

THE SECURITY CONSTITUTION

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Homeland security is a critical component of the War on Terrorism. In our federal system of government, who is responsible for securing the homeland? The U.S. Congress has made available to states and cities some funding for overtime and equipment, but it has not assumed responsibility for covering all of the security costs incurred locally. While deploying some federal personnel for domestic security, the Executive branch relies largely on state and local officials for the necessary manpower. Meanwhile, governors and mayors complain about the unfairness of asking them to shoulder the burden of preventing terrorist attacks that would affect the entire nation, pointing to the risks of refusing states and cities the resources they need. Yet residents of states and cities less vulnerable to attack are reluctant to contribute to the high costs of security efforts necessary in places like New York City and Washington, D.C.

Ratified in an age of insecurity, the U.S. Constitution provides clear guidance on the issue of responsibility for homeland security. The Protection Clause of Article IV requires the national government to safeguard states and their cities from attack, either by providing the necessary security or by paying the costs of security measures implemented locally. Although today largely forgotten, the Clause once maintained a prominent role in guiding federal efforts in fortifying coastal towns, securing the frontiers, and responding to foreign invasions and domestic insurrections. Examining how the Protection Clause governed early conceptions of national security—as well as early implementation of security efforts—unlocks a security constitution designed expressly to address many of the logistical concerns now raised by the War on Terrorism.

Finally, the U.S. Supreme Court's anticommandeering doctrine, based on the Tenth Amendment, should not limit the national government's ability to deploy modern state and local security personnel, like law enforcement, for counterterrorism work. Historically, the Protection Clause has allowed and even compelled the federal deployment of state militia—who, under the Constitution's several Militia Clauses, could be (and often were) deployed by the federal government for security purposes. Indeed, the Constitution specifically provides for and encourages this type of commandeering as a way to protect citizens from the national military taking over towns and cities.

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INTRODUCTION	30
I. THE PROTECTION CLAUSE	37
A. Invasions and Insurrections.....	37
B. Security as a Collective-Action Dilemma	39
C. The Protection Solution	47
D. The Meaning of Protection.....	53
E. The Security Constitution	59
F. Summary	62
II. OF ARMIES AND MILITIA.....	62
A. Deployment and Employment	63
B. Security and Liberty	64
C. The Militia Heritage	70
D. Security and the Articles of Confederation	75
E. The Militia at Philadelphia.....	79
F. The Militia at the State Conventions	84
G. Summary	90
III. THE PROTECTION TRADITION	91
A. Securing the New Republic	92
B. The Whiskey Rebellion and Fries' Rebellion	109
C. The Burr Conspiracy	114
D. The War of 1812	116
E. Frontier Defense.....	127
F. Ports and Harbors.....	133
G. Summary	137
IV. HOMELAND SECURITY IN THE WAR ON TERRORISM.....	137
A. Protection and Terrorism.....	138
B. The Commandeerer in Chief.....	140
C. State Resistance	146
D. Justiciability.....	149
CONCLUSION.....	151

INTRODUCTION

The War on Terrorism, begun following the attacks on American cities on September 11, 2001, is fought at home and abroad. Abroad, the nation's military—regulars, Reserves, and National Guardsmen—do the fighting.¹

1. As of the fall of 2004, approximately 135,000 U.S. troops were stationed in Iraq and 17,000 troops in Afghanistan. About half of these troops are members of the Reserves or National Guard, representing 40 percent of the total Reserve and Guard units. Large numbers of troops are also deployed in Europe (100,000), South Korea (37,500), and Japan (47,000). Rajan Menon, *Fitting the Military to Reality*, L.A. TIMES, July 16, 2004, at B11; see also Gerry J. Gilmore, *Rumsfeld: Troop Reductions Not Likely Until Iraqis Stronger*, AM. FORCES INFO. SERVICE, Oct. 10, 2004, http://www.defenselink.mil/news/Oct.2004/n10102004_2004101001.html (last visited Oct. 10, 2004);

At home, the soldiers in the war are the personnel of state—and especially local—government. Police, firefighters, city transport officials, public health officers, and other state and local employees are the men and women who guard the tunnels and bridges, monitor ports and harbors, protect transportation systems, secure public events, test for radiation and biological agents, and prepare responses to potential attacks. They are also the first responders should an attack occur.²

Securing the homeland is not cheap. The U.S. Conference of Mayors estimates that in the fifteen months after September 11, cities spent \$2.6 billion on increased homeland security costs.³ According to another estimate, each time the Department of Homeland Security raises the national terror alert level from “yellow” to “orange,”⁴ the enhanced security measures implemented

R.G. Ratcliffe, *Guard, reservists are bulk of Iraq force*, Hous. Chron., Oct. 7, 2004, at B5; Jason Sherman, *Fourth Wave of Iraq Rotations Slated to Start Next Summer*, ARMY TIMES, Sept. 20, 2004, at 22.

2. See *Combating Terrorism: Preparing and Funding First Responders: Hearing Before the Subcomm. on National Security, Emerging Threats, and Int'l Relations of the H. Comm. on Gov't Reform*, 108th Cong. 1–76 (2003) (hearings on preparing and funding the personnel of state and local government as first responders to terrorism); *Terrorism Preparedness: Medical First Response: Hearing Before the Subcomm. on Nat'l Security, Veterans Affairs, and International Relations of the H. Comm. on Gov't Reform*, 106th Cong. 51 (1999) (prepared statement of Tara O'Toole, M.D., Senior Fellow, Center for Civilian Biodefense Studies, Johns Hopkins University) (stating that in the event of a bioterrorist attack “the ‘first responders’ . . . will be physicians, nurses, and public health professionals in city and state health departments”); Press Release, U.S. Dep't of Homeland Sec., Law Enforcement Terrorism Prevention Program: Helping Our Nation's First Preventers (Nov. 3, 2003) (on file with author) (describing state and local law enforcement personnel as the “first preventers” of terrorism).

3. Press Release, U.S. Conference of Mayors, *One Year Later: A Status Report on the Federal-Local Partnership on Homeland Security* (Sept. 9, 2002), available at http://www.usmayors.org/uscm/news/press_releases/documents/homelandstatus_090902.pdf. The Conference of Mayors found in a separate survey of nearly 150 cities nationwide, ranging in size from 30,000 to 8 million people, that as a group they were spending more than \$21.4 million per week in additional homeland security costs. Extrapolating the data to account for funding by the nation's 1185 cities with populations of more than 30,000, the surveyors estimated that cities nationwide are spending nearly \$70 million per week on additional homeland security. Press Release, U.S. Conference of Mayors, *Survey on Cities: Direct Homeland Security Cost Increases Related to War/High Threat Alert* (Mar. 27, 2003), available at http://www.usmayors.org/uscm/news/press_releases/documents/survey_032703.pdf.

4. Implemented on March 12, 2002, the Homeland Security Advisory System consists of five color-coded terrorism “threat conditions”: green (low), blue (guarded), yellow (elevated), orange (high), and red (severe). See Dep't of Homeland Sec., Homeland Security Advisory System, <http://www.dhs.gov/dhspublic/display?theme=29> (last visited Aug. 7, 2005). In New York City, the threat condition has been constantly orange. See N.Y. State Office of Homeland Security, <http://www.state.ny.us/security> (last visited Aug. 22, 2005). Nationally, the System has been set at yellow except for five occasions on which it was raised briefly to orange: from September 10–24, 2002 (the anniversary of the 9/11 attacks); February 7–27, 2003 (the holy period of Hajj); March 17–April 16, 2003 (the start of the Iraq War); May 20–30, 2003 (in response to bombings in Saudi Arabia and Morocco); and December 21, 2003–January 9, 2004 (as a result of intercepted communications suggesting an attack). Andrew Zajac & John McCormick, *Terror Alerts Vulnerable to Attacks*, CHI.

nationwide may amount to as much as \$1 billion per week.⁵ Operation Atlas, New York City's counterterrorism program, costs \$5 million per week, much of which represents overtime for police and other city personnel.⁶

In our federal system of government, who is responsible for homeland security? Though it deploys some federal personnel (like FBI agents) for domestic security, the Executive branch relies largely on state and local officials for the necessary manpower.⁷ Although Congress has made available to states and cities billions of dollars in funding for overtime and equipment,⁸ it has not assumed responsibility for covering all of the security costs

TRIB., Aug. 8, 2004, at C10. From August 1 to November 10, 2004, the threat level was raised from yellow to orange for the financial services sectors of northern New Jersey, New York City, and Washington. John Mintz & Sari Horwitz, "Orange" Alert in D.C., N.Y. Dropped, WASH. POST, Nov. 11, 2004, at A1. From July 7 to August 12, 2005, following bombings in London, the threat level was raised from yellow to orange for the nation's mass transit systems. Jerry Seper, *Transit System Threat Lowered*, WASH. TIMES, Aug. 13, 2005, at A2.

5. Sara Kehaulani Goo, *Threat Level May Fall to Yellow*, WASH. POST, Jan. 9, 2004, at A2 (reporting the view of David Heyman, Center for Strategic and International Studies, that raising the alert status from yellow to orange entails \$1 billion in additional security spending).

6. William K. Rashbaum, *Tougher Measures Appear to be Paying Off*, N.Y. TIMES, May 14, 2003, at A15; see also *Eleventh Public Hearing of the National Comm'n on Terrorist Attacks Upon the United States* 14 (May 18–19, 2004) (statement of Raymond W. Kelly, Police Commissioner of the City of New York) [hereinafter *Kelly Testimony*], available at http://www.9-11commission.gov/hearings/hearing11/kelly_statement.pdf (reporting that New York City's annual counterterrorism costs are \$200 million in personnel and overtime, and that necessary training and equipment will cost an additional \$261 million).

7. HOMELAND SEC. ADVISORY COUNCIL, U.S. DEP'T OF HOMELAND SEC., A REPORT FROM THE TASK FORCE ON STATE AND LOCAL HOMELAND SECURITY FUNDING 12 (2004), available at <http://www.mipt.org/pdf/HSAC-Homeland-Security-Funding.pdf> ("The 'front lines' of our nation's domestic 'War on Terrorism' are in neighborhoods and communities across the United States where law enforcement, firefighters, emergency medical technicians, public works and health care workers live and work."). For example, the New York Police Department, anticipating its role as the first responder to an attack on the city involving nuclear, biological, or chemical weapons, has put in place highly sophisticated plans that include high-tech detection systems, mass medication and vaccination programs, medical response teams, quarantine, and food-delivery. See William K. Rashbaum & Judith Miller, *New York Police Take Broad Steps in Facing Terror*, N.Y. TIMES, Feb. 15, 2004, at A1.

8. The Department of Homeland Security budget for fiscal year 2004 allocated \$4.037 billion to the Office for Domestic Preparedness, including \$1.7 billion for distribution to states; \$725 million for discretionary grants to high-risk, high-density urban areas; \$750 million for Firefighter Assistance Grants; \$500 million for law enforcement terrorism prevention grants; and \$40 million in grants for Citizen Corps. See Press Release, Dep't of Homeland Sec., FY 2004 Budget Fact Sheet 2 (Oct. 1, 2003) [hereinafter FY 2004 Budget Fact Sheet], available at <http://www.dhs.gov/dhspublic/display?content=1817>; see also Press Release, Dep't of Homeland Sec., Department of Homeland Security Announces Over \$2.5 Billion in Grants Nationwide (Dec. 3, 2004) [hereinafter DHS Grants Nationwide], available at <http://www.dhs.gov/dhspublic/display?content=4185> (reporting on actual distributions). Grants were made to the states in the first instance, with the direction that 80 percent of funds be distributed to localities within sixty days of receipt. See FY 2004 Budget Fact Sheet, *supra*, at 2. Many cities (although not New York) have faced persistent problems receiving funds from the state level. See Eric

incurred locally.⁹ Mayors and governors complain about the unfairness of asking them to shoulder the burden of preventing terrorist attacks that would affect the entire nation, pointing to the inherent risk of refusing states and cities the resources they require.¹⁰ Vulnerable locales also object to funding allocations that fail to adhere strictly to actual security needs.¹¹

Lichtblau & Joel Brinkley, *\$5 Billion in Antiterror Aid Is Reported Stuck in Pipeline*, N.Y. TIMES, Apr. 28, 2004, at A17 (reporting on the “huge bottleneck” that prevents the flow of money to localities). Under the 2004 budget, New York State received \$77,267,726 from the formula-based program (known as the “Homeland Security Grant Program”) and \$221,082,907 from the high-risk “Urban Area Security Initiative” (UASI) program, for a total of \$298,350,633, the highest amount any state received. See DHS Grants Nationwide, *supra*, at app. A. Of the UASI amount for New York State, \$47,007,064 was allocated to New York City. See Dep’t of Homeland Sec., *Urban Area Security Initiative: FY ’04 Allocations* (2004) (on file with author). Vermont—the state receiving the smallest total amount of any state—received \$14,326,139 under the Homeland Security Grant Program but no funds under the UASI program. See DHS Grants Nationwide, *supra*, at app. A. Per capita, though, New York State received about \$4.03 per person in Homeland Security Grant funds (\$15.55 per person if UASI funds are included) while Vermont received \$23.05 per person in funds (based on population figures from U.S. Census Bureau estimates for 2004). The fiscal year 2005 budget included \$4 billion for state and local grant programs, including \$1.5 billion in formula-based grants to the states and \$885 million in UASI funding. See Dep’t of Homeland Sec., *Fact Sheet: Department of Homeland Security Appropriations Act of 2005* (Oct. 18, 2004), <http://www.dhs.gov/dhspublic/display?content=4065> (last visited Dec. 17, 2004). At the end of 2004, the Department of Homeland Security announced the first round of fiscal year 2005 distributions with allocations of \$1.66 billion to the states in Homeland Security Grant Program funds and \$854.66 million in UASI grants. See DHS Grants Nationwide, *supra*, at app. A. Under these allocations, New York State received \$77.27 million in Homeland Security Grant funds and \$221.08 million in UASI funds including \$207.56 million earmarked for New York City, a substantial increase from 2004. See *id.* apps. A, B. Other cities received less than they did in 2004. See Eric Lipton, *Big Cities Will Get More In Antiterrorism Grants*, N.Y. TIMES, Dec. 22, 2004, at A20 (reporting complaints by Memphis officials after receiving no funding under the allocation).

9. See *Kelly Testimony*, *supra* note 6, at 14 (reporting that New York City has received federal funds covering only half of its counterterrorism costs).

10. See, e.g., Josh Benson, *Homeland Security Reduces Aid for Jersey City and Newark Areas in 2005*, N.Y. TIMES, Dec. 4, 2004, at B5 (reporting statements from New Jersey Acting Governor Richard J. Codey that funding in the fiscal year 2005 budget was “unconscionable” and “a slap in the face to New Jersey”); Winnie Hu, *Speaker’s Comments Anger New York Democrats*, N.Y. TIMES, Aug. 26, 2004, at B3 (“This administration has shown contempt for New York City, and done everything possible not to help us with funding.”) (quoting New York Rep. Jerrold Nadler); Noelle Straub, *Anti-Terror Millions Finally on the Way*, BOSTON HERALD, May 29, 2003, at 18 (“We need more from the administration than just color-coded warnings. We need more assistance for our police officers, firefighters, and other first responders, who must work double and triple time to keep up with the heightened security level.”) (quoting Massachusetts Rep. Edward J. Markey).

