

by G. H. L.
used at West Point

Constitutional Uses of the Military Forces of the United States.

The subject may be considered under the following heads :

- I. Constitutional Provisions.
- II. Statutes.
- III. The *Posse Comitatus*.
- IV. Powers springing directly from the character of a *national* military establishment.
- V. Duties of military officers when called upon to aid the civil power.
- VI. War Powers.

I. The constitutional provisions relate to the "*armies*" and the "*militia*." The word "*armies*," in Art. I, Sec. VIII, Cl. 12, includes the Regular Army and the *Volunteers*, but not the *Militia*. These constitutional provisions are :

a.—The power of Congress to "*declare war*." War may be national or foreign. Under this clause Congress has authority to take measures for the suppression of Rebellion.

The power to "*declare*" war includes the right to *make* war, and extends to legislation necessary in the prosecution of war. It has been held to include the right of seizing and confiscating the property of enemies; the right of imposing conditions upon commercial intercourse with the enemy; of emancipating slaves; of suspending the statute of limitations; of providing for the government of occupied hostile territory; of making treasury notes legal tender for public and private debts, &c.

b.—The power of Congress to "*raise and support armies*," subject to the condition that no appropriation of money for such purpose shall be for a longer term than two years.

To "*raise and support*" includes to educate, commission, enlist, draft, feed, clothe, equip, transport, and pay. The control of the United States over these subjects is plenary and exclusive. Congress can determine, without any question from State authority, how the "*armies*" shall be raised, whether by voluntary enlistment or forced draft; the ages of soldiers; the period of service; compensation, &c.

c.—The power of Congress to make rules for the government and regulation of the "*land forces*." Here again the *Militia* is not included, because the same power with reference to them is given in another clause.

d.—The clause which provides that the President shall be commander-in-chief of the army, and of the militia when called into the actual service of the United States.

e.—The guarantee by the United States to each State of a *republican* form of government; protection against invasion; and, (on application of the legislature of a state, or the executive when the legislature cannot be convened.) against *domestic violence*.

By "*republican*" form of government is meant one which is not monarchical or aristocratic.

This clause is of the nature of a covenant on the part of the "*United States*," in their corporate capacity; and it has been made a question

whether the obligation rests upon the legislative, or the executive, branch.

In *Luther v. Borden*, Chief-Justice Taney held that it belongs to Congress to decide what government is the established one in a State, and that its decision is binding on every other department of the government.

But, after the government of a State has been recognized by Congress, it would be within the province of the Executive to use his constitutional powers in guaranteeing it; as well as for the other purposes mentioned in this clause.

“*Domestic violence.*” The Rail-road Riots, of 1877, furnish a recent instance.

The Constitutional provisions which relate exclusively to the Militia, are :

f.—The power of Congress to provide for calling them forth :

1. “To execute the laws of the Union,” as in the Pennsylvania Whiskey Rebellion of 1794.

2. “To suppress insurrections,” as in 1861.

3. “To repel invasions,” as in 1812.

g.—The power of Congress to provide for organizing, arming and disciplining them*, and for governing those in the service of the United States.

Under these powers Congress has provided for calling forth the Militia:

1. To repel invasion of a foreign nation, or Indian tribe; to suppress insurrection in a State *against the government thereof*, (when applied for by the Legislature, or the Executive when the Legislature cannot be convened); and, when the laws of the United States are obstructed by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, &c., to suppress such combinations, and execute the laws.

Acts of 1792 and 1795.

2. To enforce the execution of the Neutrality Laws.

Act of 1818.

3. To suppress *rebellion against the United States*.

Act of 1861.

4. To aid in the execution of judicial process under the provisions of the statutes securing to all equal *civil rights*.

Act of 1866.

*NOTE.—This power was exercised by Congress in the Act of 8th May, 1792, which provided that “every able-bodied male citizen of the respective States, resident therein, who is of the age of eighteen years, and under the age of forty-five years, shall be in the militia”; and that “every citizen shall, after notice of his enrolment, be constantly provided with a good musket or firelock of a bore sufficient for balls of the eighteenth part of a pound, a sufficient bayonet and belt, two spare flints, and a knapsack, or pouch with a box therein to contain not less than twenty four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball; or with a good rifle, knapsack, shot-pouch and powder-horn, twenty balls suited to the bore of his rifle, and a quarter of a pound of powder”; and “each commissioned officer shall be armed with a sword or hanger and spontoon.”

