ritories are defensible on the ground that Congress had the power of legislation over the Territories, which it did not possess in the States. It is true that Mr. Justice Bradley in one case[1] uttered a *dictum* that Congress can build railroads under the commerce clause. But that question did not arise in the case. The question decided was that a State could not tax a franchise granted by Congress to build a road, this being a grant for postal and military purposes. To this California consented, thus yielding her eminent domain.[2]

The power of Congress to build a railroad, where necessary and proper for postal purposes or for military purposes, must be conceded as necessary and proper to carry out express powers granted to Congress; but it is quite another thing to claim that it has power to build it as a regulation of commerce.[3]

### Power Over Copyrights and Patents.

**§ 277.** "To promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their writings and discoveries."[4]

This is a new clause in the Constitution, not found in the Articles of Confederation. It will be noted that Congress has not an unlimited power to promote the progress of science and useful arts, but that the terms of the clause limit it to two objects. "By securing for limited times to authors and inventors," etc., it is obvious that in a Union where there was an intercommunication of the privileges and immunities of citizenship, the rights of authors and inventors, but for this article, in their respective States, would be of very little avail, and yet that the use of these writings and inventions would be general throughout the Union. It was natural, therefore, that this power should be given to Congress in order that authors and inventors might be protected in their

[1] California v. Pacific R. R. Co., 127 U. S. 1.

[2] Santa Clara Co. v. Southern Pacific Ry. Co., 118 U. S. 394; Pacific Railroad Removal Cases, 115 id. 1.

[3] But see Luxton v. North River Bridge Co., 153 U. S. 525, and Lake Shore, etc. R. R. Co. v. Ohio, 165 U. S. 365.

[4] Const. U. S., Art. I, sec. 8, clause 8.



exclusive right to their works and discoveries by patent and copyright laws. This has been a valuable provision, and has stimulated authorship and invention in this country to an unparalleled extent.

The cases upon this subject are too numerous to mention, but two may be referred to.[1] The late decisions of the court have confined copyrights and patents for inventions to works and inventions involving the intellectual concept of the inventor or author. A lithograph or photograph of an original conception may be copyrighted, but not a mere mechanical copy. The photograph of Oscar Wilde, giving pose, dress, etc., as the original conception of the artist is a subject of copyright, but a photograph or lithograph which is a mere copy of the original conception of another is not a subject of copyright.[2] The patent-right or copyright of an inventor or author does not give the right of use and sale in any State contrary to the police regulations of that State. A law of a State forbidding either is paramount to the patent-right or copyright conferred by Congress.[3] Patent laws have no extraterritorial effect.[4]

Trade-marks are not included within this power; they are not inventions, but merely marks of ownership.[5] Under this power the late international copyright law was passed, by which security in the use of such rights by authors and inventors in foreign countries is guaranteed upon a reciprocal security of use to our authors and inventors in the country to which the privilege is granted.

### Power to Establish Inferior Courts, etc.

**§ 278.** The next clause to which reference will be made is as follows:[6] "To constitute tribunals inferior to the Su-

[1] Wheaton v. Peters, 8 Pet. 591; Wheaton and Donaldson v. Peters and Grigg, Id. 667.

[2] Burrow-Giles Lithographic Co. v. Sarony, 111 U. S. 53; Banks v. Manchester, 128 id. 244; Callahan v. Myers, Id. 617.

[3] United States v. Dewitt, 9 Wall. 41; Patterson v. Kentucky, 97 U. S. 501; Webber v. Virginia, 103 id. 344; Cooley on the Constitution, 95, 96.

[4] Brown v. Duchesne, 19 How. 183.

[5] Trade-Mark Cases, 100 U. S. 82.

[6] Const. U. S., Art. I, sec. 8, clauses 9, 10.

preme Court; to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations."

The first branch of this clause may be read in connection with a clause under the judicial power of the Constitution,[1] which reads thus: "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." The Constitution itself constitutes but one court and that the Supreme Court. It leaves to Congress the liberty of constituting from time to time, as policy may dictate, all the United States courts inferior to the Supreme Court. And under this power, as we shall hereafter see, Congress has established circuit, district, intermediate appellate courts and court of claims, etc.

The second branch of this clause gives to Congress the power to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations. Piracy is a "public crime, not against any particular State, but against all States, and the established order of the world." "Piracy is robbery on the sea, or by descent from the sea upon the coast, committed by persons not holding a commission from or at the time pertaining to any established State."[2] "If the robbery be committed within the territorial jurisdiction of any nation it is not strictly piracy, and would be punishable by the sovereign of the territory alone." A pirate is *hostis humani generis;* his crime is not local to a State, but as far as any one country is concerned against the property of its people on the high seas. For this reason the power is conferred on Congress to give equal protection to the property of all the States upon the high seas, and is not left to be defined and punished by the individual States.[3]

The precise nature of this crime needs some legal definition, and hence the power is given to define as well as to punish such piracy. Besides this, felonies may be committed on the high seas,[1] such as murder and the like, and when committed on a vessel of the United States would be properly cognizable by no one State, but by the representative of them all as protector of the vessel on which the crime was committed.