11. *Eleventh Public Hearing of the National Comm’n on Terrorist Attacks Upon the United States* 5 (May 18–19, 2004) (statement of Michael R. Bloomberg, Mayor, City of New York), available at http://www.9-11commission.gov/hearings/hearing11/bloomberg_statement.pdf (criticizing funding formulas in which New York City received among the lowest per capita grants). Bloomberg described the allocation of funds as

pork barrel politics at its worse. It’s the kind of shortsighted “me first” nonsense that gives Washington a bad name. It also, unfortunately, has the effect of aiding and abetting those who hate and plot against us . . . [Funds] should be allocated on the

In calling for increased federal assistance to New York State, for example, Senator Hillary Rodham Clinton has invoked the “[c]onstitutional imperative, to ‘provide for the common defense.’”¹² Others view the national government’s dependence on states and cities to provide security without complete reimbursement as an unfunded (or underfunded) mandate.¹³ Meanwhile, the residents of states and cities less vulnerable to attack have expressed reluctance to contribute to the high

basis . . . of real risks. . . . We need to make sure that New York City, the economic engine that drives the . . . country, has the resources it needs to protect itself. As a nation, we must come to each other’s aid in a manner that protects us all.

Id.; see also *Eleventh Public Hearing of the National Comm’n on Terrorist Attacks Upon the United States* 9 (May 18–19, 2004) (statement of Joseph F. Bruno, Commissioner, New York City Office of Emergency Management) [hereinafter *Bruno Testimony*], available at http://www.9-11commission.gov/hearings/hearing11/bruno_statement.pdf (“Due to [New York City’s] obvious risk as a high-profile target, City agencies have identified over \$1 billion in homeland security funding needs. . . . [The New York City Office of Emergency Management] is constantly working to correct inherently unfair funding formulas and increase the City’s funding levels . . . [to give] far more weight to the threat-based level of risk”); Amber Mobley, *Control Sought on Security Funding*, BOSTON GLOBE, July 18, 2003, at B4 (reporting Massachusetts Governor Mitt Romney’s statement that “money . . . needs to be sent according to risk”); Rick Orlov, *Hahn Seeking More Federal Security Funding*, L.A. DAILY NEWS, Mar. 6, 2004, at N3 (reporting on the efforts by the Los Angeles mayor and city council members to obtain federal security funding proportionate to the city’s risks); Richard Simon, *President Bush’s Budget Plan*, L.A. TIMES, Feb. 8, 2005, at A20 (reporting that “California officials have complained that under the current formula, the state has received less per capita for domestic security than Wyoming”).

12. Hillary Rodham Clinton, Remarks at John Jay College of Criminal Justice (Jan. 24, 2003), available at <http://www.clinton.senate.gov/speeches/030124.html>. It is not clear whether Senator Clinton was quoting the Constitution’s preamble (“We the People of the United States, in Order to . . . provide for the common defence”) or Congress’s taxing and spending authority under Article I, Section 8 (“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States”). U.S. CONST. art. I, § 8.

13. See, e.g., *Clear Law Enforcement for Criminal Alien Removal Act of 2003 (Clear Act): Hearing on H.R. 2671 Before the Subcomm. on Immigration, Border Sec., and Claims of the H. Comm. on the Judiciary*, 108th Cong. 39 (2003) (statement of Gordon Quan, Mayor Pro Tem, Houston, Texas) (“Protecting the homeland cost[s] billions of dollars. Local governments have already assumed much of the fiscal burden while they wait for first-responder funds to trickle down to the local level. . . . [The National League of Cities] unequivocally opposes . . . Congressional effort[s] to saddle local governments with an unfunded mandate.”). As one senator put it:

[W]hen terrorists strike . . . first responders are the first people we turn to. When somebody picks up their phone and calls 911, it is not going to ring at the desk of any one of you. It’s going to be the local fire department, the local sheriffs, the local police, who receive the call. As we saw at the World Trade Center and at the Pentagon, these were the people that were the first responders. They have been asked to be the Federal Government’s vanguard partners against terrorism, but it has become largely to this point an unfunded mandate on their communities and their states.

The War Against Terrorism: Working Together to Protect America: Hearing Before the S. Comm. on the Judiciary, 108th Cong. 4 (2003) (statement of Vermont Sen. Patrick Leahy).

costs of necessary security efforts in places like New York City and Washington, D.C., and have insisted on receiving a share of any national funding.¹⁴

Ratified in an age of insecurity, the Constitution, in a largely forgotten clause of Article IV, Section 4, which I call for ease of reference the Protection Clause, provides clear guidance on the issue of responsibility for homeland security. Article IV, Section 4 is known generally as the provision of the Constitution that requires the United States to “guarantee” republican government within the states.¹⁵ Yet the guarantee of republican government is only the first requirement of Section 4, and one might overlook its full import by focusing solely on that first clause. Article IV, Section 4 states in full:

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against

14. See, e.g., Hu, *supra* note 10 (quoting House Speaker J. Dennis Hastert of Illinois complaining how “[a]ll the tragedy [of 9/11] was converted into dollars and cents”); Ryan Lizza, *Bush to New York: Here’s Your \$20 Billion—Now Drop Dead*, N.Y. MAG., June 14, 2004, at 102, 104 (“‘The chairman of the Appropriations Committee is from Kentucky,’ says a [New York City Mayor Michael] Bloomberg aide, explaining how sympathy for New York has given way to pork-barrel politics. ‘He doesn’t want to go home and say ‘Well, gosh, guys, I don’t see any Al Qaeda here.’ He wants to take some home, too.’”); Dean E. Murphy, *Security Grants Still Streaming to Rural States*, N.Y. TIMES, Oct. 12, 2004, at A1 (“No member [of Congress] wants to go home and say my state didn’t get any of the money but you are paying for it.”) (quoting former Washington Sen. Slade Gorton); Edward Wyatt, *Wyoming Insists It Needs Its Share of Terror Funds*, N.Y. TIMES, June 1, 2004, at B1 (reporting on Wyoming receiving the largest per-capita share of homeland security funding).

15. The Guarantee Clause has been the subject of countless law review articles, including many about what types of political arrangements properly constitute a “republican” government. See, e.g., Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513 (1962); Hans A. Linde, *Guaranteeing a Republican Form of Government*, 65 U. COLO. L. REV. 709 (1994); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988). The Guarantee Clause also has been the basis for challenging allegedly nonrepublican practices within states, including unequal voting rights, initiatives, referenda, and the drawing of voting districts. See, e.g., *City of Rome v. United States*, 446 U.S. 156, 182 n.17 (1980) (challenge to section 5 of the Voting Rights Act of 1965); *Baker v. Carr*, 369 U.S. 186 (1962) (legislative reapportionment); *Ohio v. Akron Metro. Park Dist.*, 281 U.S. 74 (1930) (challenge to the requirement that at least all but one state supreme court justices concur before striking down state law); *Davis v. Hildebrandt*, 241 U.S. 565 (1916) (challenge to referendum); *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912) (challenging tax authorized by direct voter initiative); *Taylor v. Beckham*, 178 U.S. 548 (1900) (challenging a state law authorizing a panel of the legislature to resolve disputes in gubernatorial elections). As most law students learn, courts also dismiss lawsuits routinely based on the Guarantee Clause as raising nonjusticiable political questions, best left to political branches to resolve. This principle began with *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), in which the Supreme Court reasoned that Congress has exclusive authority to determine whether government is “republican” and thus refused to decide which of two competing factions in Rhode Island had a rightful claim to authority. *Id.* at 42–43.

Invasion; and on Application of the Legislature, or of the Executive
(when the Legislature cannot be convened) against domestic Violence.¹⁶

In addition to guaranteeing republican government, the provision requires the national government to *protect* the states from invasion and domestic violence.

This Protection Clause was a central component of the 1788 Constitution. The Clause reflects the ratifying generation's understanding of, and response to, the very problem the War on Terrorism presents today: Security represents a collective-action dilemma because each state is reluctant to contribute to the costs of defending other states although the cost of an attack is not geographically confined. The ratifying generation understood that without a constitutional mechanism to overcome this dilemma, vulnerable states and cities would not receive adequate defense, leaving the whole nation at risk. Governors and mayors therefore stand on strong constitutional ground when they argue today that the national government should bear the burdens of homeland security—either by providing the necessary security itself or by paying for security measures implemented locally. The Protection Clause once maintained a prominent role in guiding federal efforts in fortifying coastal towns, securing the frontiers, and responding to invasions and domestic insurrections. Examining how the Protection Clause governed early conceptions of national security—as well as early implementation of security efforts—unlocks a constitution designed expressly to address many of the logistical concerns now raised by the War on Terrorism. In clause after clause, the Constitution represents a blueprint for safeguarding states and their cities. At its core, the document is a security constitution.

In fulfilling its security obligations under the Protection Clause, the national government may enlist the assistance of state and local personnel so long as Congress pays the costs of their efforts. In the past, those personnel were militiamen who, under the Constitution's several Militia Clauses, could be (and often were) relied on by the federal government for security purposes. The Supreme Court's anticommandeering doctrine, based on the Tenth Amendment, should not limit the national government's ability to deploy for counterterrorism work modern state and local security personnel like law enforcement. Indeed, the Constitution specifically provides for—and encourages—this type of commandeering as a way to protect citizens from the alternative of the national military taking over towns and cities. In sum, the national government is obligated to protect states and their cities in the War on Terrorism, but in doing so it may delegate (with payment) the work to state and local personnel.

16. U.S. CONST. art. IV, § 4.

Part I of this Article examines the ratifying generation's experience with the problem of homeland security and the origin of the Protection Clause as a response to the collective-action barriers to securing vulnerable states and cities. Part II turns to the mechanisms available to the national government to protect the states: by deploying national personnel and by delegating the work to state and local personnel. Part III traces the early history of Congress in fulfilling its protection mandate. Finally, Part IV applies the Protection Clause to the War on Terrorism and the modern issue of homeland security.

I. THE PROTECTION CLAUSE

A. Invasions and Insurrections

With more than two centuries of national government behind us, it is easy to forget that in the early years following the Revolutionary War, it was far from certain that the American experiment in independence would ultimately succeed. Eighteenth-century America was a precarious setting. Although they had defeated the British, Americans remained preoccupied with the notion that there were forces conspiring against their freedom.¹⁷ These fears were not the reflection of unfounded paranoia. As Gordon Wood notes, "The Federalists were . . . not mistaken in their sense of the fragility of the United States. It was the largest republic since ancient Rome, and as such it was continually in danger of falling apart."¹⁸

One threat was foreign invasion (including attacks from Indians). The proximity of British and Spanish settlements was a constant source of unease.¹⁹ Alexander Hamilton was not paranoid when he cautioned his fellow Americans against having "an excess of confidence or security," and against

17. See generally FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 78–79 (1985); Gordon S. Wood, *Conspiracy and the Paranoid Style: Causality and Deceit in the Eighteenth Century*, 39 WM. & MARY Q. 401 (1982).

18. Gordon S. Wood, *Launching the "Extended Republic": The Federalist Era*, in *LAUNCHING THE EXTENDED REPUBLIC: THE FEDERALIST ERA* 1, 21–22 (Ronald Hoffman & Peter J. Albert eds., 1996).

19. For example, James Iredell observed:

The British government is not friendly to us. They dread the rising glory of America. They tremble for the West Indies, and their colonies to the north of us. They have counteracted us on every occasion since the peace. Instead of a liberal and reciprocal commerce, they have attempted to confine us to a most narrow and ignominious one.

Their pride is still irritated with the disappointment of their endeavors to enslave us. Debates in the Convention of the State of North Carolina (July 26, 1788) (statement of James Iredell), in 4 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 98–99 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter *ELLIOT'S DEBATES*].

becoming “too sanguine in considering ourselves as entirely out of the reach of danger.”²⁰ “On one side of us, and stretching far into our rear,” Hamilton warned, “are growing settlements subject to the dominion of Britain.”²¹ “On the other side, and extending to meet the British settlements, are colonies and establishments subject to the dominion of Spain,” while “[t]he [Indian tribes] on our Western frontier . . . [are] our natural enemies.”²² Wars in other parts of the world, particularly Europe, might also spill over onto the American continent— “[P]eace or war,” Hamilton admonished, “will not always be left to our option.”²³ Speaking at the New York ratifying convention, Hamilton, along with Robert Livingston, reiterated the theme and pressed the particular vulnerabilities of that state.²⁴

In addition to external attacks, violence might erupt from within. Sleeper cells might seem a new evil, but eighteenth-century Americans took for granted that foreign sympathizers were living among them, biding their time for the right moment to strike or to stir up trouble. “Nova Scotia and New Brunswick,” Francis Dana warned the Massachusetts Convention considering the proposed Constitution in 1788, “filled with tories and refugees, stand ready to attack and devour these states, one by one.”²⁵ Representative Harrison Gray Otis of Massachusetts had this same mindset when he warned Congress how “an army of soldiers would not be so dangerous to the country, as an army of spies and incendiaries scattered through the Continent.”²⁶ Foreign spies were not the only problem at home: Economic instability represented a constant source of internal disruption, with debtor revolts and other protests common occurrences.²⁷ Furthermore, disputes over

20. THE FEDERALIST NO. 24, at 155 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). All subsequent references to *The Federalist* are to the Cooke edition.

21. *Id.*

22. *Id.* at 156.

23. THE FEDERALIST NO. 34, at 212 (Alexander Hamilton).

24. Debates in the Convention of the State of New York (June 17, 1788) (statement of Robert Livingston), in 2 ELLIOT'S DEBATES, *supra* note 19, at 212. For example, Alexander Hamilton warned: Your capital is accessible by land, and by sea is exposed to every daring invader; and on the north-west you are open to the inroads of a powerful foreign nation. Indeed, this state, from its situation, will, in time of war, probably be the theater of its operations. *Id.* at 232.

25. Debates in the Convention of the Commonwealth of Massachusetts (Jan. 18, 1788) (statement of Francis Dana), in 2 ELLIOT'S DEBATES, *supra* note 19, at 43.

26. 8 ANNALS OF CONG. 1961 (1798) (remarks of Rep. Otis), *quoted in* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801, at 253 n.133 (1997).