These provisions, and others of the same act, were, strangely enough, re-enacted by Congress (as part of the Revised Statutes) June 22d, 1874.

5. For the safe-keeping and protection of any person surrendered by a foreign government for trial.

Act of 1869.

6. To suppress insurrections, domestic violence, or combinations in any state which so obstruct the execution of the laws of the United States as to deprive a *portion or class* of the people of their rights under the Constitution and laws.

Act of 1871; known at the time as the Ku-Klux Bill.

VOLUNTEERS are not *Militia*. The right to call for Volunteers is, therefore, not derived from the constitutional power of Congress to provide for calling forth the Militia, but from the power of raising and supporting armies. The manner of raising this force is subject to the control of Congress. Congress may provide for the appointment of the officers, and the enlistment or draft of the men, or may delegate to the States any part of these powers.

Examples: In 1798, by the act "to raise a provisional army," the President was authorized to accept companies of volunteers, and appoint the officers.

In 1807, and 1812, the President was authorized to accept volunteers, the commissioned officers to be "appointed in the manner prescribed by law in the several states and territories to which such companies shall respectively belong," and by a later act of 1812, to appoint all officers, and to form said volunteers into battalions, squadrons, regiments, brigades and divisions.

The volunteers authorized by the act of 1846 were to be accepted in companies, battalions, squadrons and regiments, and their officers appointed in the same manner as provided for in the first act of 1812; the President by a subsequent act being authorized to appoint the general officers.

By act of July 22d, 1861, a force of 500,000 volunteers was provided for; regimental officers being appointed by the Governors of the States, and general and general staff officers by the President; and the President being authorized to accept the services of, and commission officers for, any volunteers offering their services from states whose authorities might refuse or omit to furnish them.

And, the whole course of national legislation during the Rebellion shows that Congress exercised to such extent as it saw fit, the power of "raising" volunteers, leaving to the States only so much power with reference to them as it did not see fit to exercise.

The volunteers may be used in a foreign war; the militia can not. In the Mexican war both were authorized, but the militia were not called out. There is no constitutional provision authorizing their use beyond the territorial limits of the United States.

'THE NATIONAL FORCES.' By act of March 3d, 1863, all able-bodied male citizens of the United States and persons of foreign birth who should have declared on oath their intention to become citizens, * * * between the ages of twenty and forty-five years, were declared to constitute the "*National Forces*", and made liable to perform military duty when called out by the President, and he was empowered during the Rebellion to call forth the National Forces by *draft*.

In New York it was held that this act was unconstitutional, (*People vs. Stephens*), on the ground that it attempted to create a *national militia*, a power not granted to the Federal Government. In Pennsylvania it was held constitutional; and it is now recognized as a constitutional exercise of the power of raising armies.

II. The statutes of the United States which authorize the employment of the regular forces are:— (See G. O. No. 71, 1878, A. (G. O.)

a. *Civil Rights.*

The Civil Rights Bill, (Act of 1866) gives to *all persons* the same right to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens; provides that they shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other; authorizes the appointment of commissioners for the enforcement of these rights; gives authority to such commissioners to call to their aid such portion of the land and naval forces of the United States, or of the militia, as may be necessary to the performance of the duty with which they are charged; and provides that it shall be lawful for the President of the United States, or such person as he may empower for that purpose, to employ such part of the land or naval forces of the United States, or of the militia, as may be necessary, to aid in the execution of judicial process issued under these provisions, or as shall be necessary to prevent their violation, and enforce their due execution.

b. *The Elective Franchise.*

Military and civil officers of the United States are forbidden, under the penalty of a fine not exceeding \$5000, and imprisonment at hard labor not exceeding five years:

To order, bring, keep, or have any troops at the place where an election is held, *unless it may be necessary to repel the armed enemies of the United States, or to keep the peace at the polls*; (Sec. 2002, Rev. Stat.)

To prescribe or fix, or attempt to prescribe or fix, by proclamation, order, or otherwise, the qualifications of voters in any State, or in any manner interfere with the freedom of any election in any State, or with the exercise of the free right of suffrage in any State: (Secs. 2003 and 5530, Rev. Stat.)

To prevent, or to attempt to prevent, by force, threat, intimidation, order, advice, or otherwise, any qualified voter of any State from freely exercising the right of suffrage at any general or special election in such State; (Sec. 5529, Rev. Stat.)