[1] Const. U. S., Art. III, sec. 1.
[2] Dana on Wheaton, note 83.
[3] Cooley on the Constitution, 97, and cases there cited.



**§ 279.** The last clause gives to Congress like power to define and punish offenses against the law of nations. The wisdom of confiding this power to Congress is manifest. The Federal government is the representative of all the States in their individual relations with other countries. These relations may breed conflicts with other nations. The duty to protect by their armies and navies in case of collision is imposed on the Federal government; vesting in Congress as regards the conduct of war, in the President and the Senate as regards treaties of peace and amity. To have left this power to the individual States would have imposed on the Federal government the defense of each State against foreign invasion in any collision which their separate relations might bring about, thus burdening all with the peril and expense of war for the defense of each in its separate dealings with every other nation in the world.

Some years ago complaint was made by some of our South American neighbors that systematic counterfeiting of their public securities in the commercial marts of the United States was damaging their credit and their capacity to issue their genuine securities in the United States upon which to raise money. It was complained that the United States were, in effect, a harbor for these gangs of counterfeiters, and they asked for some redress or remedy. This resulted in the passage of a law denouncing this practice as an offense against the law of nations, because, under cover of the United States, it was an offense against the rights of other nations. The offense was defined and punishment imposed. In a case before the Supreme Court,[2] a conviction under this law was

[1] Two recent cases may be referred to as showing the scope of the words "high seas." Jones v. United States, 137 U. S. 202; United States v. Rodgers, 150 id. 249.
[2] United States v. Arjona, 120 U. S. 479.

affirmed. The considerations justifying this law and making it constitutional are fully stated in the opinion of the court. See also Report of the Judiciary Committee of the House of Representatives on that subject.[1]

### The War Power.

**§ 280.** The War Power of the United States may be comprehended under the next five clauses of the eighth section of the first article. They involve the following heads: To declare war; to grant letters of marque and reprisal; to make rules concerning captures on land and water; to raise and support armies; to provide and maintain navies; to provide for calling forth the militia; to make rules for the land and naval forces; and to provide for organizing, arming and disciplining the militia, etc. These clauses will be considered in order. The tenth clause gives to Congress the power to declare war.

**§ 281.** As an original proposition, a declaration of war is necessary to its existence; for by war the citizens of the two belligerent nations are *quasi*-enemies. All other nations must observe neutrality between them, and must recognize the rights of each, by warlike measures, blockade and the like, to put a check upon freedom of trade of the non-belligerent nations with either of those at war. Without some public announcement of this abnormal status between nations once at peace and now at war, great confusion might arise affecting the rights of nations other than the belligerents. In Greece and Rome, and even in the European countries in the Middle Ages, such public declaration was uniformly made, and was regarded as obligatory. But since the middle of the eighteenth century, formal declarations have not been universal and have fallen into disuse. This disuse of the formal declaration arises from the publicity and circulation of intelligence peculiar to modern times. Countries have their ambassadors at the different courts of the world, and in our day steam and cable make it impossible for a nation to engage in war without the world's knowing it.[1] Still, President Woolsey states that the party entering into war is bound to indicate it by some public acts which will be equivalent to a public declaration, such as sending away an ambassador, non-intercourse, and the like. Furthermore, its own people ought to know that they have been made enemies, not friends, of the subjects of the belligerent enemy of their country. Neutrals have a right to know of the state of war, and are not bound to observe the duties of neutrals until notified.[2] The language of the Constitution was obviously adopted with a view to making public the important fact of the status of belligerency between the United States and any other country. But as declarations are merely a mode of notification, the fact of war may speak louder than words; and the language of the Constitution cannot be evaded by a change in the custom of nations which dispenses with a formal declaration, nor can the United States be thrown into war with another power through any other authority than that of Congress. The words "to declare" include the power to make war, with all the incidents of raising armies and navies which the Constitution has confided to Congress. It is well, therefore, to guard against the inference that, because the declaration of war is not now held necessary to constitute the status of belligerency, the President may plunge the country into war without that which is equivalent to a declaration of it by Congress.

The war with Mexico was never openly or in terms declared by the United States, but Congress passed an act the preamble of which read, "Whereas war exists by the act of Mexico," etc., which act was the invasion of the territory of a State; and the United States accepted the state of war as a fact without a formal declaration. But an act of Congress is necessary to create a state of war between the United States and any other country.