27. See generally PAUL A. GILJE, THE ROAD TO MOBOCRACY: POPULAR DISORDER IN NEW YORK CITY, 1763–1834 (1987); RIOT AND REVELRY IN EARLY AMERICA (William Pencak et al. eds., 2002); Alan Taylor, *Agrarian Independence: Northern Land Rioters after the Revolution*, in BEYOND THE AMERICAN REVOLUTION: EXPLORATIONS IN THE HISTORY OF AMERICAN RADICALISM 221 (Alfred F. Young ed., 1993).

trade and territory threatened conflicts between the new states,²⁸ leading one political scientist to view the Constitution as a “peace pact.”²⁹

B. Security as a Collective-Action Dilemma

The ratifying generation understood that in a federal system of government, providing the right level of domestic security is a persistent problem. Left to their own devices, states are often unable or unwilling to deal sufficiently with sources of insecurity. Consider this scenario: State A is invaded or violence erupts there. Unable to deal with the problem itself, State A asks its neighbor, State B, for assistance. B will have an interest in helping A, but only to the extent that B itself is likely to suffer the effects of ongoing instability in A. States C, D, and E, farther away from A, will have less incentive to act. States F, G, and H, the states most remote and thus least affected by A’s troubles, will pay little or no attention and certainly will not waste time or money to help out A. Conversely, if the effects of violence in State A are felt mostly in neighboring State B (for example, because insurgents conduct raids across the border), A is unlikely to deal with the problem sufficiently to secure B. Neither A nor B will do much if the effects are felt in C. And so on. Put simply, if the contribution to security reflects only what each state perceives to be in its own interest, the overall level of security is likely to be below what is needed to ensure ongoing stability in every state.

Likewise, in a federal system, decisions by the national government represent the collective preferences of the individual states.³⁰ The

28. See, e.g., Debates in the Convention of the State of Connecticut (Jan. 4, 1788) (statement of Oliver Ellsworth), in 2 ELLIOT’S DEBATES, *supra* note 19, at 186:

We must unite, in order to preserve peace among ourselves. If we be divided, what is to prevent wars from breaking out among the states? States, as well as individuals, are subject to ambition, to avarice, to those jarring passions which disturb the peace of society. What is to check these? If there be a parental hand over the whole, this, and nothing else, can restrain the unruly conduct of the members.

Union is necessary to preserve commutative justice between the states. If divided, what is to prevent the large states from oppressing the small? What is to defend us from the ambition and rapacity of New York, when she has spread over that vast territory which she claims and holds? Do we not already see in her the seeds of an overbearing ambition?

Id.

29. DAVID C. HENDRICKSON, *PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING* (2003).

30. Although perhaps not perfectly. See Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 112–28 (2001) (discussing the problem of vertical aggrandizement that occurs when the national government increases its own power at the expense of the states, and the problem of horizontal aggrandizement that occurs when some states harness the national government to impose their own preferences on other states); Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court’s “Unsteady Path”: A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447, 1471–74 (1995) (discussing how members of Congress may vote in ways that enhance their own powers, impose burdens on the states, or aid the members’ own reelection efforts).

collective-action dilemma is thereby replicated, because just as states are unlikely to send help to each other to ensure the optimal level of security, representatives of states in Congress are unlikely to vote in favor of national security measures that do not benefit their own constituents. As Alexander Hamilton stated at the New York ratifying convention: "While danger is distant, its impression is weak; and while it affects only our neighbors, we have few motives to provide against it."³¹ This is true even though the sources and effects of insecurity rarely are confined neatly to a single state. Foreign invasions and domestic insurrections easily spill across geographical borders or otherwise end up affecting the nation as a whole. Accordingly, states often have an ultimate interest in the security of their neighbors beyond the level at which they are willing to contribute resources. Security represents, in modern terminology, a dilemma of collective action: No state wants to contribute fully to the collective effort even though each state is likely to be worse off as a result, and every state would be better off if each were to contribute its share.

When the Philadelphia Convention got under way in the summer of 1787, with delegate Edmund Randolph enumerating the defects in the Articles of Confederation and presenting the Virginia Plan, he therefore began not with the structures of government or with individual rights, but with the problem of maintaining security.³² Accordingly, Randolph's wish list for what the new government should accomplish put security at the very top.³³ Similarly, at the state ratifying conventions, the need for a coercive

31. Debates in the Convention of the State of New York (June 17, 1788) (statement of Alexander Hamilton), *supra* note 24, at 232.

32. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 29–30 (Adrienne Koch ed., Ohio Univ. Press, 1984) (1840) [hereinafter MADISON'S NOTES]. Randolph's list of defects began:

1. that the confederation produced no security against foreign invasion; congress not being permitted to prevent a war nor to support it by their own authority—Of this he cited many examples; most of which tended to shew, that they could not cause infractions of treaties or of the law of nations, to be punished: that particular states might by their conduct provoke war without controul; and that neither militia nor draughts being fit for defence on such occasions, inlistments only could be successful, and these could not be executed without money.
2. that the foederal government could not check the quarrels between states, nor a rebellion in any, not having constitutional power nor means to interpose according to the exigency.

Id.

33. *Id.* at 29. According to Randolph's proposals:

- The Character of such a government ought to secure
1. against foreign invasion:
2. against dissentions between members of the Union, or seditions in particular states:
3. to procure to the several States, various blessings, of which an isolated situation was incapable: 4. to be able to defend itself against incroachment: and 5. to be paramount to the state constitutions.

Id.

central authority to overcome the states' reluctance to contribute voluntarily to collective security efforts was a constant refrain. Alexander Hamilton and Robert Livingston pressed this theme at the New York Convention, focusing on how, during the Revolutionary War, New York had suffered from the inadequate contributions of other states.³⁴ In Connecticut, Oliver Ellsworth called for "[a] more energetic system" because "[t]he present is merely advisory. It has no coercive power," and given the experience of the Revolutionary War in which "[a] few states bore the burden, . . . a power in the general government to enforce the decrees of the Union is absolutely necessary."³⁵ In North Carolina, William Davie cautioned that "we cannot obtain any effectual protection from the present Confederation," calling it "universally acknowledged" that this was among the "greatest defects" of the Articles.³⁶ In Massachusetts, Francis Dana observed how

[t]he state oppressed must exert its whole power, and bear the whole charge of the defence; but common danger points out for common exertion; and this Constitution is excellently designed to make the danger equal. Why should one state expend its blood and treasure

34. Hamilton stated:

[N]ot being furnished with those lights which directed the deliberations of the general government, and incapable of embracing the general interests of the Union, the states have almost uniformly weighed the requisitions by their own local interests, and have only executed them so far as answered their particular convenience or advantage. . . . How have we seen this state, though most exposed to the calamities of the war, complying, in an unexampled manner, with the federal requisitions, and compelled by the delinquency of others to bear most unusual burdens. . . . From the delinquency of those states which have suffered little by the war, we naturally conclude, that they have made no efforts; and a knowledge of human nature will teach us that their ease and security have been a principal cause of their want of exertion.

Debates in the Convention of the State of New York (June 17, 1788) (statement of Alexander Hamilton), *supra* note 24, at 231–32. According to Robert Livingston:

Necessity of circumstances, which operates with almost a physical energy, alone procured any tolerable supplies. Thus the state of New York, which was continually the seat of war, was more punctual than the other states. The neighboring states afforded something, apparently in proportion to their sense of danger. When the enemy appeared in any state, we find them making efforts, and wearing at once a very federal complexion. . . . If we form this Constitution so as to take away from the Union the means of protecting us, we must, in a future war, either be ruined by the enemy, or ruined by our exertions to protect ourselves.

Id. at 343–44; *see also id.* at 366 (statement of Alexander Hamilton) ("States will contribute or not, according to their circumstances and interests. They will all be inclined to throw off their burdens of government upon their neighbors.").

35. Debates in the Convention of the State of Connecticut (Jan. 4, 1788) (statement of Oliver Ellsworth), *supra* note 28, at 186–90.

36. Debates in the Convention of the State of North Carolina (July 24, 1788) (statement of William Davie), in 4 ELLIOT'S DEBATES, *supra* note 19, at 17.

for the whole? Ought not a controlling authority to exist, to call forth, if necessary, the whole force and wealth of all the states?³⁷

The Federalist also explains at length the collective-action dilemma (although the essays do not use that term) underlying security. In *The Federalist No. 4*, John Jay writes how the states lack sufficient incentives to assist each other in times of war or insurrection even though it is unwise for them to refuse aid:

Leave America divided into thirteen, or if you please into three or four independent Governments, what armies could they raise and pay, what fleets could they ever hope to have? If one was attacked would the other[s] fly to its succour, and spend their blood and money in its defence? Would there be no danger of their being flattered into neutrality by specious promises, or seduced by a too great fondness for peace to decline hazarding their tranquillity and present safety for the sake of neighbours, of whom perhaps they have been jealous, and whose importance they are content to see diminished? Altho' such conduct would not be wise it would nevertheless be natural.³⁸

Moreover, Jay explains, even if states are willing to come to the aid of another state under attack, they likely will be unable to mount a sufficient response because the states lack the means of, and experience with, military coordination.³⁹ A strong national government, on the other hand, can "collect and avail itself of the talents and experiences of the ablest men, in whatever part of the Union they may be found," and put in place "uniform principles" that "harmonize, assimilate, and protect" each state.⁴⁰ The national government can also "apply the resources and power of the whole to the defence of any particular part," including by "plac[ing] the militia under one plan of discipline, and . . . consolidat[ing] them into one corps," so as to "render them more efficient than if divided into thirteen . . . independent bodies."⁴¹

37. Debates in the Convention of the Commonwealth of Massachusetts (Jan. 18, 1788) (statement of Francis Dana), in 2 ELLIOT'S DEBATES, *supra* note 19, at 42–43.

38. THE FEDERALIST NO. 4, at 21–22 (John Jay).

39. *Id.* Jay writes:

But admit that they might be willing to help the invaded State or Confederacy. How and when, and in what proportion shall aids of men and money be afforded? Who shall command the allied armies, and from which of them shall he receive his orders? Who shall settle the terms of peace, and in case of disputes what umpire shall decide between them, and compel acquiescence? Various difficulties and inconveniences would be inseparable from such a situation; whereas one Government watching over the general and common interests, and combining and directing the powers and resources of the whole, would be free from all these embarrassments, and conduce far more to the safety of the people.

Id. at 22.

40. *Id.* at 20.

41. *Id.* at 21.

Alexander Hamilton, who spoke forcefully at the Philadelphia Convention about the collective-action obstacles to security,⁴² continues the theme in several of *The Federalist* essays. He observes in *The Federalist* No. 22 that under the Articles of Confederation, the national government's "power of raising armies . . . is merely a power of making requisitions upon the States for quotas of men."⁴³ Yet the Revolutionary War demonstrated the flaws of a system dependent on states voluntarily meeting quotas: The war presented a classic collective-action dilemma because "[s]tates near the seat of war, influenced by motives of self preservation, made efforts to furnish their quotas, which even exceeded their abilities, while those at a distance from danger were for the most part as remiss as the others were diligent in their exertions."⁴⁴ The problem, Hamilton notes, was particularly acute with respect to the provision of soldiers because states understood that once the battles were over, they could not easily be held accountable for failing to send men. Without central oversight, there arose a market for soldiers—of states bidding with bounties for men to fill their quotas—that interfered with military needs.⁴⁵ Accordingly, a system of defense dependent on states voluntarily contributing their fair share represents "a system of imbecility in the union, and of inequality and injustice

42. On June 18, 1787, in critiquing the New Jersey Plan, the proposal William Paterson offered as an alternative to the Virginia Plan, Hamilton observed:

Let us take a review of the variety of important objects which must necessarily engage the attention of a national government. You have to protect your rights against Canada on the north, Spain on the south, and your western frontier against the savages. You have to adopt necessary plans for the settlement of your frontiers, and to institute the mode in which settlements and good governments are to be made.

How is the expense of supporting and regulating these important matters to be defrayed? By requisition on the states, according to the Jersey plan? Will this do it? We have already found it ineffectual. Let one state prove delinquent, and it will encourage others to follow the example; and thus the whole will fail. And what is the standard to quota among the states their respective proportions? Can lands be the standard? . . . Compare Pennsylvania with North Carolina, or Connecticut with New York. Does not commerce or industry in the one or other make a great disparity between these different countries, and may not the comparative value of the states, from these circumstances, make an unequal disproportion when the data are numbers? I therefore conclude that either system would ultimately destroy the Confederation, or any other government which is established on such fallacious principles. Perhaps imposts—taxes on specific articles—would produce a more equal system of drawing a revenue.

Another objection against the Jersey plan is, the unequal representation. Can the great states consent to this? If they did, it would eventually work its own destruction. How are forces to be raised by the Jersey plan? By quotas? Will the states comply with the requisition? As much as they will with the taxes.

Yates's Minutes (June 18, 1787), in 1 ELLIOT'S DEBATES, *supra* note 19, at 420–21.

43. THE FEDERALIST NO. 22, at 137 (Alexander Hamilton).

44. *Id.* at 138.

45. *Id.* at 137–38.

among the members.”⁴⁶ In *The Federalist No. 23*, Hamilton presses the point by critiquing the reliance in the Articles of Confederation on the goodwill of the states to contribute to security. Although the Articles “presum[ed] that a sense of . . . [the states’] true interests, and a regard to the dictates of good faith, would be found sufficient pledges for the punctual performance of the duty of the members to the Foederal Head,” such optimism was “ill founded and illusory.”⁴⁷ Accordingly, rather than asking the states to provide men and money for security and waiting for the states to comply, the national government must have independent authority to raise troops and spend for defense. In place of the “vain project of legislating upon the States in their collective capacities,” Hamilton argues, “we must extend the laws of the Foederal Government to the individual citizens of America” so that the national government has “full power to levy troops; to build and equip fleets, and to raise the revenues, which will be required for the formation and support of an army and navy”⁴⁸ Further, once the national government is made “the guardian of the common safety” in this manner, the scope of its power must not be restricted.⁴⁹ In particular, allowing the states to decide what resources the national government may employ simply recreates the problem of depending on the states for security. “[A] want of co-operation [is] the infallible consequence of such a system” and “weakness, disorder, an undue distribution of the burthens and calamities of war, an unnecessary and intolerable increase of expence” are “its natural and inevitable concomitants.”⁵⁰

46. *Id.* at 138.

47. THE FEDERALIST NO. 23, at 148 (Alexander Hamilton). In *The Federalist No. 21*, Hamilton also states:

The want of a mutual guarantee of the State governments is . . . [a] capital imperfection

Without a guarantee, the assistance to be derived from the Union in repelling those domestic dangers, which may sometimes threaten the existence of the State constitutions, must be renounced. Usurpation may rear its crest in each State, and trample upon the liberties of the people; while the national government could legally do nothing more than behold its encroachments with indignation and regret. A successful faction may erect a tyranny on the ruins of order and law, while no succour could constitutionally be afforded by the Union to the friends and supporters of the government. The tempestuous situation, from which Massachusetts has scarcely emerged [that is, Shays' Rebellion], evinces that dangers of this kind are not merely speculative. . . . Who can predict what effect a despotism established in Massachusetts, would have upon the liberties of New-Hampshire or Rhode-Island; of Connecticut or New-York?

THE FEDERALIST NO. 21, at 130–31 (Alexander Hamilton).

48. THE FEDERALIST NO. 23, at 148–49 (Alexander Hamilton).

49. *Id.* at 149.

