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## THE CONSCRIPTION ACT OF APRIL 1862 AS A CONSTITUTIONAL CHALLENGE IN THE CONFEDERATE REVOLUTION

In the years leading up to the American Civil War, the South was sensitive to state rights, focusing particularly over the issue of slavery. After secession, and with the formation of the Confederate States of America, the governors were viewed, in part, as defenders of state rights. For the first year of the war, both the governors and the president of the Confederacy cooperated extensively in an effort to win the war. But that would change in April 1862 with the passage of the first conscription statute by the Confederate government. This article examines the reactions of the Confederate governors to that measure. As the first conscription law in American history, its passage elicited significant opposition within the Confederacy. The governors' responses varied, from refusal to recognize any constitutional infringement of a state right, to recognizing a potential violation but delaying a response until after the war, to outright hostility and interference with the law's implementation. Passage of this law led to the governors, as a whole, moving from a phase of cooperation with the central government to one of a negotiated federalism, leading to conflict over competing resources (e.g., draftees) for the defense of the nation as well as the states. This paper challenges the current historiography asserting that the Confederate national government was the most centralized national government in America until the New Deal in the 1930s by suggesting that the state governors carved out appropriate constitutional authority and responsibility during the exigencies of fighting for the nation's independence. Refs 29.

*Keywords:* Confederate States of America, federalism, Jefferson Davis, Constitution, John Letcher, Joseph Brown, John Gill Shorter, John Milton.

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## ЗАКОН 1862 г. О ВОИНСКОЙ ОБЯЗАННОСТИ КАК КОНСТИТУЦИОННЫЙ КРИЗИС В ХОДЕ РЕВОЛЮЦИИ КОНФЕДЕРАТИВНЫХ ШТАТОВ АМЕРИКИ

Накануне Гражданской войны в Америке Юг США крайне щепетильно относился к правам штатов, уделяя особое внимание вопросу рабства. После отделения от Севера и образования Конфедеративных Штатов Америки губернаторы южных штатов во многом рассматривались как защитники их прав. В течение первого года войны и губернаторы, и президент Конфедерации действовали в тесном сотрудничестве, прилагая совместные усилия к победе в войне. Но это положение радикально поменялось в апреле 1862 г., когда правительство Конфедерации приняло первый закон о воинской обязанности. В статье рассматривается реакция губернаторов штатов Конфедерации на введение этой меры. Принятие этого закона — первого закона о воинской повинности в американской истории — вызвало большое возмущение в Конфедеративных Штатах. Губернаторы выступали с самых разных позиций: некоторые отказывались смириться с таким поправлением конституционных прав штатов; другие признавали, что закон, возможно, и был нарушен, но предлагали отложить решение этого вопроса до окончания войны; третьи открыто проявляли негодование и пытались помешать реализации закона. В целом подписание этого акта привело к тому, что губернаторы перешли от прежнего сотрудничества с центральным правительством к новому этапу «договорного федерализма», который проявился тогда, когда разгорелась борьба за право распоряжения ресурсами (т. е.

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призывниками) для защиты как всего государства, так и отдельных штатов. В статье оспаривается традиционная для современной историографии точка зрения, согласно которой правительство Конфедеративных Штатов Америки было самым централизованным правительством на территории Соединенных Штатов Америки до начала «нового курса» в 1930-е годы. Вместо этого в статье демонстрируется, что губернаторы штатов сумели поддержать и укрепить авторитет конституции и конституционной ответственности в тяжелое время борьбы за государственную независимость. Библиогр. 29 назв.

*Ключевые слова:* КША, федерализм, Джефферсон Дэвис, конституция, Джон Летчер, Джозеф Браун, Джон Джил Шортер, Джон Мильтон.

On a warm February 1861 afternoon in Richmond, as Jefferson Davis, president of the Confederate States of America, delivered his inaugural address, celebration of a new nation gave way to a sober assessment of the reasons for secession and the determination necessary to ensure the success of the Confederacy. Davis opened by harkening to the Declaration of Independence and the compact theory of government. He noted that the government rests upon the consent of the governed, that it is “the right of the people to alter or abolish [governments] at will whenever they become destructive of the ends for which they were established...”, and that the “sovereign States” have the right to defend their inalienable rights as asserted in the Declaration of Independence. The Confederate revolution, therefore, was conservative in nature. Much like the American revolutionary patriots a century earlier, southerners in the Confederacy saw themselves recapturing those principles abandoned by the ruling government<sup>1</sup>. Davis remarked, “We have changed the constituent parts, but not the system of government. The Constitution framed by our fathers is that of these Confederate States”. And Davis specifically articulated a role for the states in this process by asserting that, “the sovereign States here represented have proceeded to form this Confederacy... they formed a new alliance, but within each State its government has remained; so that the rights of person and property have not been disturbed”. By commenting on the states’ legitimate authority to protect natural rights, Davis implicitly recognized that the governors, as chief executives of their respective states, would assume a leadership role in defending against any perceived infringement of those rights by the central government. While the governors would decline Davis’ offer throughout much of the first year of the war, they would increasingly be sensitive to this issue as the war progressed [Richardson 1966, pp. 32–36]<sup>2</sup>.