[1] Forty-eighth Congress, First Session, H. R. No. 1329.

[1] Woolsey on International Law, 187–92; Hall on International Law, 379–81.

[2] Woolsey on International Law, 193–93.

§ 282. The next clause runs, "to grant letters of marque and reprisal." It is sufficient to say of these words that they may permit the grant of public authority to persons who are not in the regular service of the country to exercise the public power of warring upon and capturing vessels of the enemy upon the high seas; giving rise to the habit of what is known as privateering. The authority of a privateer to exercise this war power is derived from the sovereign authority under which he acts. If he acts otherwise he is liable to the charge of piracy. Thus the policy of privateering, now very much inveighed against, was in the minds of the framers of the Constitution, because it enabled the militia of the seas to supplement the regular naval forces of the United States in conflicts with great naval powers. The issue of these letters is a part of the war power of Congress. It may be well to say that the power to grant these letters is denied to the States, and also the power to engage in war, unless actually invaded, etc. The power "to make rules concerning captures on land and water" vests in Congress the determination of the subjection of the property of an enemy to capture and condemnation. And in an early case[1] it was held that the property of an alien enemy found in the United States could not be condemned as prize without an act of Congress to authorize it. This includes the power, through the establishment of prize courts, to regulate the method in which a capture shall be brought into our hands for adjudication, and the principles upon which it shall be condemned as lawful prize.

§ 283. The next clause grants the power to "raise and support armies." This no doubt means a regular force as distinct from militia, the calling forth of whom is provided for by a distinct clause. No limit is placed upon the size of the army, for the reason so often assigned by the authors of the *Federalist*, that no limit could be assigned to the necessities of the country for defense. But an important limit is put upon the permanency of this army, which recalls the English check upon the power of the Crown as the declarer of war,

[1] The Thomas Gibbsons, 8 Cr. 421



and as the generalissimo of the army. One of these checks is the peculiar form of the bill to raise the army, which gave it the name of the Mutiny bill;[1] there being no similar provision in our Constitution. But the other British check is substantially embodied in this clause in the words, "But no appropriation of money to that use shall be for a longer term than two years." In England the term is one year. It was made two years by our Constitution because the term of service of the House of Representatives is two years. The forbidding of an appropriation for the support of an army for a longer period than two years makes it impossible for the President to use that army beyond that term for any illicit purpose, without the renewal of the appropriation by the two houses of Congress. It is a most potent check upon the abuse of power by the President as commander-in-chief, and was within the view of the framers of the Constitution, as appears from the strong statement of Mr. Hamilton in the *Federalist*,[2] which is worthy of insertion here: "The legislature of the United States will be *obliged* by this provision, once at least in every two years, to deliberate upon the propriety of keeping a military force on foot; to come to a new resolution on the point; and to declare their sense of the matter, by a formal vote in the face of their constituents. They are not at *liberty* to vest in the executive department permanent funds for the support of an army; if they were even incautious enough to be willing to repose in it so improper a confidence." This being so, it is in the power of Congress to condition the grant of money for the support of the army upon terms which will secure its non-use by the President, even during the two years, for any purpose hostile to the liberty of the people.

A question arose under the Conscription Act passed by the Confederate Congress during the late war, whether it was competent for that Congress by conscription substantially to exhaust the material out of which the militia was composed. It was objected that this would make a standing army composed of the whole of the militia of the country,

[1] Ch. IV. [2] No. XXVI.

and would leave to the States no armed force to resist its power. The Court of Appeals of Virginia decided there was, and could be in reason, no limitation put upon the size of the army which was to be raised, and that the objection to the law was not good.[1]

**§ 284.** The next clause is, "To provide and maintain a navy." It will be seen that the two years' limit on appropriations for this purpose is omitted. A navy on the seas cannot be used, as an army on the land may be, for the destruction of liberty. The words used as to these two forces are different. The words "to raise and support armies" have not the idea of permanency in them, because there is the intimation that the army may be raised only when a contingency arises making it necessary. It involves the idea of raising it when needed, and supporting it while needed; but let it disband under the two years' limit if there be no need for it. But there is, in the words "to provide and maintain a navy," a very significant intimation of its permanency in maintaining it, that is, holding it in the hand. It is according to the genius of our Constitution, then, that while standing armies are to be avoided, the maintenance of a navy is to be favored.

The next clause, "To make rules for the government and regulation of the land and naval forces," vests in Congress, and not in the Executive, the framing of the rules and articles of war; for the government and control of the citizens who may be in the land and naval forces and for regulating their conduct. In this clause we may see the jealousy of executive power, and the favor to the representatives of the people, lest the rules and articles of war might be unduly severe and tyrannical.