50. *Id.* at 150.

Only a strong national government with responsibility for defense can overcome the collective-action dilemma of states contributing security resources. Unlike the states, the national government will “make suitable provisions for the public defence” because it is the “center of information” and so “will best understand the extent and urgency of the dangers that threaten.”⁵¹ The national government is the “representative of the whole,” and so “will feel itself most deeply interested in the preservation of every part—which, from the responsibility implied in the duty assigned to it, will be most sensibly impressed with the necessity of proper exertions”⁵² Further, the national government, “by the extension of its authority throughout the States,” is uniquely able to “establish uniformity and concert in the plans and measures by which the common safety is to be secured.”⁵³ To be sure, Hamilton recognizes that granting defensive powers to a national government is no small matter and requires structuring that government so as to “admit of its being safely vested with the requisite powers.”⁵⁴ The task, then, is to put in place a constitution establishing a national government that can be trusted with this sort of authority.⁵⁵

In *The Federalist No. 25*, Hamilton delves further into the problem of relying on states to secure the Union, focusing on the ways in which differences and inequalities among the states undermine their contributions to collective defense. Making an argument that resonates with modern mayoral complaints about security funding in the War on Terrorism, Hamilton observes how, in the absence of national coordination, individual states that are more vulnerable to attack will be forced to contribute disproportionately to defense, and how this unwisely leaves national security in the hands of a few states. Though the British and Spanish territories and the Indian lands “incircle the Union from MAINE to GEORGIA,” so that in one sense “[t]he danger is . . . common,” and “the means of guarding against it ought in like manner to be the objects of common councils and of a common treasury,” not all states require the same specific protections from these threats.⁵⁶ “It happens that some States, from local situation, are more directly exposed. New York is of this class.”⁵⁷

51. *Id.* at 149.

52. *Id.*

53. *Id.* at 149–50.

54. *Id.* at 150.

55. *Id.* at 150–51.

56. THE FEDERALIST NO. 25, at 158 (Alexander Hamilton).

57. *Id.*

Similarly, in *The Federalist No. 41*, James Madison writes of the particular vulnerabilities of New York:

If we except perhaps Virginia and Maryland, which are peculiarly vulnerable on their eastern frontiers, no part of the Union ought to feel more anxiety . . . than New-York. Her sea coast is extensive. The very important district of the state is an island. The state itself is penetrated by a large navigable river for more than fifty leagues. The great emporium of its commerce, the great reservoir of its wealth, lies every moment at the mercy of events, and may almost be regarded as a hostage, for ignominious compliances with the dictates of a foreign enemy, or even with the rapacious demands of pirates and barbarians.⁵⁸

It is all there: the unique vulnerability of New York because of its coastline, the precariousness of Manhattan, and the temptation this commercial center represents to foreign enemies. The words could have been written yesterday.

But what exactly prevents vulnerable states like New York from putting in place sufficient security measures to defend themselves (and protect their wealth)? Madison explains that it is not that vulnerable states simply are lax, but that security is too difficult and expensive for one state to provide: “[I]f their single resources were equal to the task of fortifying themselves against the danger, the object to be protected would be almost consumed by the means of protecting them.”⁵⁹ Moreover, Hamilton cautions, other states should not *want* to leave vulnerable states to muster sufficient defenses to protect themselves from attack. Because attacks cannot easily be confined to a single state or region, “[t]he security of all would . . . be subjected to the parsimony, improvidence or inability of a part.”⁶⁰ Leaving the states to defend their own borders is therefore as unfair as it is unwise: “New-York would have to sustain the whole weight of the establishments requisite to her immediate safety, and to the mediate or ultimate protection of her neighbours. This would neither be equitable as it respected New-York, nor safe as it respected the other States.”⁶¹

Hamilton also warns of a further consequence of asking a state like New York to create its own adequate defense apparatus: “If the resources of such part becoming more abundant and extensive, its provisions should be proportionally enlarged, the other States would quickly take the alarm at seeing the whole military force of the Union in the hands of two or three of its

58. THE FEDERALIST NO. 41, at 275 (James Madison).

59. *Id.* at 275–76.

60. THE FEDERALIST NO. 25, at 158–59 (Alexander Hamilton).

61. *Id.* at 158.

members; and those probably amongst the most powerful.”⁶² As if a New York War Department is not worrisome enough, consider, Hamilton suggests, the arms race that might result. “[M]ilitary establishments, nourished by mutual jealousy, would be apt to swell beyond their natural or proper size; and being at the separate disposal of the members, they would be engines for the abridgment, or demolition of the national authority.”⁶³ Be careful, in other words, of what you wish for. Ask New York to defend itself, and it may soon run the whole country. At the end of the day, depending on states to furnish security resources is, according to Hamilton, “[a] project oppressive to some States, dangerous to all, and baneful to the confederacy.”⁶⁴

C. The Protection Solution

The Protection Clause of Article IV was the ratifying generation’s solution to the problem of security. The Clause overcomes the barriers to collective action by taking the responsibility for security away from individual states and assigning it to the national government. Just as other collective-action dilemmas can be resolved by a coercive, coordinating force, so too is security accomplished when the national government takes charge. Moreover, by *requiring* the national government to provide security, the Protection Clause ensures that the dilemma of collective action is not simply replicated in the chambers of Congress. The national government is both empowered and obligated to protect the states.

While the impetus for constitutional provisions may often be hard to reconstruct, one event ensured that the Constitution would include a requirement that the national government protect the states. Shays’ Rebellion, the farmer revolts that broke out in western Massachusetts in January 1787, made clear—if anyone had doubted it before—that the national government must have a security mandate. The events of the rebellion are well known. To pay off its debts, the state of Massachusetts levied high taxes in the period of economic hardship and currency shortages following the Revolutionary War, ignoring pleas for relief from farmers who feared foreclosure. Protests that began as town meetings and petitioning transformed into farmers blocking county courts in the fall of 1786 to prevent foreclosure proceedings. Despite deep concern over these events in Massachusetts, Congress lacked the authority under the Articles of

62. *Id.* at 159.

63. *Id.*

64. *Id.* at 158.

Confederation (and as a practical matter lacked the manpower) to meet the governor's request for assistance. After violence escalated at the end of the year, a militia force assembled in the eastern part of the state and—financed by wealthy Boston creditors—moved westward to quell the riots. On January 25, 1787, before the eastern militia arrived, Daniel Shays, an officer in the Continental Army, led 1500 men to seize the federal arsenal at Springfield. There, Shays and his men confronted a local militia force under the command of Major General William Shepard. Fearing that his troops might support their farmer neighbors, Shepard opened fire. Several of the insurgents were killed. The remainder fled—some to Vermont and New York, where despite requests to those states to turn them over, they continued periodic raids across the border. Shays and the other leaders of the revolts were sentenced to death (but later pardoned). Ultimately, the Massachusetts legislature caved, suspending taxes and exempting clothing, farm tools, and other household items from debt collection.⁶⁵

Though Massachusetts put down the farmer insurrections, the events of Shays' Rebellion heralded the risk of future disorder. Under the Articles of Confederation, the national government seemed powerless to guarantee security. Even assuming that Congress had the funds or the manpower (which it did not) to take action,⁶⁶ nothing in the Articles provided explicit authority to Congress to intervene to quell a rebellion within a state (and Article II reserved to the states "every power, jurisdiction, and right" not "expressly delegated" to Congress).⁶⁷ Though Article III bound the states "into a firm league of friendship with each other, for their common defence," by which they pledged to "assist each other, against all force offered to, or attacks made upon them, or any of them,"⁶⁸ this did not amount to much. Even assuming that the pledge extended to domestic revolt rather than just foreign attacks, there was no mechanism to enforce the requirement—in particular, there was no way to summon troops from other states to help. A pledge was just that. Moreover, states could not necessarily maintain security themselves. For one, a state dependent on militia forces might be rendered powerless. The sympathy that the farmers'

65. See generally DAVID P. SZATMARY, SHAYS' REBELLION: THE MAKING OF AN AGRARIAN INSURRECTION (1980); IN DEBT TO SHAYS: THE BICENTENNIAL OF AN AGRARIAN REBELLION (Robert A. Gross ed., 1993).

66. Congress passed a resolution stating that "in the present embarrassments of the federal finance, Congress would not hazard the perilous step of putting arms into the hands of men whose fidelity must in some degree depend on the faithful payment of their wages." 1 SECRET JOURNALS OF THE ACTS AND PROCEEDINGS OF CONGRESS 269–70 (Boston, Thomas B. Wait 1821).

67. ARTICLES OF CONFEDERATION art. II (1781).

68. *Id.* art. III.

plight evoked in the general population meant that the Massachusetts government could not fully rely on its own militia—particularly units within the western part of the state—to put down the revolts. And under the Sixth Article of Confederation, states (including Massachusetts) lacked their own large, professional armies.⁶⁹

Shays' Rebellion was very much on the minds of the delegates to the Philadelphia Convention in the summer of 1787.⁷⁰ James Madison, in his April 1787 pamphlet, "Vices of the Political System of the United States," identified as vice number six the "want of Guaranty to the States of their Constitutions & laws against internal violence" and the problem that because "[t]he confederation is silent on this point . . . the hands of the federal authority are tied."⁷¹ Writing to Edmund Randolph that same month, Madison emphasized the need in the plan for a new government for "[a]n article . . . expressly [guaranteeing] the tranquility of the States [against] internal as well as external dangers," because "unless the Union be organized efficiently & on Republican Principles, innovations of a much more objectionable form may be [intruded]."⁷²

On May 29, 1787, Randolph cited among the defects of the Articles that "the confederation produced no security against foreign invasion" and that "the foederal government could not check the quarrels between states, nor a rebellion in any, not having constitutional power nor means to interpose according to the exigency."⁷³ Randolph therefore presented the so-called Virginia Plan. Section 11 of the Plan proposed that "a Republican Government [and] the territory of each State, except in the instance of a voluntary junction of Government [and] territory, ought to be guarantied

69. *Id.* art. VI ("[N]or shall any body of forces be kept up by any State in time of peace, except such number only, as in the judgment of the United States in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defence of such State.").

70. It was not, of course, the only such insurrection of the period. Indeed, many of the Philadelphia delegates had experienced firsthand what it meant to be under siege. In the summer of 1783, eighty former soldiers of the Continental Army arrived in Philadelphia to demand payment of their war accounts. They "dr[ew] up in the street before the State House" and "utter[ed] offensive words, and wantonly pointed their Muskets to the Windows of the Hall of Congress." 25 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 973 (Gov't Printing Office 1936) (1783). Because the Pennsylvania militia was unwilling to deal with an uprising by revolutionary soldiers, Congress was forced to adjourn. *Id.* at 402–10.

71. Vices of the Political System of the United States (Apr. 1787), in 9 THE PAPERS OF JAMES MADISON 345, 350 (Robert A. Rutland et al. eds., 1975). On June 19, 1787, Madison raised the problem while objecting to the plan William Paterson offered to the Philadelphia Convention. MADISON'S NOTES, *supra* note 32, at 144.

72. Letter from James Madison to Edmund Randolph (Apr. 8, 1787), in 9 THE PAPERS OF JAMES MADISON, *supra* note 71, at 368, 370–71.

73. MADISON'S NOTES, *supra* note 32, at 29.

by the United States to each State.”⁷⁴ On June 11, when the delegates first considered this proposal, they dropped the territory guarantee and changed the remaining language to read “that a republican Constitution [and] its existing laws ought to be guaranteed to each State by the [United] States,”⁷⁵ and the provision was included in the June 13 Report of the Committee of the Whole.⁷⁶ On July 18, when the delegates debated the guarantee provision, Gouverneur Morris of Pennsylvania objected that it would require the United States to guarantee “such laws as exist in R[hode] Island” (a reference to that state’s severe franchise restrictions).⁷⁷ Pennsylvania delegate James Wilson responded that the guarantee’s purpose was “merely to secure the States [against] dangerous commotions, insurrections and rebellions.”⁷⁸ George Mason of Virginia tied the guarantee to the federal government’s own security: “If the [General Government] should have no right to suppress rebellions [against] particular States, it will be in a bad situation indeed. As Rebellions [against] itself originate in [and against] individual States, it must remain a passive Spectator of its own subversion.”⁷⁹ After Randolph explained that the guarantee provision was meant both to secure republican government and to suppress domestic commotions,⁸⁰ Madison moved to amend the provision to read “that the Constitutional authority of the States shall be guarantied to them respectively [against] domestic as well as foreign violence.”⁸¹ Two delegates immediately identified difficulties with the proposal. William C. Houston of New Jersey complained that some of the existing state constitutions should be amended, not guaranteed, and that “[i]t may also be difficult for the [General Government] to decide between contending parties each of which claim the sanction of the Constitution.”⁸² Luther Martin of Maryland “was for leaving the States to suppress Rebellions themselves.”⁸³ Massachusetts delegate Nathaniel Ghorum emphasized the national government’s need for authority to intervene to put down rebellions, even if that meant choosing among competing claims.⁸⁴ Responding to concerns that the existing provision did not explicitly

74. *Id.* at 32.

75. *Id.* at 104.

76. *Id.* at 117.

77. *Id.* at 320.

78. *Id.* at 321.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

condemn monarchical government, Randolph moved (and was seconded by Madison) to insert language that “no State be at liberty to form any other than a Republican [Government].”⁸⁵ Wilson proposed as an alternative that the provision read that “a Republican form of [Government] shall be guarantied to each State [and] that each State shall be protected [against] foreign [and] domestic violence.”⁸⁶ The delegates accepted this formulation and it was included in the proposals that went to the Committee of Detail.⁸⁷ The Committee of Detail then modified the proposal to provide for a state’s application to trigger the national government’s obligation to intervene to stop domestic violence. As reported on August 6, the provision began to take its familiar form: “The United States shall guaranty to each State a Republican form of Government; and shall protect each State against foreign invasions, and, on the application of its Legislature, against domestic violence.”⁸⁸

When debate resumed on August 17, it centered on the “application of the legislature” component of the provision.⁸⁹ Charles Pinckney⁹⁰ of South Carolina moved to strike the requirement that states make an application for protection.⁹¹ Gouverneur Morris opposed the motion “as giving a dangerous [and] unnecessary power. The consent of the State ought to precede the introduction of any extraneous force whatever.”⁹² When Connecticut delegate Oliver Ellsworth moved to add “or Executive” after the term legislature, Morris responded: “The Executive may possibly be at the head of the Rebellion. The [General Government] should enforce obedience in all cases where it may be necessary.”⁹³ Ellsworth changed his motion to add

85. *Id.* at 322.

86. *Id.*

87. *Id.*

88. *Id.* at 395. On August 8, Rufus King of Massachusetts cautioned that this provision might require the northern states to quell slave revolts created by the importation of slaves without corresponding taxation to support the national government:

Shall all the States then be bound to defend each; [and] shall each be at liberty to introduce a weakness which will render defence more difficult? Shall one part of the [United States] be bound to defend another part, and that other part be at liberty not only to increase its own danger, but to withhold the compensation for the burden? If slaves are to be imported shall not the exports produced by their labor, supply a revenue the better to enable the [General Government] to defend their masters?—There was so much inequality [and] unreasonableness in all this, that the people of the Northern States could never be reconciled to it.