In February 1861, however, the governors were not thinking about potential conflict with the Confederate central government; they were enthusiastic at the prospect of an independent nation with Jefferson Davis as its president. Even Governor Joseph Brown of Georgia, who would prove to be one of Davis’ most persistent antagonists during the war, proclaimed that Davis’ selection as president was “a good one, as his wisdom and

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<sup>1</sup> As James McPherson observed, the ante-bellum South maintained a more conservative and rural way of life, bound by tradition and hierarchy, with an emphasis on honor and chivalry (a *gemeinschaft* culture) as compared to the North’s growing *gesellschaft* culture which emphasized industry, urbanization, impersonal relationships, and bureaucracy. Thus the Confederates’ also were fighting to maintain a way of life long familiar to Americans, while the North was moving into an era of modernity. See [McPherson 1983, pp. 230–244].

<sup>2</sup> As Jefferson Davis himself noted, “The inaugural ...in connection with the farewell speech to the Senate, presents a clear and authentic statement of the principles and purposes which actuated me on the assuming the duties of the high office to which I had been called” [Davis 1990, pp. 200–201].

statesmanship are known to all to be of the most profound and highest order”<sup>3</sup>. This display of unity was consistent with not just the euphoria at leaving what was perceived as an oppressive government, or at the prospect of creating a new nation, but of the political culture early in the war. As one historian has observed, “The republicanism embodied in the Confederate Constitution looked back into the eighteenth century before the formation of political parties” [Rable 1994, p.63]. It was this republicanism that mandated placing community interests above individual interests and encouraged public demonstration of unity for the nascent government and its politicians without the rancor and divisiveness of party politics. Yet, with the April 1862 implementation of the first conscription act in American history, this unity and cooperation between the Davis administration and the state governors that existed during the first year of the war entered a new phase of negotiated federalism<sup>4</sup>.

Acting from personal beliefs, or in response to their constituents’ pressure, the governors frequently assumed leadership in curbing the central government’s power. Implementing legislation was a critical tool of the chief executives because they could use that power to minimize the effect of an objectionable statute and reduce the actual power that accrued to the central government. Richmond authorities might, in response to objections from the states, modify a particular statute, or the state courts could impose limits on the power of the central government. In these ways, the governors played a critical role in negotiating a position that would minimize centralization of the Confederate government. The degree of centralization in the Confederacy was not simply the result of a strong central government imposing its will on the states, but rather the result of the process of negotiation that occurred between the central government and the governors.

This position contrasts sharply with the historiography on federalism in the Confederacy. Frank Lawrence Owsley first asserted that the Confederacy “died of states’ rights.” In largely blaming the nation’s demise on the governors, particularly Georgia’s Joseph Brown and North Carolina’s Zebulon Vance, he identified local defense, hoarding supplies, and adherence to a state rights ideology despite the changing character of the war as critical weaknesses [Owsley 1925]. By the 1960s, Owsley’s dominance began to wane. The general consensus among contemporary historians is that the Confederate government was highly centralized [Amlund 1966; Bensel 1990; Luraghi 1978]. This centralization, which occurred largely as a result of the war and the need to both field an army and wage war, came into direct conflict with the states rights’ ideology of the Confederacy, which emphasized the sovereignty of the states and the authority of the states to form a compact, or constitution, in creating the central government. The Confederacy, in its own constitution, created a system of “dual federalism,” defined by one historian as a system “intended to mark off two mutually independent and fixed spheres of power — spheres that were to be changed only by formal constitutional amendment...” [Bennett 1964, p.181]<sup>5</sup>. With the central

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<sup>3</sup> [The Correspondence 1913, p.543], as quoted in [Murray 1977, pp. 478–479].

<sup>4</sup> Negotiated federalism can be defined as the assertion of authority contested between the national and state governments. Examples can include direct negotiation between state and central government authorities, legislative action, court decisions, and/or citizen activism. Negotiated federalism becomes particularly acute in a political culture of state rights where sensitivity to lines of authority are heightened.