To compel, or to attempt to compel, by force, threat, intimidation, order, or otherwise, any officer holding any election in any State, to receive a vote from a person not duly qualified to vote; or to impose, or attempt to impose, any regulations for conducting any general or special election in a State different from those prescribed by law; or to interfere in any manner with any officer of an election in the discharge of his duty. (Sec. 5531, Rev. Stat.)

c. *Indians.*

The military forces of the United States may be employed *in such manner and under such regulations as the President may direct* :

1. In the apprehension, and turning over to the civil authority, of every person who may be in the *Indian country* in violation of law;

2. In the examination and seizure of stores, packages, and boats, when authorized by law;

3. In preventing the introduction of persons and property into the Indian country contrary to law;

4. In destroying distilleries in the Indian country;

5. In apprehending any Indians who have committed crimes or offenses in a State or Territory, and have fled into the Indian country;

6. In preventing or terminating hostilities between any of the Indian tribes.

7. If the commanding officer of any post has reason to suspect, or is informed, that any white person or Indian is about to introduce, or has introduced, any spirituous liquor or wine into the Indian country in violation of law, he may cause the boats, stores, packages, wagons, sleds, and places of deposit of such persons to be searched; and if any such liquor is found therein, the same, together with the boats, teams, wagons and sleds used in conveying the same, and also the goods, packages, and peltries of such person shall be seized and delivered to the proper officer, to be proceeded against by libel in the proper court. (See also, Sec. 2139, Rev. Stat., and G. O. No. 8, 1879, Hdqrs. of the Army.)

8. It is the duty of "any person in the service of the United States" to take and destroy any ardent spirits or wine found in the Indian country, except such as may be introduced therein by authority of the War Department. (Revised Statutes, Title XXVIII, Chapter IV.)

The Indian Country. By act of June 30th, 1834, it was provided that "all that part of the United States west of the Mississippi, and not within the States of Mississippi and Louisiana, or the Territory of Arkansas, and also that part of the United States, east of the Mississippi River, and not within any State, to which the Indian title has not been extinguished." should, for the purposes of that act, be taken to be Indian Country; and, in *Bates v. Clark*, (5 Otto, 204) the Supreme Court held that "all the country described by the act of 1834 as Indian country remains Indian country so long as the Indians retain their original title to the soil, and ceases to be Indian country whenever they lose that title, in the absence of any different provision by treaty or by act of Congress."

d. *Public Lands.*

The President is authorized to employ the military forces in preventing:

1. The unlawful destruction of timber on public lands.

2. The unlawful settlement of persons on public lands.

e. *The Public Health.*

Military officers commanding in any fort or station upon the sea-coast are required to aid in the execution of State quarantine and health laws, according to their respective powers and within their respective precincts, "as they shall be directed, from time to time, by the Secretary of the Treasury"

The order to carry out such directions would come from a military superior.

f. *Extradition.*

The President is authorized to employ the military forces for the safe-keeping and protection of any person surrendered by a foreign government for trial for any crime of which he is duly accused.

g. Neutrality.

The President, or such other person as he shall empower, is authorized to employ the military forces for the purpose of taking possession of, and detaining, any vessel (with her prizes, if any,) in the following cases:

1. When a vessel is *fitted out* and *armed*, or *attempted* to be fitted out and armed; or when the force of any vessel of war, or cruiser, is *increased* or augmented; or when any *military expedition* or *enterprise* is *begun* or *set on foot*; contrary to the laws of the United States;

2. In case of the capture of a vessel within the jurisdiction or protection of the United States;

3. When any process issuing out of any court of the United States is disobeyed or resisted by any person having the custody of any armed vessel.

The President is also authorized to employ the military forces for :

4. The restoration of prizes when adjudged;

5. Preventing the carrying on of any hostile expedition or enterprise from the Territories, or jurisdiction of the United States, against any foreign power with which the United States are at peace;

6. To compel any foreign vessel to depart the United States in all cases in which, by the law of nations or the treaties of the United States, she ought not to remain within the United States.

h. Insurrection. (Rev. Stat., Title 69.)

It is lawful for the President of the United States to employ the land or naval forces:

1. To suppress any insurrection in any State *against the government thereof*, on application of the legislature of such State, or of the executive, when the legislature cannot be convened. (Act of 1795.)

2. To enforce the faithful execution of the laws of the United States, and to suppress rebellion when, "by reason of unlawful obstructions, combinations, or assemblages of persons, or rebellion *against the authority of the United States* it shall become impracticable in the judgment of the President to enforce, by the ordinary course of judicial proceedings, the laws of the United States within any State or Territory.