Id. at 409–10.

89. *Id.* at 474.

90. Cousins Charles Pinckney and Charles Cotesworth Pinckney both attended the Convention. Madison’s notes do not make clear which one was speaking here.

91. *Id.* at 474.

92. *Id.*

93. *Id.*

to the consent of the legislature requirement, "or without it when the legislature cannot meet."⁹⁴ Referring to Shays' Rebellion, Massachusetts delegate Elbridge Gerry was "[against] letting loose the myrmidons of the [United] States on a State without its own consent. The States will be the best Judges in such cases. More blood would have been spilt in [Massachusetts] in the late insurrection, if the [General] authority had intermeddled."⁹⁵ Morris thought it strange to "form a strong man to protect us, and at the same time wish to tie his hands behind him." The national government, he insisted, "may surely be trusted with such a power to preserve the public tranquility."⁹⁶ Ellsworth's motion passed.⁹⁷

On August 30, the delegates again took up the protection provision and upon motion by Morris, "the word 'foreign' was struck out . . . as superfluous, being implied in the term 'invasion.'"⁹⁸ John Dickinson of Delaware also moved to delete the requirement that a state apply for protection against domestic violence: "He thought it of essential importance to the tranquility of the [United States] that they should in all cases suppress domestic violence, which may proceed from the State Legislature itself, or from disputes between the two branches where such exist."⁹⁹ The motion was defeated.¹⁰⁰ Also defeated was a motion to change "domestic violence" to "insurrections."¹⁰¹ A separate motion by Dickinson to "insert the words, 'or Executive' after the words 'application of its Legislature'" passed.¹⁰² A motion by Martin to add "in the recess of the Legislature" was defeated.¹⁰³ As reported out of the Committee of Style on September 12, the provision therefore read: "The United States shall guarantee to every state in this union a Republican form of government, and shall protect each of them against invasion; and on application of the legislature or executive, against domestic violence."¹⁰⁴ On September 15, the phrase "when the Legislature can not be convened" was inserted following "executive," and the final provision was approved and sent to the states for ratification as Section 4 of Article IV of the Constitution.¹⁰⁵

94. *Id.*

95. *Id.* at 475.

96. *Id.*

97. *Id.*

98. *Id.* at 559.

99. *Id.*

100. *Id.* at 560.

101. *Id.*

102. *Id.* (Dickinson argued that an insurrection "might hinder the Legislature from meeting").

103. *Id.*

104. *Id.* at 625.

105. *Id.* at 648.

D. The Meaning of Protection

Focusing solely on the text for a moment, a few things can be said about the Protection Clause. There are two threats that the national government must protect the states from: invasion and domestic violence. The Clause treats the two differently. The national government's duty to protect a state from domestic violence is triggered when the state legislature (or governor if the legislature cannot convene) applies for protection.¹⁰⁶ The national government's duty to protect the states from invasion exists without any further triggering action or event.

In contrast to other provisions of the Constitution that refer to "the States" as an undifferentiated group,¹⁰⁷ Section 4 requires the national government to protect *each* of the states against the two specified threats. In other words, an equality principle is at play: The national government fails in its duties if it protects some states but not others.¹⁰⁸ Protecting *each* of the states suggests also taking into account the particular circumstances of individual states. What protects one state from invasion or domestic violence might not suffice to protect another. The text suggests, therefore, that states are entitled to the same result—protection—but that the means to achieve that result might well vary by state.

The use of "shall" in Article IV also bears mention. In contrast to Congress's permissible Article I powers—powers that Congress may choose whether or not to exercise—the Protection Clause *requires* the national government to protect the states from invasion and domestic violence. Shall means must: Section 4 creates obligations. Viewed in the context of the Constitution as a whole, the reason for obligating the national government to protect the states is evident. Because preceding provisions of the

106. The text leaves unclear whether the national government may act *sua sponte* against domestic violence if a state has not applied, but it is at least clear that if a state does apply, the national government must respond.

107. See, e.g., U.S. CONST. art. I, § 8 ("reserving to the States . . . the Appointment of the [militia] Officers, and the Authority of training the Militia according to the discipline prescribed by Congress"); *id.* amend. X ("reserved to the States").

108. Similarly, other references in the Constitution that refer to "each" state also reflect equality principles. See, e.g., *id.* art. I, §§ 2, 3 (representation) ("each State shall have at Least one Representative" and "[t]he Senate of the United States shall be composed of two Senators from each State . . . and each Senator shall have one Vote"); *id.* art. II, § 1, cl. 2 (same) ("Each State shall appoint . . . a Number of Electors . . ."); *id.* art. IV, § 1 (full faith and credit) ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."); *id.* § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States").

Constitution disable the states from acting in their own defense, Article IV assigns the national government responsibility for securing the country.

In order better to understand the context of Article IV, consider what the first three articles of the Constitution take away from the states. First, treaties: States cannot guard against attack by entering into treaties or military alliances with each other or with foreign nations or aggressors. Article I prohibits the states from "enter[ing] into any Treaty, Alliance, or Confederation"¹⁰⁹ or from "enter[ing] into any Agreement or Compact with another State, or with a foreign Power."¹¹⁰ Article II gives the sole power to make treaties to the President, with the concurrence of two-thirds of the Senate.¹¹¹ California cannot, therefore, send economic aid to Pyongyang in exchange for a promise that any missiles fired from North Korea will land in Arizona and Nevada. New York cannot prevent future terrorist attacks on Manhattan by allowing Al Qaeda to operate training camps in the Catskills. The midwestern states cannot create their own mutual-defense treaty.

Second, waging war: Article I gives Congress the power to tax and spend for the common defense, to declare war, to raise and support armies, and to maintain a navy.¹¹² Article II makes the President Commander in Chief.¹¹³ Article I denies the states a general power to maintain their own military forces and to wage war.¹¹⁴ States cannot, therefore, launch preemptive attacks, and they lack the means to do so in any event.

Third, the regulation of foreigners: One way to prevent attacks is to prevent the entry and movement of would-be attackers. But the states are disabled from regulating the entry of foreigners from abroad because the Constitution assigns the power exclusively to Congress.¹¹⁵

109. *Id.* art. I, §10, cl. 1.

110. *Id.*

111. *Id.* art. II, § 2.

112. *Id.* art. I, § 8.

113. *Id.* art. II, § 2.

114. *Id.* art. I, § 10, cl. 3 ("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.").

115. *Id.* § 8. To be accurate, Article I only gives Congress authority "[t]o establish a uniform Rule of Naturalization." *Id.* In the early Republic, states monitored the arrival of foreigners in their ports. New York, for example, required masters of arriving ships to provide information on passengers and pay a tax on each of them, a measure aimed at deterring the indigent. In *New York v. Miln*, 36 U.S. (11 Pet.) 102 (1837), the Supreme Court upheld these requirements as an exercise of the state's police powers. In 1849 the Court retreated from this view, holding in *The Passenger Cases*, 48 U.S. (7 How.) 283 (1849), that state taxes on immigrants infringed Congress's exclusive Article I power to regulate commerce with foreign nations. In *Henderson v. Mayor of New York*, 92 U.S. 259 (1876), the Court extended the reasoning to invalidate all state laws regulating immigrants. The

Fourth, trade: Because commercial disputes threaten war, a state might wish to favor commercial interests from powerful nations. However, the Constitution prohibits such efforts. Article I gives Congress authority to “regulate Commerce with foreign Nations,”¹¹⁶ and it disallows states from imposing tariffs on imports or exports without Congress’s consent.¹¹⁷ In short, because the states are not miniature sovereign nations with their own defensive capacities and full powers to deal with foreign states and their citizens, the national government must assume responsibility for protecting the states from attack. Although the guarantee of republican government has long produced confusion,¹¹⁸ the meaning of the Protection Clause is clear.¹¹⁹ It obliges the national government to protect the states from invasions by external foes and from insurrections from within.

It is therefore no accident that Section 4 of Article IV contains both the requirement that the United States guarantee republican government within the states and protect the states—and that the two are linked by “and” rather than “or.” These two obligations are closely related; security and republican government stand in Section 4 as constitutional bookends. While this is not the occasion for a full account of the elements of republican government, in very general terms it can be understood to mean self-rule: government by the people.¹²⁰ Article IV, Section 4, containing both the Guarantee Clause and the Protection Clause, implies that government

Court also held in *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (the Chinese Exclusion Case), that Congress as the national sovereign has exclusive power over the admission of foreigners.

116. U.S. CONST. art. I, § 8.

117. *Id.* § 10.

118. John Adams, confessing that he “never understood” the Guarantee Clause, observed that the term republican government is “so loose and indefinite that successive predominant factions will put glosses and constructions upon it as different as light and darkness.” Letter from John Adams to Mercy Warren (July 20, 1807), in *CORRESPONDENCE BETWEEN JOHN ADAMS AND MERCY WARREN* 353 (Charles F. Adams ed., Arno Press 1972) (1878). At the Massachusetts ratifying convention, Amos Singletary said that “[h]e did not understand what gentlemen meant by Congress guarantying a republican form of government; he wished they would not play round the subject with their fine stories, like a fox round a trap, but come to it.” Debates in the Convention of the Commonwealth of Massachusetts (Jan. 24, 1788) (statement of Amos Singletary), in 2 ELLIOT’S DEBATES, *supra* note 19, at 100–01.

119. This is not to say that uses of the Protection Clause have always been on the right track. In February 1799, the Massachusetts legislature invoked the Clause in passing a resolution supporting the constitutionality of the Alien and Sedition Acts of 1798. Resolution of Feb. 9, 1799 (Senate) & Feb. 13, 1799 (House), in 4 ELLIOT’S DEBATES, *supra* note 19, at 533–37 (stating that because the federal government is required to protect the state from “internal as well as external foes,” the expulsion of “aliens who . . . [are] ready to cooperate in an external attack” is justified).

120. Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 749 (1994) (“The central pillar of Republican Government . . . is popular sovereignty. In a Republican Government, the people rule.”).

based on self-rule is impossible to achieve and sustain without security. Conversely, security—protecting the states from attack—would be a hollow achievement if its price was the loss of republican government itself. Section 4 therefore imposes dual obligations of republican government *and* security. Neither may be set aside to achieve the other.¹²¹

Turning from text to history, the Protection Clause generated little recorded opposition in the state ratifying conventions, but the debates shed additional light on the meaning of the Clause. In Pennsylvania, James Wilson referred to the lessons from Shays' Rebellion in supporting the Constitution's strong role for Congress:

[I]t is not generally known on what a perilous tenure we held our freedom and independence at that period. The flames of internal insurrection were ready to burst out in every quarter . . . from one end to the other of the continent, we walked on ashes, concealing fire beneath our feet . . . ought Congress to be deprived of power to prepare for the defence and safety of our country?¹²²

In North Carolina, William Davie also cited Shays' Rebellion in arguing for strong national security powers.¹²³ At the Virginia Convention, James Madison emphasized the collective-action dilemma of security and the need for a coordinating, indeed coercive, national government:

If the general government is to depend on the voluntary contribution of the states for its support, dismemberment of the United States may be the consequence. In cases of imminent danger, the states more immediately exposed to it only would exert themselves; those remote from it would be too supine to interest themselves warmly in the fate of those whose distresses they did not immediately perceive. The general government ought, therefore, to be empowered to defend the whole Union.¹²⁴

121. The ratifying generation understood this point. See, e.g., THE FEDERALIST NO. 21, at 131–32 (Alexander Hamilton) (explaining how the guarantee of republican government “operate[s] against changes to be effected by violence” and “would be as much levelled against the usurpations of rulers, as against the ferments and outrages of faction and sedition in the community”).

122. Debates in the Convention of the State of Pennsylvania (Dec. 11, 1787) (statement of James Wilson), in 2 ELLIOT'S DEBATES, *supra* note 19, at 521.

123. Debates in the Convention of the State of North Carolina (July 24, 1788) (statement of William Davie), in 4 ELLIOT'S DEBATES, *supra* note 19, at 20 (“[I]f the rebellion in Massachusetts had been planned and executed with any kind of ability, that state must have been ruined; for Congress were not in a situation to render them any assistance.”).

124. Debates in the Convention of the Commonwealth of Virginia (June 7, 1788) (statement of James Madison), in 3 ELLIOT'S DEBATES, *supra* note 19, at 132.

John Marshall made a similar point, warning that “[u]nited we are strong, divided we fall.”¹²⁵

Also at the Virginia Convention, a debate occurred over the implications of the Protection Clause for state powers, particularly the states’ control of their principal security personnel, the militia.¹²⁶ Francis Corbin pointed to the provisions of the Protection Clause as evidence that the states retained control over their own militias when not in use by the national government.¹²⁷ William Grayson disputed this understanding, arguing that all circumstances in which a state might wish to use the militia would fall within the protection provisions of Article IV, and therefore under national authority.¹²⁸ John Marshall disagreed, arguing that even though the Constitution gave Congress certain duties under Article IV, Section 4, the states retained reserve powers, including powers to deploy their militia for the same purposes they had always used them.¹²⁹ Patrick

125. According to Marshall:

What government is able to protect you in time of war? Will any state depend on its own exertions? The consequence of such dependence and withholding this power from Congress will be, that state will fall after state and be a sacrifice to the want of power in the general government. *United we are strong, divided we fall*. Will you prevent the general government from drawing the militia of one state to another, when the consequence would be, that every state must depend on itself? The enemy, possessing the water, can quickly go from one state to another. No state will spare to another its militia, which it conceives necessary for itself. It requires a superintending power, in order to call forth the resources of all to protect all. If this be not done, each state will fall a sacrifice.

Debates in the Convention of the Commonwealth of Virginia (June 14, 1788) (statement of John Marshall) (emphasis added), in 3 ELLIOT’S DEBATES, *supra* note 19, at 420–21.

126. Part II *infra* takes up militia issues in detail.

127. Debates in the Convention of the Commonwealth of Virginia (June 14, 1788) (statement of Francis Corbin), *supra* note 125, at 417 (“He thought . . . [Article IV, Section 4] gave the states power to use their own militia, and call on Congress for the militia of other states.”).

128. Grayson said that Corbin

was mistaken when he produced the 4th section of the 4th article to prove that the state governments had a right to intermeddle with the militia. He was of opinion that a previous application must be made to the federal head, by the legislature when in session, or otherwise by the executive of any state, before they could interfere with the militia. In his opinion, no instance could be adduced where the states could employ the militia; for, in all the cases wherein they could be employed, Congress had the exclusive direction and control of them. . . . He thought that, if there was a constructive implied power left in the states, yet, as the line was not clearly marked between the two governments, it would create differences.

Id. at 417–18 (statement of William Grayson).