<sup>5</sup> Political scientist Morton Grodzins utilized the analogy of a layer cake. Just as each layer is distinct and self-contained, so in dual federalism, the states and the national government each possess their own distinct responsibilities. Thus, neither the federal government nor the state governments would dominate the other; rather each would exercise authority within their appropriate spheres [Grodzins 1974].

government by-passing the states and establishing a direct relationship with the draftee, conscription represented a significant violation of those spheres and the governors were acutely aware of that breach. This paper claims that federalism in the Confederacy was much more complex than the current historiography presents. That complexity focuses on negotiated federalism.

By the spring of 1862, the Confederacy was faced with a number of significant crises. Through a coordinated army and naval attack, the Union threatened to take the key southern seaport of New Orleans (which would, in fact, fall to the Union forces on April 25). Confederate General Pierre G. T. Beauregard had retreated from Tennessee to Corinth, Mississippi, leaving the Confederate heartland open to attack by the Union. In Virginia, General George McClellan's army, after landing at Fort Monroe, was moving up the peninsula toward the Confederate capital of Richmond<sup>6</sup>. European recognition of the Confederacy, long hoped-for by the Confederate government, still seemed distant. And, to compound these reversals, volunteers whose one-year enlistments expired in the spring were not "re-upping" (re-enlisting) while the number of new volunteers was declining. At the most acute period thus far in Confederate history, with the nation facing threats on several fronts, tens of thousands of soldiers could be discharged.

President Jefferson Davis articulated his concern about this acute manpower shortage even before 1862 [Cooper 2000, p.384]. After numerous discussions with his Cabinet, Davis, in a message to the Confederate Congress on March 28, observed that the current method of raising armies through the states was inefficient and cumbersome. He then proposed, "The passage of a law declaring that all persons residing within the Confederate States, between the ages of eighteen and thirty-five years, and rightfully subject to military duty, shall be held to be in the military service of the Confederate States...." [Official Records 1900, ser. IV, vol. 1, p.1031]. Three weeks later, on April 16, the Confederate Congress responded to Davis' proposal by passing the Conscription Act. All able-bodied, white males between the ages of eighteen and thirty-five were subject to service within the Confederate armed forces for a period of three years. Those within that age bracket serving in the Confederate military had their terms extended to three years from their original enlistment date. Exemptions were provided in an act passed five days later. This conscription act was significant because it was the first national conscription in American history and because it radically changed the method of raising troops in the Confederacy. In addition to relying on compulsory, rather than voluntary, military service, the act also removed the states as the conduit through which men would be received in the Confederate army [Moore 1944, 1996, p.16]. Thus, in a nation founded upon the principles of states' rights, the central government would bypass the state in its traditional role of supplying volunteers to the army and would acquire unprecedented national government power.

The irony, and potential danger, in the Conscription Act was not lost on the governors of the various Confederate states. The governors were in a pivotal position as chief executives of states which had joined to create the Confederate States of America but with "...each State acting in its sovereign and independent character..." (Confederate Constitution preamble). While the governors' concerns included a range of issues, such as implementation of the act and the state appointment of officers, this paper will focus on their collective responses to what they perceived as a constitutional crisis. The crucial point is

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<sup>6</sup> Fort Monroe protected the entrance to the Chesapeake Bay. It was situated where the James River empties into the Chesapeake Bay.

that, while many governors had significant reservations about the constitutionality of the Conscription Act, and its concentration of power in the central government, the overwhelming majority of governors saw the necessity of securing independence first, and then addressing any constitutional imbalance of power between the central government and states after the war. The positions on both extremes were also represented — for example, on one extreme was the governor of Georgia, who strenuously opposed national conscription and presented an articulate, constitutionally sound rationale for his opposition. At the other, was the governor of Florida, who observed that the state had no substantive constitutional concerns in this matter. Most of the governors, however, were content to put military considerations first and postpone constitutional concerns until after the war.

John Letcher, governor of Virginia, was a voice of moderation during the secession crisis of 1860–1861. After Virginia seceded, this governor from the Shenandoah Valley recognized the reality that Virginia was to be a battleground in the hostilities, and cooperated extensively with Confederate officials. With the passage of the Conscription Act, however, Letcher noted in a letter to Governor John Gill Shorter of Alabama that it was “the most alarming stride towards consolidation that has ever occurred” [Boney 1966, p. 162]. To the Virginia legislature on May 5, 1862, the governor observed,

This bill (the Conscription Act) divests the state authorities of all control over the troops of Virginia, and vests in the Confederate government the power to enroll all persons between the ages of eighteen and thirty-five, organize them, commission the officers, call them into service, and dispose of them in such manner as they may deem advisable.... It is my deliberate conviction that this act is *unconstitutional*; but taking into consideration the peculiar condition of affairs existing at the time of its passage, I forbear to debate the question at present. When the war is ended, we can discuss these questions, and so settle them as to preserve the rights of the states [Journal of the Senate 1862, A. la, VA, reel 7].

