment to a State constitution—could be lawful as long as it provided accommodations to individuals who sought exemptions from service.

---

[29] 197 U.S. 11.
[30] *Id*. at 26.
[31] *Id*. at 26.
[32] *Id*. at 29.
[33] *Id*. at 27.