129. According to Marshall:

The state legislatures had power to command and govern their militia before, and have it still, undeniably, unless there be something in this Constitution that takes it away.

For Continental purposes Congress may call forth the militia—as to suppress insurrections and repel invasions. But the power given to the States by the people is not taken away; for the Constitution does not say so. . . . All the restraints intended to be laid on the state governments (besides where an exclusive power is expressly given to Congress) are contained in the 10th section of the 1st article. This power is not included in the restrictions in that section. But what excludes every possibility of doubt, is the last part of

Henry thought Marshall's understanding failed with respect to domestic insurrections. Because Article I of the Constitution prohibits states from "engag[ing] in war unless actually invaded," the implication is that a state is allowed to muster militia to defend itself from invaders but not from domestic insurrections. Hence, Section 4 of Article IV "expressly directs that, in case of domestic violence, Congress shall protect the states on application of the legislature or executive; and the 8th section of the 1st article gives Congress power to call forth the militia to quell insurrections; there cannot, therefore, be a concurrent power."¹³⁰ Henry thought this a defect of the Constitution because "[t]he State legislatures ought to have power to call forth the efforts of the militia, when necessary" in the case of an "urgent, pressing, and instantaneous" need. Requiring the states to apply first to Congress, he thought, might be "fatal."¹³¹

James Madison offered the best rebuttal to these interpretations of the Protection Clause's negative implications. According to Madison, while Congress has a duty to protect the states, it does not follow that the states have no power to maintain order within their borders. Rather,

[t]he 4th section of the 4th article is perfectly consistent with the exercise of the power by the states. . . . [T]hey are to be protected from invasion from other states, as well as from foreign powers; and, on application by the legislature or executive, as the case may be, the militia of the other states are to be called to suppress domestic insurrections. Does this bar the states from calling forth their own militia? No; but it gives them a supplementary security to suppress insurrections and domestic violence. [Under Article I, Section 10, the states] . . . are restrained from making war, unless invaded, or in imminent danger. When in such danger, they are not restrained. I can perceive no competition in these clauses. They cannot be said to be repugnant to a concurrence of the power.¹³²

it—that "no state shall engage in war, unless actually invaded, or in such imminent danger as will not admit of delay." When invaded, they can engage in war, as also when in imminent danger. This clearly proves that the states can use the militia when they find it necessary.

Id. at 419–20 (statement of John Marshall).

130. *Id.* at 423 (statement of Patrick Henry).

131. *Id.*

132. *Id.* at 425. Madison suggests also that the word "invasion" does not have the same meaning in Article IV, Section 4 as in Article I, Section 8. In his view,

[t]he word *invasion* . . . [in Article IV, Section 4], after power had been given in . . . [Article I, Section 8] to repel invasions, may be thought tautologous, but it has a different meaning. . . . This clause speaks of a particular state. It means that it shall be protected from invasion by other

In agreeing with Madison's understanding, George Nicholas emphasized that Article IV, Section 4 "was introduced wholly for the particular aid of the states. A republican form of government is guarantied, and protection is secured against invasion and domestic violence on application."¹³³ The provision represented, in his view, "a guard as strong as possible" and "exclude[s] the unnecessary interference of Congress in business of this sort," but "gives an additional security; for, besides the power in the state governments to use their own militia, it will be the duty of the general government to aid them with the strength of the Union when called for."¹³⁴ Also agreeing with Madison, Edmund Pendleton emphasized the federalist nature of the Protection Clause with respect to domestic violence: "This is a restraint on the general government not to interpose. The state is in full possession of the power of using its own militia to protect itself against domestic violence; and the power in the general government cannot be exercised, or interposed, without the application of the state itself."¹³⁵

E. The Security Constitution

The Protection Clause is an important element of a constitution concerned as much with security as it is with governmental structures and individual rights. In clause after clause, the Constitution is a blueprint for domestic security. According to the Preamble, among the goals of "We the People" in "establish[ing] this Constitution" are to "insure domestic Tranquility, [and] provide for the common defence."¹³⁶ Only then, the Preamble says, can we seek to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."¹³⁷

states. A republican government is to be guarantied to each state, and they are to be protected from invasion from other states, as well as from foreign powers.

Id. Whether or not Madison is right that there is a different quality to the two uses of the term invasion, it should at least be clear (as the last sentence quoted above confirms) that he is not suggesting that the only meaning of invasion in Article IV, Section 4 is of one state by another.

133. *Id.* at 427 (statement of George Nicholas).

134. *Id.*

135. *Id.* at 441 (statement of Edmund Pendleton). In making this point, Pendleton suggests that Congress is not even obliged to come to the aid of a state: "Congress may, at their pleasure, on application of the state legislature, or (in vacation) of the executive, protect each of the states against domestic violence." *Id.* He does not press the view, one that was of course inconsistent with the text and origin of the Clause.

136. U.S. CONST. pmbl.

137. *Id.* The same order of priority appears in Alexander Hamilton's list in *The Federalist No. 23* of the Constitution's purposes. Hamilton stated, "The principal purposes to be answered by union are these—The common defence of the members—the preservation of the public peace as well against internal convulsions as external attacks—the regulation of commerce with other nations and between the States—the superintendence of our intercourse, political and commercial, with foreign countries." THE FEDERALIST NO. 23, at 146–47 (Alexander Hamilton).

Security also features prominently in the organization of the three branches of government under Articles I, II, and III of the Constitution. The opening clause of Article I, Section 8 empowers Congress “[t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence . . . of the United States.”¹³⁸ Of the other seventeen clauses enumerating congressional powers in Section 8, ten relate closely to security,¹³⁹ and an eleventh power—to suspend habeas corpus in times of insecurity—can be inferred from Section 9.¹⁴⁰ Article I, as we have seen, also prohibits the states from exercising key security-related powers.¹⁴¹ Yet the Constitution does not make the states irrelevant to security. For one, they can fight back without waiting for a federal response if invaded or in imminent danger.¹⁴² The security provisions of the Constitution also take for granted the availability of state militiamen.¹⁴³ Moreover, the states determine

138. U.S. CONST. art. I, § 8.

139. The ten are: (1) “To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes,” *id.* cl. 3 (thereby preventing trade wars); (2) “To establish an uniform Rule of Naturalization,” *id.* cl. 4; (3) “To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations,” *id.* cl. 10; (4) “To declare War, grant letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water,” *id.* cl. 11; (5) “To raise and support Armies,” *id.* cl. 12; (6) “To provide and maintain a Navy,” *id.* cl. 13; (7) “To make Rules for the Government and Regulation of the land and naval Forces,” *id.* cl. 14; (8) “[T]o exercise . . . Authority over all places purchased . . . for the Erection of Forts, Magazines, [and] Arsenals,” *id.* cl. 17; (9) the clauses empowering Congress “[t]o provide for calling forth the Militia,” *id.* cl. 15; and (10) “[t]o provide for organizing, arming, and disciplining” them, *id.* cl. 16. An important limitation on Congress’s army-financing power is that “no Appropriation of Money to that Use shall be for a longer Term than two Years . . .” *Id.* cl. 12.

140. *Id.* § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”); see also Hamdi v. Rumsfeld, 542 U.S. 507, 597–98 (2004) (discussing Congress’s authority to suspend the writ).

141. Article I, Section 10, Clause 1 prevents the states from entering “any Treaty, Alliance, or Confederation,” from granting letters of marque and reprisal, and, unless Congress consents, from imposing import or export duties. U.S. CONST. art. I, § 10, cls. 1–2. Further, Clause 2 provides:

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Id. cl. 2.

142. *Id.* § 10; see also Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 682 (1972). Lofgren notes that this provision

had far more meaning in the 1780’s when communications and transportation would not have allowed an immediate federal response to a truly surprise attack. In such a situation, the real problem would have been whether states might act prior to a national decision.

Id.

143. See U.S. CONST. art. I, § 8, cls. 15–16 (creating Congress’s authority “[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions,” and “[t]o provide for organizing, arming, and disciplining, the Militia”); *Id.* art. II, § 2 (“The President shall be Commander in Chief . . . of the Militia of the several States, when called into the actual Service of the United States.”).

when the national government will act, as the national obligation to protect the states from domestic insurrection is triggered by “Application” of the legislature (or governor).¹⁴⁴

The first of the President’s Article II powers is also for security. The President is “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”¹⁴⁵ The second Article II power is to “make Treaties” with the concurrence of two-thirds of the Senate.¹⁴⁶ While courts are not often thought of as military actors, the security theme of the Constitution continues in one section of Article III. Section 3 contains the Constitution’s single specification of a substantive criminal offense—treason.¹⁴⁷

Article IV, in addition to imposing the dual requirements that the national government protect and guarantee republican government to the states, contains three other security-related provisions. These are the Extradition Clause,¹⁴⁸ the Fugitive Slave Clause,¹⁴⁹ and a provision preserving state geography.¹⁵⁰ Each seeks to harmonize relationships among the states by heading off three likely sources of war: harboring fugitives, harboring slaves, and altering state borders.

Over and over in the Constitution, security is thus taken up specifically or is never far from mind. . Our modern characterization of the Constitution as one of government structures and individual rights pays insufficient attention to the Constitution as a document designed to

144. *Id.* art. IV, § 4.

145. *Id.* art. II, § 2, cl. 1.

146. *Id.* cl. 2.

147. The provision reads more like a criminal statute than a constitutional provision. It reads: Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained.

Id. art. III, § 3. Notably, treason is also the first offense listed in Article II for which officials may be removed from office. *Id.* art. II, § 4.

148. *Id.* art. IV, § 2, cl. 2 (requiring “deliver[ing] up” any “Person charged . . . with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State”).

149. *Id.* cl. 3, *superseded by* amend. XIII (stating that “[n]o Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall . . . be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due”).

150. *Id.* § 3 (prohibiting formation of new states within an existing state and prohibiting junction of states or parts of states without the consent of Congress and the states’ legislatures).

prevent and respond to war and rebellion.¹⁵¹ The Protection Clause, rather than a peripheral provision that deserves to be forgotten, in an important sense is the Constitution's key.

F. Summary

Homeland security is not a new problem. The ratifying generation understood the need for a constitution that would safeguard states and their cities from invasions and from internal violence. The Protection Clause is a key component of the security constitution. Empowering the national government to come to the aid of states allows for a coordinated response to security problems with national implications. Requiring the national government to protect the states overcomes the collective-action barriers to security and ensures that the states receive the assistance they need.

II. OF ARMIES AND MILITIA

From this understanding of the purposes of and the reasons for the Constitution's Protection Clause, the discussion moves to practicalities. Requiring the United States to protect the states is all well and good, but the national government needs the right tools and sufficient resources to carry out the mandate. This part examines how the Constitution anticipates the national government will go about protecting the states and the reasons for the Constitution's particular design. As it turns out, the national government either can do the work of securing the states itself by sending in federal personnel, or it can pay the states, including by hiring their personnel, to carry out the task. Of these two options, the Constitution prefers (if a constitution can be said to have preferences) the second, because state personnel are more likely to respect and safeguard individual liberties. All of this is contained in the provisions of Articles I and II of the Constitution—provisions closely related to the Protection Clause of Article IV—that concern national employment of the principal state personnel of the eighteenth-century: the militia. Later Part IV will take up the issues of translating the Constitution from the age of the militia to today's War on Terrorism, and the ways in which the early history of national security under

151. Note in this regard that even the Fourteenth Amendment authorizes, but does not require, Congress to enforce programs prohibiting the states from abridging privileges or immunities of citizens, depriving persons of life, liberty, or property without due process of law, or denying persons equal protections of the laws. *Id.* amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

the Protection Clause informs and resolves the problems of contemporary homeland security. For now, however, the task is to get straight the original story of how the national government is to provide security on the ground.

A. Deployment and Employment

How does the federal government fulfill its obligation to protect the states? Here, too, the Constitution provides a clear answer. There are two mechanisms. The first is by the use of federal military personnel in accordance with the Article I authorization to Congress “[t]o raise and support Armies” and “[t]o provide and maintain a Navy,”¹⁵² and the designation in Article II of the President as the “Commander in Chief of the Army and Navy of the United States”¹⁵³ The second mechanism is by employing the militia of the states. Article I authorizes Congress to “provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions,”¹⁵⁴ and Article II makes the President “Commander in Chief . . . of the Militia of the several States, when called into the actual Service of the United States.”¹⁵⁵ Therefore, though Article IV obligates the United States to provide protection, on the ground the actual work of providing security is split. The national government can deploy federal personnel or it can employ state personnel.

The Constitution envisages that the national government often will wish, and indeed will be required, to rely on state militia to respond to security threats. For that to happen, the militia must be trained and equipped properly. Hence, Congress has additional powers under Article I 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,” while “reserving to the States . . . the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.”¹⁵⁶ Although Congress is not required to outfit and organize

152. *Id.* art. I, § 8, cl. 13.

153. *Id.* art. II, § 2, cl. 1.

154. *Id.* art. I, § 8, cl. 15.

155. *Id.* art. II, § 2, cl. 1.

156. *Id.* art. I, § 8, cl. 16. Charles Pinckney of South Carolina therefore observed in explaining how the Constitution overcomes the central defect of the Articles of Confederation:

At present the United States [under the Articles of Confederation] possess no power of directing the Militia, and must depend upon the States to carry their Recommendations upon this subject into execution—while this dependence exists, like all their other reliances upon the States for measures they are not obliged to adopt, the Federal views and designs must ever be delayed and disappointed. To place therefore a necessary and Constitutional power of defence and coercion in the hands of the Federal authority, and

the militia, as a practical matter it will need to do so if it wants to call forth an effective fighting force.¹⁵⁷ Properly organized, armed, and disciplined, the militia can be employed and delegated by the national government, under the command of the President, to carry out the mandate of the Protection Clause.

B. Security and Liberty

Military authority is normally thought to be indivisible. Consider, then, what the Constitution imagines in allowing the national government to fulfill its security obligation by employing militiamen in place of deploying federal personnel. Citizens of a state will be part of the state militia units. At certain times, the national government will call up those units, and they will serve under the authority of the President for the cause of national security. The militia will answer to the President as Commander in Chief, but the states will continue to train the militia and appoint their officers, albeit in a manner consistent with a plan the national government has devised.

An ingenious military strategy? Hardly. It is not difficult to see the potential problems: state militiamen required during certain periods to obey federal officers, states conferring promotions on militiamen who might be deemed unworthy by the Commander in Chief, and militia units poorly trained to carry out the functions that the national government requires of them. The Constitution's elaborate (and potentially problematic) division of the security function between a national military force and the militia, over which authority is further split, like much else at the time represents a

to render our Militia uniform and national . . . they should have the exclusive right of establishing regulations for their Government and Discipline, which the States should be bound to comply with, as well as with their Requisitions for any number of Militia, whose march into another State, the Public safety or benefit should require.

Charles Pinckney, *Observations on the Plan of Government Submitted to the Federal Convention in Philadelphia*, in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 118–19 (Max Farrand ed., 1966).