Winning the war was of paramount importance to the Virginia governor, despite what he perceived to be the central government’s overreaching into the sphere of state governance. As he further noted, “Harmony, unity and conciliation are indispensable to success now.... Drive the invader from our soil, establish the independence of the Southern Confederacy, and then we can mark clearly and distinctly the line between state and confederate authority” [Journal of the Senate 1862, A. la, VA, reel 7].

Letcher could ill afford to alienate the Confederate authorities because he relied very heavily upon their armies to defend his state. But his cooperation and acquiescence to the Confederate government would last only so long as the state of war existed, after which he would “be the first to challenge [the Act] in the courts. This was his stand in a flurry of correspondence between the rebel governors, and his opinion doubtless encouraged some other governors to accept this revolutionary law” [Boney 1966, p. 162].

Virginia was not alone in its support of the Conscription Act. Initially Governor John Gill Shorter of Alabama was strenuously opposed to conscription: “If we are to depend upon [conscription] to maintain the liberty of the South, I should almost despair of our ultimate triumph.” [McMillan 1985, p. 25]. Yet he eventually not only supported conscription, but argued that it was constitutional. Shorter urged the states to recognize the “power of Congress to pass this law.” He continued, “The several States, as sovereignties, had the power to declare war, and to levy armies to wage war. These powers they have delegated, in

the Constitution, to the Confederate Congress for the common protection, reserving the right to call out troops to suppress insurrection or repel invasion. Under this delegation and grant of powers, Congress . . . , in the passage of the conscript act, has only used the power which the States, as sovereignties, unquestionably possessed, to raise armies with which to wage the war” [Journal of the House of Representatives (Alabama) 1862, 27 October]. Although Shorter does not explicitly state his rationale, he implied his support for Jefferson Davis’ justification for conscription: that the Confederate constitution grants Congress the authority “to raise and support armies...” and, through the “necessary and proper” clause, conscription was necessary to that legitimate end<sup>7</sup>. Interestingly, however, Shorter acknowledged that, despite the delegation of power to the Congress, the state reserved the right to “call out troops” in the event of an invasion. While the delegation of power was qualified with the potential of seriously undermining the Confederacy’s effort to raise troops for the defense of the entire country, surely the governor was reacting to the massive resistance in northern and southeastern Alabama toward conscription. Yet, Shorter noted that Alabama’s interests were intertwined with those of the Confederacy as a whole “[The Confederate government] having assumed, as was its duty, the management and direction of the war, Alabama, cheerfully and trustingly committed to it the resources of men and means available for her own defense: (sic) and her destiny being irrevocably fixed with that of her sister Confederate States, she will respond, to the last, to every requisition which may be made upon her for the maintenance of the common cause” [Journal of the House of Representatives (Alabama) 1862, 27 October].

But Governor Shorter also was experiencing the dilemma that most Confederate governors had to encounter: the need for troops from the central government and the growing dissatisfaction by the state’s citizenry over a host of issues, including the extensive centralization of the central government, the unanticipated length of the war, and, later the following year, a tax-in-kind. While an enthusiastic supporter of the Davis administration, Shorter was forced to also address the concerns of his own constituency [Murray 1977, pp. 689–690].

However, no state governor was probably more hamstrung by his constituents than Francis Lubbock of Texas. A strong supporter of the Conscript Act of April 1862, Lubbock was not sensitive to the opposition by many in Texas. Resistance to conscription, particularly among the German population, was so strong that General Paul Hebert, Confederate commander of the Department of Texas, suspended the writ of *habeas corpus* and declared martial law on May 30. While Lubbock approved of Hebert’s actions, a number of Texas politicians complained to Jefferson Davis, who ordered Hebert to rescind his orders. Lubbock lamented Davis’ actions, believing that a “strong military government . . . would halt the rapid depreciation of Confederate currency, quiet disaffection, and, of course, help enforce the conscript act” [Kaufman 1977, p. 395].

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<sup>7</sup> Confederate Constitution, art. 1, sec. 8, which reads that Congress has the authority to

“12. To raise and support armies...:

13. To provide and maintain a navy:

15. To provide for calling forth the militia to execute the laws of the Confederate States, suppress insurrections, and repel invasions:

18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the Confederate States, or in any department or officer thereof”.