**§ 285.** The next clause provides for calling forth the militia, and executing the laws of the Union, suppressing insurrection, and repelling invasion. This authorizes Congress alone to make provision for putting the militia of the country under the command of the President for the pur-

[1] Burroughs v. Peyton, 16 Gratt. (Va.) 470. As to enlistments, see In re Morrisey, 137 U. S. 157.



pose named in the clause, and this is made more clear by reference to a subsequent provision: "The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States." The call is to be made under the provisions of an act of Congress. By an act passed in 1795 Congress gave power to the President to call out the militia for certain purposes, and by subsequent acts in 1807 power was given to him to be exercised whenever he should deem it necessary for the purposes stated in the Constitution; and the Supreme Court has decided that this executive discretion in making the call could not be judicially questioned.[1]

It is perhaps proper that as the duty devolves on the President to see that the laws are faithfully executed, Congress should vest in him the power to call out the militia whenever he deems it necessary in order to execute the laws of the Union. His recent action in the city of Chicago has had judicial sanction in the *Debs Case*.[2] The power to suppress insurrection by a call upon the militia applies only to insurrections against the authority of the United States, for the reason that as to any insurrection against State authority a distinct provision is made.[3] The power to call forth the militia to repel invasion grows out of the duty of the United States to protect each of them against invasion.[4]

### Power Over the Militia.

**§ 286.** Congress is authorized "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions."[5]

This clause requires careful consideration. Under the Confederation, Congress, as we have seen, had no power to raise revenue, but was dependent on the States; and while

[1] Houston v. Moore, 5 Wheat. 1; Martin v. Mott, 12 id. 19.
[2] In re Debs, 158 U. S. 564.
[3] Const. U. S., Art. IV, sec. 4.
[4] Id., Art. IV, sec. 4.
[5] Id., Art. I, sec. 8, clause 15.

it had power to "build and equip a navy," it had no power to raise land forces, and could only make requisitions upon each State for its quota in proportion to the number of white inhabitants in such State, which requisitions should be binding; and thereupon the legislature of each State should appoint the regimental officers, raise the men, etc., who should then march to the place appointed by the United States in Congress assembled. Under this clause of the Confederation the States had the power only to appoint *regimental* officers in the Continental army so raised. The general officers were appointed by the United States. This did not touch the militia at all, the control of this force being left exclusively to the States. The Constitution of the United States, as we have seen, gave to Congress an independent power to raise an army and provide a navy; and it is interesting to observe that under the Confederation the power to build a navy was granted to Congress, while the power to raise armies is denied.

And furthermore, the power to appoint all naval officers was granted to Congress, and the power to appoint regimental officers in its own army was denied, leaving only a power to appoint general officers. Along with the power granted in the Constitution to raise armies and provide a navy, the power to appoint all officers of the standing army and navy was conferred upon the Federal government. This cured the vice of the Confederation by vesting in Congress a power independent of the State to raise the standing land and naval forces of the United States. Along with this we may note the prohibitions on State power. It is provided: "No State shall, without the consent of Congress . . . keep troops or ships of war in time of peace . . . or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."[1] This prohibition upon the States, it will be observed, only provided against the States keeping a standing army or vessels of war, but did not apply to the militia; and the prohibition related only

[1] Const. U. S., Art. I, sec. 10, clause 3.



to a time of peace; so that the State is left free to keep troops or ships of war in time of war. And furthermore, a State may not engage in war, unless actually invaded, or in imminent danger. That is to say, while not permitted to declare an offensive war, it is not precluded from engaging in war when actually invaded or in imminent danger. The militia of each State, while liable to call under the power of Congress, is subject entirely to the State control, except as modified by the clause now under consideration.

But the jealousy of the States, while according independent power to Congress as to the regular army and navy, guarded their own control over the militia force by the fifteenth clause, special attention to which is now directed.

By reference to the sixteenth clause it may be seen that the precise power given to Congress over the militia is in these words: "To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States." (See also fourteenth clause, *supra*, and article II, section 2, clause 1, of the Constitution, and the fifth amendment to the Constitution.) The power of Congress to govern the militia is excluded, unless they are employed in the service of the United States, which leaves to Congress nothing but the power to provide for organizing, arming and disciplining the militia. This power, as appears from the debates, looked to the organization of the militia into divisions, regiments and the like, and to furnishing arms, which had always been done, and to establishing rules by which recruits were to be disciplined, involving tactics and the like. No control over the militia was given to the Federal government, except when that government might call them into its service for the purpose stated in the fifteenth clause. The latter part of the clause under consideration was confined to the reservation to the respective States in respect to the militia. That reservation is in these words: "The appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress." The appointment of the officers