157. Hence, it was not long before these Article I powers were also spoken about as involving duties. See, e.g., Recommendation of the Secretary of War that Camp Equipage and Knapsacks be Provided for the Militia when called into the Service of the United States (Feb. 10, 1836), in 6 AMERICAN STATE PAPERS: MILITARY AFFAIRS 93 (William S. Hein & Co., Inc. 1993) (1861) (“It can hardly be expected that camp kettles and other articles of camp equipage can be provided by the troops themselves.”); Clothing the Militia (Jan. 12, 1820), in 2 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra*, at 44–45 (stating that “it is the duty of the Congress of the United States to endeavor, by every means in their power, consistent with the provisions of the constitution, to qualify . . . [the militia] for the most efficient discharge of [their defense functions]” including providing for the militia’s “organization and discipline,” and ensuring that militiamen “have sufficient clothing to encounter the various climates and inclement seasons of the United States”).

compromise. Among the ratifying generation, support for a national military coexisted with widespread fears of a standing army.¹⁵⁸ Proponents of the Constitution hammered out in Philadelphia—with its assignment of military power to the national government—emphasized that the United States, like other modern nations, needed a national military force,¹⁵⁹ and that without a national military the country would be vulnerable to attack.¹⁶⁰ Moreover, the power to raise armies could not be limited to times of actual war because military preparations must be made in advance.¹⁶¹ From this perspective, the militia did not represent a sufficient security force. Militia units (as Shays' Rebellion amply had demonstrated) might support an insurrection.¹⁶² Relying on the militia also required the difficult task of coordinating the various units of different states.¹⁶³ Further, the militia could not easily be expected to provide permanent security at forts and harbors.¹⁶⁴ In addition, militia service, in contrast to a national army financed by taxation,

158. See generally Bernard Donahoe & Marshall Smelser, *The Congressional Power to Raise Armies: The Constitutional and Ratifying Conventions, 1787–1788*, 33 REV. POL. 202 (1971).

159. See, e.g., James Wilson, *Substance of an Address to a Meeting of the Citizens of Philadelphia* (Oct. 6, 1787), reprinted in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787–1788, at 158 (Paul Leicester Ford ed., 1888) [hereinafter PAMPHLETS ON THE CONSTITUTION]; MADISON'S NOTES, *supra* note 32, at 484 (Aug. 18, 1787) (statement of Charles Pinckney) (footnotes omitted) ("He had . . . but a scanty faith in Militia. There must be also a real military force. This alone can effectually answer the purpose. The United States had been making an experiment without it, and we see the consequence in their rapid approaches towards anarchy."); Debate before the Convention of the Commonwealth of Pennsylvania (Dec. 11, 1787), *supra* note 122, at 520 (statement of James Wilson) ("A government without the power of defence! [I]t is a solecism.").

160. Here is what Alexander Hamilton thought about relying solely on the militia for the security function:

The steady operations of war against a regular and disciplined army, can only be successfully conducted by a force of the same kind. Considerations of economy, not less than of stability and vigor, confirm this position. The American Militia, in the course of the [Revolutionary War], have by their valour on numerous occasions, erected eternal monuments to their fame; but the bravest of them feel and know, that the liberty of their country could not have been established by their efforts alone, however great and valuable they were. War, like most other things, is a science to be acquired and perfected by diligence, by perseverance, by time, and by practice.

THE FEDERALIST NO. 25, at 161–62 (Alexander Hamilton).

161. See, e.g., Tench Coxe, *An Examination of the Constitution for the United States of America*, reprinted in PAMPHLETS ON THE CONSTITUTION, *supra* note 159, at 150; Alexander Contee Hanson, *Remarks on the Proposed Plan of a Federal Government*, reprinted in PAMPHLETS ON THE CONSTITUTION, *supra* note 159, at 234.

162. See, e.g., THE FEDERALIST NO. 28 (Alexander Hamilton).

163. See, e.g., THE FEDERALIST NOS. 19, 22 (Alexander Hamilton); Debate before the Convention of the State of New York (June 23, 1788) (statement of Oliver Ellsworth), in 2 ELLIOT'S DEBATES, *supra* note 19, at 278.

164. See THE FEDERALIST NO. 24 (Alexander Hamilton); Debate before the Convention of the Commonwealth of Virginia (June 7, 1788) (statement of Francis Corbin), *supra* note 124, at 112–13.

unfairly burdens poorer citizens.¹⁶⁵ More generally, the militia simply was not up to the task of securing an entire country.¹⁶⁶ As Gouverneur Morris stated bluntly, the militia was an “expensive and inefficient force,” and to rely on the militia for national security was “to lean on a broken reed.”¹⁶⁷

In supporting the allocation of military powers to the national government, proponents of the Constitution emphasized that the appropriations requirement of Article I would keep any national military in check.¹⁶⁸ While the Virginia Plan had proposed giving Congress unlimited power to raise armies, the Philadelphia Convention ultimately borrowed from the British a financial limitation: “[N]o Appropriation of Money to that Use shall be for a longer Term than two Years.”¹⁶⁹ A second check exists in the limitations on the President’s powers as Commander in Chief. Congress, not the President, declares war and raises national troops,¹⁷⁰ and the militia units fall under the authority of the Commander in Chief only when they are called forth into federal service.¹⁷¹ Unlike the British monarch who wielded both the sword and the purse, the President’s powers thus were to be more easily controlled.¹⁷² Moreover, as Alexander Hamilton argued, it was actually more conducive to liberty to place authority over the army in the national government than in the states. Hamilton noted:

As far as an army may be considered as a dangerous weapon of power, it had better be in those hands, of which the people are most likely to be

165. See THE FEDERALIST NO. 25 (Alexander Hamilton); Debate before the Convention of the Commonwealth of Virginia (June 9, 1788) (statement of Henry Lee), in 3 ELLIOT’S DEBATES, *supra* note 19, at 178.

166. See, e.g., Debate before the Convention of the Commonwealth of Virginia (June 16, 1788) (statement of Edmund Randolph), in 3 ELLIOT’S DEBATES, *supra* note 19, at 77. Randolph stated:

I will pay the last tribute of gratitude to the militia of my country: they performed some of the most gallant feats during the last war, and acted as nobly as men inured to other avocations could be expected to do; but . . . it is dangerous to look to them as our sole protectors.

Id.

167. Letter from Gouverneur Morris to Moss Kent (Jan. 12, 1815), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 156, at 420–21.

168. See THE FEDERALIST NO. 8 (Alexander Hamilton); THE FEDERALIST NO. 46 (James Madison); Noah Webster, *An Examination into the Leading Principles of the Federal Constitution* (1787), reprinted in PAMPHLETS ON THE CONSTITUTION, *supra* note 159, at 56; Debate before the Convention of the Commonwealth of Virginia (June 9, 1788) (statement of Henry Lee), *supra* note 165, at 181.

169. U.S. CONST. art. I, § 8, cl. 12. Presumably, the same limit was not applied to the navy because, as a practical matter, naval men would be less capable of seizing power or aiding an oppressive government to suppress the freedom of citizens.

170. *Id.* cl. 11.

171. *Id.* art. II, § 2, cl. 1.

172. Indeed, the President’s powers were lesser even than those of some state governors. See, e.g., THE FEDERALIST NO. 69, at 464–67 (Alexander Hamilton) (discussing why the President’s military powers are inferior to those of the king and even to those of some state governors).

jealous, than in those of which they are least likely to be jealous. For it is a truth which the experience of all ages has attested, that the people are always most in danger, when the means of injuring their rights are in the possession of those of whom they entertain the least suspicion.¹⁷³

Giving power to the national government imposed risks, but in this instance, there were mechanisms to ensure the use of that power would not become oppressive.

Federalists also emphasized the important role the militia would perform under the Constitution to prevent abuses by a standing national army. Some delegates to Philadelphia specifically sought to add to the Constitution a statement that the militia was a guard “against the danger of standing armies in time of peace.”¹⁷⁴ Hamilton in *The Federalist No. 29* argues that federal control over the militia protects liberties: The militia is “the only substitute that can be devised for a standing army; [and] the best possible defense against it, if it should exist.”¹⁷⁵ Madison calculated that given the option of employing the militia, the federal government would not need a very large army at all: It would never comprise more than 25,000 or 30,000 men.¹⁷⁶ An army of that size presented little risk to liberties because it would be “opposed [by] a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence.”¹⁷⁷ In any showdown, the militia would never “be conquered by such a proportion of regular troops.”¹⁷⁸ Preventing abuses by a national army therefore required giving the national government power to employ militiamen for security purposes so it would not be tempted to deploy federal troops instead.¹⁷⁹ As

173. THE FEDERALIST NO. 25 (Alexander Hamilton).

174. MADISON’S NOTES, *supra* note 32, at 639 (Sept. 14, 1787) (recording a proposal by George Mason and Edmund Randolph).

175. THE FEDERALIST NO. 29, at 184–85 (Alexander Hamilton).

176. THE FEDERALIST NO. 46, at 321 (James Madison).

177. *Id.*

178. *Id.*

179. See Debate before the Convention of the Commonwealth of Virginia (June 14, 1788), *supra* note 125, at 381 (statement of James Madison). Madison stated:

I...agree...that a standing army is one of the greatest mischiefs that can possibly happen.... The most effectual way to guard against a standing army, is to render it unnecessary. The most effectual way to render it unnecessary, is to give the general government full power to call forth the militia, and exert the whole natural strength of the Union, when necessary. Thus you will furnish the people with sure and certain protection, without recurring to this evil....

Id. Madison further argued that the national government would have “no temptation whatever to abuse” its power to employ the militia because “such abuse could only answer the purpose of exciting the universal indignation of the people” and drawing “the general hatred and detestation of the country.” *Id.*

for the militia, it would never turn against the people even while under federal command, because “the existence of subordinate governments to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterprises of ambition”¹⁸⁰ Finally, Federalists emphasized that because the militia comprised ordinary citizens, giving the national government power to march militia units into other states would not render them an instrument of oppression.¹⁸¹

To opponents of the Constitution, assigning the national government any power to create standing armies brought to mind all of the abuses of the Stuart monarchy.¹⁸² To some, the defect was fatal. “I abominate and detest the idea of a government, where there is a standing army,” announced an angry George Mason at the Virginia ratifying convention in 1788.¹⁸³ Elbridge Gerry and Luther Martin also argued against ratifying the Constitution because it

180. THE FEDERALIST NO. 46, at 321–22 (James Madison). Similarly, in *The Federalist* No. 8, Hamilton observed that

[t]he smallness of the army renders the natural strength of the community an overmatch for it; and the citizens, not habituated to look up to the military power for protection, or to submit to its oppressions, neither love nor fear the soldiery: They view them with a spirit of jealous acquiescence in a necessary evil, and stand ready to resist a power which they suppose may be exerted to the prejudice of their rights. The army under such circumstances, may usefully aid the magistrate to suppress a small faction, or an occasional mob, or insurrection; but it will be unable to enforce encroachments against the united efforts of the great body of the people.

THE FEDERALIST NO. 8, at 47–48 (Alexander Hamilton).

181. See Debate before the Convention of the Commonwealth of Virginia (June 9, 1788) (statement of Henry Lee), *supra* note 165, at 178–79. According to Lee:

The people of America . . . are one people. I love the people of the north, not because they have adopted the Constitution, but because I fought with them as my countrymen, and because I consider them as such. Does it follow from hence that I have forgotten my attachment to my native state? In all local matters I shall be a Virginian: in those of a general nature, I shall not forget that I am an American.

Id.

182. On standing armies, see, for example, Letter from Samuel Adams to Joseph Warren (Jan. 7, 1776), in 1 WARREN-ADAMS LETTERS 197–98 (Mass. Hist. Soc. 1917). Adams writes:

A standing Army, however necessary it may be at some times, is always dangerous to the Liberties of the People. Soldiers are apt to consider themselves as a Body distinct from the rest of the Citizens. They have their Arms always in their hands. Their Rules and their Discipline is [sic] severe. They soon become attached to their officers and dispos[e]d to yield implicit obedience to their Commands. Such a Power should be watch[e]d with a jealous Eye.

Id. Notably, the Declaration of Independence complains that King George III “has kept among us, in times of peace, Standing Armies” and has “affected to render the Military independent of and superior to the Civil power” and “quarter[ed] large Bodies of Armed Troops among us.” DECLARATION OF INDEPENDENCE ¶¶ 13, 14, 16 (1776).

183. Debate before the Convention of the Commonwealth of Virginia (June 14, 1788) (statement of George Mason), *supra* note 125, at 379.

authorized Congress to raise and maintain armies in times of peace.¹⁸⁴ To their opponents, the Federalists' claims about the need for federal military powers and the Constitution's built-in safeguards for liberty rang hollow. Giving Congress the power to raise and maintain armies allowed deployment of the military to support a monarchy.¹⁸⁵ The very need for a national army was proof that citizens would not respect the federal government.¹⁸⁶ Federalists had exaggerated the risk of foreign invasions and domestic insurrections to generate support for inadvisable federal powers.¹⁸⁷ Granting authority to the national government over the militia would destroy the states,¹⁸⁸ or at least undermine the ability of the states to maintain order at home.¹⁸⁹

Critics argued that national control of the militia would undermine, not protect, liberties.¹⁹⁰ There was no need for a national army because the

184. See Luther Martin, *The Genuine Information delivered to the Legislature of the State of Maryland, relative to the Proceedings of the General Convention*, in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 156, at 207–09 (“[T]his plan of government, instead of *guarding against a standing army*, that engine of arbitrary power, which has so often and so successfully been used for the *subversion of freedom*, has in its formation given it an *express and constitutional sanction* . . .”).

185. See, e.g., Elbridge Gerry, *Observations on the New Constitution and on the Federal and State Conventions*, By a Columbian Patriot (1788), reprinted in PAMPHLETS ON THE CONSTITUTION, *supra* note 159, at 10; Debate before the Convention of the Commonwealth of Virginia (June 5, 1788) (statement of Patrick Henry), in 3 ELLIOT'S DEBATES, *supra* note 19, at 51; Debate before the Convention of the Commonwealth of Massachusetts (Feb. 1, 1788) (statement of Samuel Nason), in 2 ELLIOT'S DEBATES, *supra* note 19, at 136.

186. See, e.g., Debate before the Convention of the Commonwealth of Virginia (June 24, 1788) (statement of John Dawson), in 3 ELLIOT'S DEBATES, *supra* note 19, at 611.

187. On the risk of foreign invasion, see, for example, Debate before the Convention of the Commonwealth of Virginia (June 11, 1778) (statement of William Grayson), in 3 ELLIOT'S DEBATES, *supra* note 19, at 277. On the risk of domestic insurrections, see, for example, Debate before the Convention of the Commonwealth of Virginia (June 5, 1788) (statement of Patrick Henry), *supra* note 165, at 48. Henry argued:

Is there a disposition in the people of this country to revolt against the dominion of laws? Has there been a single tumult in Virginia? Have not the people of Virginia, when laboring under the severest pressure of accumulated distresses, manifested the most cordial acquiescence in the execution of the laws? . . . Is there any revolution in Virginia?