In a February 5, 1863 message to the Texas legislature, Lubbock addressed conscription, but failed to engage in any constitutional analysis of the law. He observed, "... viewing the law as constitutional, and convinced that the necessities of the country imperiously demanded its prompt execution, I stopped not to discuss the good or bad policy of its enactment, but at once accorded permission to the Confederate Commander of Texas for his employment of State officers to aid in carrying out its provisions." While the state and individuals had rights to protect, the war made it such that "unity of purpose and action is completely necessary between the Confederate and State governments" [Francis Lubbock (Governor) to the Texas legislature 1863, pp. 13–18]. Thus Lubbock failed to recognize, unlike Letcher and Shorter, his state's right to retain troops for self-defense, or of fighting the constitutionality of this act after the conclusion of hostilities. To Lubbock, the immediate present necessitated and justified the law.

One of the more unique constitutional interpretations of the law was that of Florida's governor John Milton. After noting the "extraordinary circumstances" which compelled Congress to pass a conscript act, Milton addressed the Florida legislature, "...if the Act was not constitutional, it was a judicial question, which should be decided, if at all, by the proper department of Government, and that each individual whose rights might be considered in jeopardy, would have the protection of an enlightened judiciary. I did not consider it necessarily, a question of political power between the Confederate and State Government". Milton was denying any role for the state, since it had no interest to protect in this situation. He continued, "the unity of interest between the States is such that I entertain no serious apprehension of permanent detriment to the rights of the States, and ... during the existence of the war, [one should] watch and battle the purposes of the enemy, [rather] than with skeptical apprehensions to criticise (sic) and defeat the purposes of the Government of our choice..." [Journal of the House of Representatives (Florida) 1862, p. 29]. The governor of Florida clearly recognized the necessity for conscription; it would have been preferable for the states to have individually instituted conscription, but "the demand for immediate action in the premises was imperative. There was not time for argument or controversy" [Journal of the House of Representatives (Florida) 1862, p. 30].

Yet for Milton to assert that the individual's recourse to conscription was individually through the court system implies that the individual's relationship with the central government is direct, not by and through the state. In other words, he is denying the legitimacy of state sovereignty and agreeing with the Republican Party's position that the individual's relationship is directly with the central government, and not through an intermediary such as the state, where sovereignty of the nation resided. It appears, from Milton's perspective, that political and military exigency superseded rational and logical constitutional thought.

Without question, the most outspoken and dramatic objections to the conscription act were those of Joseph Brown. The governor of Georgia, portrayed as an opportunist by many historians, raised principled constitutional arguments consistent with a states rights' position. Although forced to concede to the central government, he continually bombarded the Davis administration with constitutional issues. Brown's first volley was fired within a week of the act's passage. Georgia, according to the governor, had supplied her quota of troops. Ask for more troops if the army requires them, and Georgia will furnish them. But "the plea of necessity, so far at least as this State was concerned, cannot be set up in defense of the conscription act". Furthermore, the state was deprived of men to defend

itself. Brown then raised a fundamental issue that was as related to the separation of powers issue as it was to consolidation of power in the central government, “This act not only disorganizes the military systems of all the States, but consolidates almost the entire military power of the States in the Confederate Executive with the appointment of the officers of the militia, and enables him at his pleasure to cripple or destroy the civil government of each State by arresting and carrying into the Confederate service the officers charged by the State constitution with the administration of the State government” [Official Records 1900, ser. IV, vol. 1, p. 1085].

While most historians have focused on allegations of consolidation of power by the Confederate government, Brown differentiated between the overreaching of the central government and the president usurping authority rightfully belonging to states at the expense, not only of the states, but, he implies, of Confederate legislative and judicial departments. However, Brown’s claim falls short of being persuasive. Even if his allegations were true, the Confederate constitution vested the president with the powers of commander-in-chief (Confederate Constitution, Article II, section 2(1), n.d.). Congress passed the appropriate legislation authorizing conscription. Brown’s claim of the president potentially “crippling” the states’ defenses stands on far firmer ground.

Brown also argued that the Constitution grants Congress the authority for “organizing, arming, and disciplining the militia and for governing such part of them as may be employed in the service of the Confederate States...” [Official Records 1900, ser. IV, vol. 1, p. 1085]<sup>8</sup>. Therefore, he argued, the national government should have access only to the states’ militias. Not so, responded Davis, who expressed that Brown’s reading of the constitution failed to include that the power of the Congress is derived from the power to raise armies, not just the militia [Official Records 1900, ser. IV, vol. 1, p. 1100].