[Act of 1861.]

3. To employ the military forces for the suppression of any insurrection, domestic violence, unlawful combinations, or conspiracies in any State, which so obstruct its laws, or those of the United States, as to deprive *any portion or class* of the people of such State of any of the rights, privileges, and immunities, or protection, secured by the Constitution or laws, and which the authorities of the State are unable, fail, or refuse to protect; and also when any such insurrection, violence, unlawful combination, or conspiracy, opposes or obstructs the laws of the United States, or the due execution thereof.

[Act of 1871. The, so-called, Ku-Klux Bill.]

4. When, by reason of any unlawful combinations, duties on imports cannot be collected at any port, the President may direct the custom-house for the district to be established on board a vessel, and may

employ the military forces to prevent any unlawful attempt to remove the vessel or cargo, and for the protection of the officers of customs in retaining custody thereof.

[Act of 1861.]

When, in the judgment of the President, it becomes necessary to use the military forces under this title [Insurrection], it is made his duty first by proclamation to require the insurgents to disperse.

III. *The Posse Comitatus.*

The act of June 18th, 1878, makes it unlawful to employ any part of the Army as a *posse comitatus*, or otherwise, for the purpose of executing the laws except as authorized by the Constitution, or Act of Congress.

Previous to this the army was liable [under orders from the War Department, adopting the views of Attorneys General Cushing, Evarts and Taft,] to be called out as a *posse*, not only by United States marshals, but by State sheriffs; although the correctness of this position has been questioned.

The act of June 18th, 1878, was probably not intended to relieve individual members of the army from a duty which, [if consistent with their military obligations,] they may have in common with every other subject of the state, viz : to interfere to suppress riot, and prevent acts of felony, treason, or rebellion.

IV. *Powers springing directly from the character of a National Military Establishment.*

If the constitution and laws of a state should provide for a military establishment, but should be silent as to its use, its very existence would involve the power of using it for the purposes for which armies are created—i. e., national self-preservation, or defense against foes both external and internal. Every independent state possesses the right of self-preservation.

Though it is the province of Congress to declare war, the President may use the army for such purposes without such declaration. This was done in the Mexican war; and it has been decided by the Supreme Court that he may resist insurrection without declaration of war. (Prize Cases, 2 Black. 668.)

Under this head may be included, the occupation of military posts; the protection of national territory and property in military custody; and the protection of settlers on national territory against Indians.

V. *Duties of Military Officers when called upon to aid the civil power.*

1. Officers cannot permit the use of troops under their command as a *posse comitatus*, or otherwise, except as above indicated.

2. If time admits, application for the use of troops for such purposes must be forwarded for the action of the President.

3. In cases of sudden and unexpected invasion, insurrection, or riot, endangering the public property of the United States, or in cases of attempted or threatened robbery, or interruption of the United States mails, or other equal emergency, officers may take the necessary action before the receipt of instructions. (War Department, G. O. No. 71, 1878.)

4. Where, as under the Civil Rights and Neutrality laws, the right

to use the military forces is given to any person *empowered by the President*, and an application for them is made by such person, it would be the duty of the commanding officer, in a case of emergency not admitting of delay, to furnish such force without waiting for superior orders, upon satisfactory proof of the authority of the person making the demand, and of the necessity of the case.

5. The troops retain their character as part of the permanent national military organization, and can do nothing inconsistent with that character. They cannot, therefore, be required to lay aside their arms.

6. An officer when deciding for himself must judge whether the service required of him is lawful and necessary, and compatible with the discharge of his military duties.

7. The summons must be made to the commanding officer. A soldier obeying the summons without the authority of his commander would be punishable for absence without leave. (Opin. of Law Officers of England, 19 Dec., 1796.)

8. When lawfully assisting the civil power, the military may use whatever force is necessary for self-defence, or for the protection of the civil power when required, and may assist the civil power in making arrests, and holding arrested persons; but care must be taken not to exceed the warrant of the civil officer.

9. The military officer must judge for himself of the necessity of using force, and must cause it to cease as soon as it appears no longer necessary.

VI. *War Powers.*

By this we mean, powers silent in time of peace, but active during war. They are both legislative and executive, and many of them derive their legality from the Constitution, and laws passed thereunder. The most difficult question is as to war powers claimed to exist irrespective of constitutional grants. It involves the subject of *Martial Law*, and is based on the law of necessity, and national self-preservation. It will be considered hereafter.