Both sides then engaged in extended correspondence which articulated arguments harkening to the Federalist/Anti-Federalist debates regarding the adoption of the Constitution. Brown claimed that he could not “consent to commit the State to a policy which is in my judgment subversive of her sovereignty and at war with all the support of which Georgia entered into this revolution. It may be said that it is not time to discuss constitutional questions in the midst of revolution, and that State rights and State sovereignty must yield for a time to the higher law of necessity” [Official Records 1900, ser. IV, vol. 1, p. 1116]. The governor, once again, urged Davis to demonstrate the necessity and prove it. Brown reiterated his argument that the Congress was entitled to call out the militia, but not employ a draft to raise armies. Although one historian has described Brown’s argument as “turgid,” the governor did utilize the formal rules of constitutional construction, including original intent, in advocating his claim [Escott 1978, pp. 81–82].

Davis’ reply not only refuted Brown’s argument, contention by contention, but asserted a position closely akin to Alexander Hamilton’s argument of two generations earlier. Congress, under the “necessary and proper” clause, had the authority to determine the appropriate means to implement its right to raise an army and navy. To Davis, so long as Congress determined that the ends legitimated the means, the decision by Congress was acceptable. Davis continued, “The true and only test is to inquire whether the law is intended and calculated to carry out the object; whether it devises and creates an instrumentality for executing the specific power granted, and if the answer be in the affirma-

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<sup>8</sup> See the Confederate Constitution, Article I, section 8 (15).

tive the law is constitutional. None can doubt that the conscription law is calculated and intended to 'raise armies'. It is, therefore, 'necessary and proper' for the execution of that power, and is constitutional, unless it comes into conflict with some other provision of our Confederate compact" [Official Records 1900, ser. IV, vol. 1, pp. 1134–1135]. As one historian has clearly noted, "Davis had deliberately taken the stage playing a Confederate [Alexander] Hamilton to Brown's [Thomas] Jefferson" [Escott 1992, p. 83]. Indeed, Davis' constitutional analysis of broad construction is nearly identical to Hamilton's when the former Secretary of the Treasury stated in 1791 that, "necessary often means no more than needful, requisite, incidental, useful, or conducive to.... The relation between the measure and the end, between the nature of the mean employed towards the execution of a power and the object of that power, must be the criterion of constitutionality not the more or less of necessity or utility" [Hamilton 1791]. Brown was quick to grasp the significance of Davis' argument; the governor observed the close constitutional affinity of the Federalist's accumulation of national power at the expense of the states with the president's.

Despite Brown's objections, he acquiesced and forwarded Georgians to the Confederate army. But not without making his states' rights opinions known to Davis and other members of the central government. And not without continued insistence upon protecting his state's interests, as he saw fit. Although state courts would ultimately uphold Davis' interpretation of the constitution (there was no Confederate Supreme Court), Brown's objections represent a continued line of reasoning dating to the Anti-Federalists.

Weighing in on the controversy, Governor Shorter of Alabama supported Brown by arguing that the Constitution differentiated between an army raised by the Confederacy and the state militia. The state militia, or portions of it, may be called up by the central government. According to Shorter, a self-proclaimed strict constructionist, Article 1, section 8, granted the authority for the central government "[t]o provide for calling forth the militia to execute the laws of the Confederate States, suppress insurrections, and repel invasions." The invasion of the Confederacy by the Union provided justification for calling out the militia. But limitations precluded absolute control over the militia once called up, since "the States in the exercise of their own sovereignty, give form or body to this army, and after it is so formed or embodied, Congress may provide the mode of its organization and discipline, the States retaining the right to supply the officers. This is the compact between the States". The Confederacy, therefore, may call for the state militia, but the composition of the militia is for each state to determine, as is the appointment of the officer corps.

The Confederacy could exercise other options for raising troops, according to Shorter; the state militia was just one method for raising troops for the Confederacy under the constitution. The constitution grants the central government the right "to raise and support armies". This provision applies to "all residents in the Confederate States who [fall] within its provisions..." and provides justification for conscription [Journal of the House of Representatives of the State of Alabama 1863, p. 5]. Those who do not fall within the pale of the national law are subject to state law with regard to serving in the militia. The central government, therefore, does not have to follow the traditional method of raising troops by going first through the governor. The Confederate constitution, under Shorter's interpretation, creates a direct relationship between the citizen and the central government in the Confederacy's raising of an army. This is a dual federalism interpretation consistent with the intentions of the founders of the Confederacy. No negotiation was

necessary between the Davis administration and the states with respect to conscription because the raising of a national army falls within the constitutionally delegated sphere of the central government.

The governor of Alabama was making a significant assumption in his analysis that belies his self-professed belief in strict construction, although it does not damage his argument. In justifying conscription under the nation's power "to raise and support armies," a strict constructionist would have difficulty in reading the word "conscription" into "rais[ing] ... an army." No national conscription had existed previously in the United States; only volunteers had been inducted into military service. It was only through the "necessary and proper" clause that one can read conscription into "rais[ing] ... an army"; this particular clause would provide sufficient breadth of interpretation to include conscription. So, like Davis, Shorter could conclude that conscription was constitutional.

The governors were willing to allow the state courts to determine the constitutionality of conscription and the limits to the central government's constitutional authority in raising troops extended with respect to the states' authority. Given the lack of a national Supreme Court, the state courts were logical choices to determine the constitutionality of national law. This, however, was a significant risk for the Davis administration since the state's political climate might induce reluctance on the court's part to support the central government. But it was not. Trusting that the state supreme courts' decisions would support his position, Davis consistently referred contested opinions on conscription to the courts for resolution. He would not be disappointed; throughout the Confederacy, the state courts consistently upheld the constitutionality of conscription.

A comparison between Georgia and Virginia illustrates two different approaches to use of the state courts. Joseph Brown undertook aggressive measures to obstruct the implementation of conscription in Georgia. In harkening back to the concept of nullification, the governor of Georgia refused to allow execution of the second Conscription Act, passed in September 1862, until after it had been approved by the state legislature [Official Records 1900, ser. IV, vol. 2, p. 170]. This position contrasted starkly with the cooperation extended by the Davis administration in confronting the constitutional concerns raised by the governors. Two weeks prior to Brown's actions, when informed that the superintendent of the Virginia Military Institute had been ordered by Governor Letcher, *inter alia*, not to allow any cadet to be conscripted until the constitutionality of the conscription law had been determined, the Secretary of War agreed that a V.M.I. cadet should file a test case, while allowing the plaintiff to remain enrolled at the Institute during the course of the proceedings. The Secretary closed his correspondence to Letcher by noting, "As my only wish is to obtain a speedy decision of a question threatening us with so much peril, I desire to avoid all controversy about forms of proceeding, and will acquiesce in any arrangements by which the constitutionality of the act can be tested" [Official Records 1900, ser. IV, vol. 2, p. 123].

At this point, the Confederate central government was negotiating a resolution to the impasse over conscription. Letcher entered into the discussions with the Davis administration, but Brown remained adamant that the state legislature should rule on the constitutionality of conscription. Brown shaped the discussion in terms of state rights, individual liberty, and separation of powers, "The conscription act, at one fell swoop, strikes down the sovereignty of the States, tramples upon the constitutional rights and personal liberty of the citizen, and arms the President with imperial powers". The question for the

legislature, according to Brown was, “shall we continue to have States, or shall we in lieu thereof have a consolidated military despotism?” [Journal of the Senate of the State of Georgia 1862, pp. 43, 45]. Letcher had identical concerns, but, unlike Brown, was willing to accept a settlement of the issue by allowing the state court to decide the constitutionality of conscription. In addition, Letcher had targeted a specific population (the V. M. I. cadets) to whose conscription he objected, whereas Brown prohibited the execution of the conscription law with respect to the state of Georgia.

Most governors (Shorter, Milton, and Brown excepted) did not raise a constitutional challenge to conscription and were reluctant to raise the issue while the war was in progress. But citizens were willing to bring the issue to the state courts for adjudication and those subject to conscription had standing to file suit on the law’s constitutionality. In *Burroughs v. Peyton*, two plaintiffs from Virginia were drafted and both filed for writs of *habeas corpus*<sup>9</sup>. The issue was whether Congress possessed the authority to pass the Conscription Acts of April 16, 1862 and September 27, 1862 or whether this authority resided with the states. Virginia’s highest court held that Congress’ right to “raise and support armies” did not restrict congressional action to voluntary enlistments alone. In fact, compulsory service existed during the Revolution, through “compulsory draughting” of the militia, with which the Confederate Founding Fathers would have been familiar. To the majority, “in granting the power ‘to raise armies,’ without any words of limitation or restriction as to the mode to be employed, the [Founding Fathers] must be understood as intending that the power should be exercised in any and all of the modes which had been previously employed by the States. Full power to make war was vested in the Federal government” [*Burroughs v. Peyton* 1867].

According to the Virginia court, the central government was vested with the authority to wage war, which was within its sphere of authority in a dual federalist constitutional structure. The states, therefore, were compelled to submit to the central government on this issue. However, the court recognized that the central government’s authority was not unlimited, observing “in executing them (the powers delegated to the central government in the Constitution), nothing shall be done to interfere with the independent exercise of its sovereign powers by each state” [*Burroughs v. Peyton* 1867]. And the central government, within its delegated authority of “raising armies” possessed a direct relationship with its citizens. As the Court made clear, “If it should appear at any time to be proper to increase the army, it might be done by taking men from the militia either as volunteers or as conscripts — the action in either case being upon the individual citizen, and not upon the militia as an organized body” [*Burroughs v. Peyton* 1867].

The Texas high court, in adhering to the formal structure dictated by the Confederate constitution, also agreed that dual federalism defined the relationship between the states and the central government. As Justice George F. Wheeler wrote for the majority, “In fact, however, nothing is better established than that neither of these governments is inferior or superior to the other. While both possess some of the powers which are called by law writers, in distinguishing different forms of government, ‘sovereign powers,’ neither of them are themselves sovereign, but each of them represents the sovereign and both have within

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<sup>9</sup> 7 Va (16 Gratt.) 470 (1864). The two individuals, R. F. Burroughs and L. P. Abrahams filed separate suits, but the cases were consolidated because of the similar challenge to the constitutionality of conscription.

their mutual spheres of action just such powers and functions as have been conferred upon them by the constitution creating them” [Ex Parte Coupland 1881].

The Mississippi Supreme Court, following a different approach, defined the relationship between the states and the central government in terms of concurrent powers, which the Court observed, “are not independent and absolute, but subordinate powers, subject to be defeated or postponed whenever the Federal government shall exercise the power granted to it in a manner incompatible with the legislation of the state upon the subject” [Simmons v. Miller 1867]. The Mississippi court emphasized the supremacy clause in the Confederate constitution in deciding that the central government’s need to raise troops superseded the states’ authority also to raise troops. The court held that both the Confederate government and the states had the authority to raise troops simultaneously as an authority within their distinct spheres, but treated raising troops as a concurrent power, by which the central government trumped the states’ authority by the supremacy clause.

All of these cases recognized the authority constitutionally conferred upon the national government to wage war and raise an army. Within this context, the central government possessed authority that was either distinct from state authority or prevailed because of the supremacy clause. The significance of the involvement of the state courts contributing to the negotiating process between the Davis administration and the state governments cannot be overemphasized. The central government’s offer to permit adjudication of an aggrieved citizen’s claim in state court was an important concession in the negotiated compromise. The state possessed a separate sphere of sovereignty. As a separate entity, the national government need not have acquiesced to a state court’s decision, much less suggested that an aggrieved individual seek resolution in the state court. By submitting to the state court, the national government was submitting to the will of the state, not knowing beforehand the outcome of the state courts’ decisions. And when Justice Moore, in *Ex Parte Coupland*, asserted that the state courts can decide when conscription is a constitutional national government function, based upon the principle of necessity, he was actually asserting state dominance over a constitutional power delegated to the national government. In terms of centralization of authority, Davis could not have foreseen that the state courts would uphold his interpretation of the constitutionality of conscription, despite his claim to the governor and Executive Council of South Carolina that he had “full confidence” that conscription was constitutional [Escott 1992, p. 87]. The president was assuming an enormous risk by submitting to the jurisdiction of the state courts. But within the framework of a negotiated federalism, the president and the governors were seeking to resolve the conflict through negotiation, which always entails risk of loss for either side. These negotiations, which forced each side to compromise and sacrifice in areas where feasible, were a necessary element in the attempt to determine common ground by which the central government could fully prosecute the war while allowing sufficient forces to remain in the state for local defense.

It was therefore the implementation of the law that defined the contours of Confederate federalism. This invalidates the approach of most historians that labels conscription as “centralizing” without acknowledging the negotiation that occurred with the enforcement of the conscription act as the key determinant of the limits of Confederate authority. In addition to instances where both the states and the central government submitted to the state courts for interpretation of the constitutionality of conscription, the two sides negotiated changes in conscription on three other fronts: changes to the law itself, exemptions,

and local defense. The governors would achieve a measure of success with the first two, and less with the third. But the governors' success in the first two areas demonstrates that the central government could not enforce the conscription statute without continual negotiation between itself and the governors. The pressure exerted by the governors, and other constituencies, necessitated concessions by the central government. While conscription acts themselves would remain in force, in practice their impact would be diminished by the subsequent negotiations, frequently initiated by the governors.

Although the governors did not stand on common ground in their analysis of the Conscription Act of April 1862, it is clear that most objected to its passage. However, winning the war was of utmost importance and any opposition to the consolidation of power in the central government could wait until after independence was won. This was a common theme in the correspondence of all governors but one, Brown of Georgia. And while only Brown articulated a clear constitutional objection, others perceived no need to do so at that time. However, the Conscription Act represented a major shift in the inter-governmental relationship. While an open and willing cooperation existed between the governors and the Davis administration prior to April 1862, thereafter President Davis and his government would face a more obdurate gubernatorial opposition. Cooperation would give way to negotiation.

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