Id.

188. Ellsworth complained at the Federal Convention: “The whole authority over the Militia ought by no means be taken away from the States whose consequence would pine away to nothing after such a sacrifice of power.” MADISON'S NOTES, *supra* note 32, at 483. John Dickinson of Pennsylvania opined, “[T]he States never would or ought to give up all authority over the Militia.” *Id.* at 483. Luther Martin, seeking to persuade Maryland to reject the Constitution, thought the Militia Clause was evidence that “the advocates of this system design the *destruction of the State governments* . . .” Martin, *supra* note 184, at 209.

189. Roger Sherman of Connecticut “took notice that the States might want their Militia for defence against invasions and insurrections, and for enforcing obedience to their laws.” MADISON'S NOTES, *supra* note 32, at 485.

190. See, e.g., Debate before the Convention of the Commonwealth of Virginia (June 5, 1788) (statement of Patrick Henry), *supra* note 185, at 47, 51 (complaining that national control of the militia would “trample on our fallen liberty”).

militia could continue to provide defense—the poor performance of the militia during Shays' Rebellion did not reflect its true fighting capacity.¹⁹¹ And if there was to be national military power, more control over the national government was needed. During the course of the ratification debates, several states proposed that Congress be required to approve by a super majority any army appropriation.¹⁹² These objections to the Constitution's assignment of military powers at the national level were not the exaggerations of a fringe minority. They reflected firsthand experience with British regulars. Without the prospect of soon amending the Constitution to add a Bill of Rights to protect against federal powers—including by safeguarding the state militia—the proposed Constitution likely would not have been ratified at all.¹⁹³

C. The Militia Heritage

To appreciate what was at stake in these late eighteenth-century debates over the proposed national army and the compromise that the Constitution wrought, it is useful to review briefly the American militia heritage and the state of affairs on the eve of the Constitutional Convention.¹⁹⁴ During the seventeenth century, every colony except Pennsylvania

191. See Debate before the Convention of the Commonwealth of Massachusetts (Feb. 1, 1788) (statement of Samuel Nason), *supra* note 185, at 137 (blaming the lack of "alacrity shown by the militia" on the fact that "they were going to fight their countrymen," and arguing that "such supineness would [not] have been discovered" had the British invaded).

192. See Proceedings of the Meeting at Harrisburg in Pennsylvania (Sept. 3, 1788), in 2 ELLIOT'S DEBATES, *supra* note 19, at 542, 545–46; Debate before the Convention of the State of New York (July 2, 1788), in 2 ELLIOT'S DEBATES, *supra* note 19, at 406–11; Debate before the Convention of the Commonwealth of Virginia (June 27, 1788), in 3 ELLIOT'S DEBATES, *supra* note 19, at 660.

193. As historian Don Higginbotham writes, in understanding the history of the Second Amendment, it is critical to recognize "how disturbing . . . to the Antifederalists" was "the shift from the states' total control of their militias to the sharing of that authority under the Constitution" Don Higginbotham, *The Federalized Militia Debate: A Neglected Aspect of Second Amendment Scholarship*, 55 WM. & MARY Q. 39, 40 (1998). Elbridge Gerry, in the debates over the Bill of Rights, summarized the concerns in the following manner:

Whenever Government means to invade the rights and liberties of the people, they always attempt to destroy the militia, in order to raise an army upon their ruins. This was actually done by Great Britain at the commencement of the late revolution. They used every means in their power to prevent the establishment of an effective militia to the eastward. The Assembly of Massachusetts, seeing the rapid progress that administration were making . . . endeavored to counteract them by the organization of the militia; but they were always defeated by the influence of the Crown.

1 ANNALS OF CONG. 778 (1834).

194. This paragraph draws on JERRY COOPER, *THE RISE OF THE NATIONAL GUARD: THE EVOLUTION OF THE AMERICAN MILITIA, 1865–1920* (1997). See generally LAWRENCE DELBERT CRESS, *CITIZENS IN ARMS: THE ARMY AND THE MILITIA IN AMERICAN SOCIETY TO THE WAR OF 1812* (1982); MARCUS CUNLIFFE, *SOLDIERS & CIVILIANS: THE MARTIAL SPIRIT IN AMERICA*,

organized a militia, based loosely on the militia system in England. Although the English had abandoned universal service in favor of a select militia of property owners controlled by the Crown, American colonists revived the practice of universal service. Every able-bodied, white male was required to arm himself, enroll in the local unit, participate in training exercises, and go to fight when called. Universal did not therefore mean everyone: Blacks, Native Americans, women, and indentured servants were excluded, and there were limited exemptions for certain occupational groups like ministers or government officials. Colonial militia laws specified fines for failing to participate as required or failing to maintain the correct arms and equipment. Though nominally under the control of the colonial legislature (and subject to colonial law), and under the command of the governor, colonial militias overwhelmingly were local institutions. Training occurred at the local level, local officers commanded the militia, and local officials imposed and collected fines for failing to fulfill militia obligations. Statutes limited the ability of the militia to serve beyond its immediate locale, and to respond effectively to attacks, local officials were authorized to call out their units without further authorization from the central government. Not surprisingly, colonial militia units were often poorly skilled (they were only part-time soldiers) and disorganized (they had little practice), particularly when it came to colony-wide coordination. If there were any doubts, the French and Indian War (1756–1763) amply demonstrated the weakness of the militia and its inadequacies when asked to work alongside the professional British army.

In addition to their militia, the colonies had volunteer troops that, by the beginning of the eighteenth century, had become the principal defensive force.¹⁹⁵ These troops were raised by the colonial legislature, sometimes

1775–1865 (1973); RICHARD H. KOHN, *EAGLE AND SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT IN AMERICA, 1783–1802* (1975); S.T. Ansell, *Legal and Historical Aspects of Militia*, 26 *YALE L.J.* 471 (1917); John K. Mahon, *The American Militia: Decade of Decision, 1789–1800*, U. FLA. MONOGRAPHS, SOC. SCI., Spring 1960.

195. CRESS, *supra* note 194, at 7–8. As Cress observes:

Defense had ceased to be a function of the community in colonial America by the middle of the eighteenth century. The militia's continued association with the preservation of order and authority at the local level made its utilization for external defense improbable . . . Instead of a citizen army, colonists relied on special fighting forces manned by draftees and volunteers and officered by British regulars or American colonists holding commissions outside the militia establishment. The application of martial law to expeditionary troops (militiamen normally served under civil law) underscored the growing separation of the colonial military establishment from the rest of society. . . In their composition . . . colonial armies had more in common with the mercenary forces serving the monarchs of Europe than they did with the citizen armies glorified by classical republican theorists.

Id.

with a threat of conscription, and served for extended periods in frontier campaigns, at times under the command of British regulars.¹⁹⁶ Colonial authorities appointed the officers, outfitted the troops, and provided them with wages.¹⁹⁷ In 1720s Massachusetts, for example, the colonial legislature passed legislation providing for funds to arm volunteers, for enlistment bounties, and for pensions for soldiers wounded in service—the colony also experimented with supplementing the roster of volunteers by ordering vagrants into service.¹⁹⁸ Other states employed different devices: During the Seven Years War, New York granted pardons to prisoners willing to serve in its volunteer regiments;¹⁹⁹ Virginia by the 1740s exempted soldiers from taxes and civil suits and ordered the unemployed into service.²⁰⁰

The militia for its part occasionally served in local military campaigns, but by the early eighteenth century, its principal function was to maintain civil order as the local police force. The militia performed night watch functions, for example, and it also put down slave insurrections, such as in New York City in 1741.²⁰¹ Importantly, because it was law enforcement drawn from the local community, the militia had “the dual function of maintaining civil order while ensuring that the demand for domestic order did not become a disguise for tyranny.”²⁰² Since the militia could refuse to suppress—indeed it could join—an insurrection, it was not simply an arm of government but was rather identified with individual political responsibilities and liberties.²⁰³

Militia units, moreover, comprised the Revolutionary Army until Congress raised its own troops.²⁰⁴ In the period immediately following the Revolutionary War, with national troops disbanded and the Continental Congress left with no military role, security was once more highly decentralized. Each state maintained its own militia, consisting of adult, white males who were required to participate in training and other exercises several days per year. Militiamen were required to provide and maintain their own muskets and other equipment, according to a specified list. Continuing the local tradition, militia companies normally were organized at the district level, with all of the men from one district belonging to a single company.²⁰⁵

196. *Id.*

197. *Id.* at 8.

198. *Id.* at 6.

199. *Id.*

200. *Id.* See generally KOHN, *supra* note 194, at 6–9.

201. CRESS, *supra* note 194, at 7.

202. *Id.* at 9.

203. See *id.* at 13.

204. See *id.* at 58–60.

205. *Id.*

Eighteenth-century Americans were not opposed to armies entirely, and the wisdom of professional military training was widely appreciated. Armies only became problematic if they escaped the control of the people's elected representatives—the legislature.²⁰⁶ “So long as the sanctity of English liberties remained unchallenged in the colonies, Americans gave little thought to the implications of their growing reliance on professional soldiers, satisfied with their effectiveness and confident that the prerogatives of the colonial assemblies in military affairs would contain any dangers.”²⁰⁷ When Parliament started using regular troops to enforce taxes on the colonies in 1763, however, hostility toward regulars increased dramatically—and colonists began to emphasize the importance of the militia as the only security apparatus that would not infringe their liberties.²⁰⁸ To many observers, the British regulars who arrived in Boston in October 1768 to enforce the Townshend duties signified the danger of a military no longer under the control of the people. In contrast to earlier episodes in which redcoats had responded to calls from the colonial legislatures to quell disturbances, the troops in Boston had come at the request of Governor Francis Bernard, without the approval (as required by law) of the Massachusetts Provincial Council.²⁰⁹ Moreover, in maintaining security in the city, the redcoats had taken over the police function of the local militia—and worse, were enforcing oppressive legislation.²¹⁰ Within a few years, the complaint that regulars without legislative control were the agents of oppression had expanded into a full-scale assault on professional soldiering—as the antithesis of militia service and subversive of liberties.²¹¹

By the fall of 1774, opposition to professional soldiering had reached national proportions.²¹² Essayists called for mobilization of the militia to

206. See *id.* at 8.

207. *Id.* at 13.

208. *Id.*

209. *Id.* at 37.

210. See *id.* at 36–39.

211. See *id.* at 44. Cress explains that by the end of 1773, New England essayists deemed professional soldiers subversive of civil liberties, laying the groundwork for mobilizing the militia to protect colonial liberties. *Id.* As John Hancock observed in commemorating the Boston Massacre, the security of society depended on a unity of arms and property. *Id.* Cress notes that:

Owning no property, the professional soldier had neither cause for good conduct nor any interest in protecting the property of those he served. Add to that the propensity of the professional soldier to serve the highest bidder and the result was a society undermined by the very force hired to defend it.

Id. Hence, the prevailing view that “[o]nly the citizen militia could be depended on to protect the rights and liberties of a free society.” *Id.*

212. *Id.* at 46–48.

protect liberties.²¹³ In September 1774, the Continental Congress endorsed a resolution from Suffolk County, Massachusetts, calling for the colonies to reorganize their militias under a leadership friendly to the “rights of the people.”²¹⁴ Massachusetts was the first to take action: In October 1774, its provincial congress instructed the local committees of safety to assume responsibility for training and mobilizing the colony’s militia and directed citizens to elect their militia officers locally.²¹⁵ By the fall of 1775, seven additional colonies had implemented similar measures.²¹⁶ The ninth article of Congress’s Declaration and Resolves, passed on October 14, 1774, asserted a claim for colonial legislative control over the military apparatus.²¹⁷

When the continental army was organized in June 1775, Charles Lee, commissioned as one of six major generals, imagined that the army would be made up of units from the militia.²¹⁸ George Washington disagreed. In his view, defeating the British required the use of regulars.²¹⁹ After several poor militia performances in 1775, by the summer of 1776 Congress began to rely on a quasi-professional army of soldiers with military experience.²²⁰ Nonetheless, many of the state constitutions ratified during the Revolutionary War subordinated the military to civil authority, refusing to allow the executive exclusive power to mobilize the militia and other military forces.²²¹

In short, the revolutionary experience resurrected an old ideal of the militia as the guardian of liberty, ever ready to defend against the abuses of

213. *Id.* at 48.

214. *Id.*

215. *Id.* at 48–49.

216. *Id.* at 49.

217. DECLARATION AND RESOLVES OF THE FIRST CONTINENTAL CONGRESS ¶ 15 (Oct. 14, 1774) (“That the keeping a standing army in these colonies, in times of peace, without the consent of the legislature of that colony, in which such army is kept, is against law.”).

218. CRESS, *supra* note 194, at 55.

219. *Id.* at 57. He would complain to Congress that “[t]o place any dependence upon militia is assuredly resting upon a broken staff.” Letter from George Washington to the President of Congress (Sept. 24, 1776), in 4 THE WRITINGS OF GEORGE WASHINGTON 110, 113 (Jared Sparks ed., 1834). Later, Washington wrote:

[S]hort enlistments, and a mistaken dependence upon militia, have been the origin of all our misfortunes, and the great accumulation of our debt. We find, Sir, that the enemy are daily gathering strength from the disaffected. This strength, like a snow-ball by rolling, will increase, unless some means can be devised to check effectually the progress of the enemy’s arms. Militia may possibly do it for a little while; but in a little while, also, and the militia of those States, which have been frequently called upon, will not turn out at all; or, if they do, it will be with so much reluctance and sloth, as to amount to the same thing.

Letter from George Washington to the President of Congress (Dec. 20, 1776), in 4 THE WRITINGS OF GEORGE WASHINGTON, *supra*, at 232, 234.

220. See CRESS, *supra* note 194, at 58–59.

221. See *id.* at 60–61.

a tyrannical government and its standing army of professional soldiers. With independence at hand, and attention turned to securing the emerging nation, it was hard to shed this romanticism of the militia and the notion that it was dangerous for the government to have its very own army, to control a force apart from the people themselves.

D. Security and the Articles of Confederation

All of this played out under the first attempt at national government: the 1781 Articles of Confederation. The Articles combined the need for security with the desire for the militia in a formula that quickly proved unworkable. Under the Articles, the states “enter[ed] into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever.”²²² Article 9, setting out the exclusive powers of Congress, included the “power of determining on peace and war” and entering treaties and alliances²²³ (with a requirement that nine states approve any exercise of Congress’s military powers).²²⁴ The Articles prohibited the states from “send[ing] any embassy to, or receiv[ing] any embassy from, or enter[ing] into any conference, agreement, alliance or treaty with any King, Prince or State” without Congress’s approval.²²⁵ The states also required Congress’s consent before they could enter treaties or alliances with each other.²²⁶ States could only maintain war ships and troops to the extent Congress determined necessary for self-defense.²²⁷ The Articles prohibited the states from engaging in war without the consent of Congress unless a state was “actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to

222. ARTICLES OF CONFEDERATION art. III (1781).

223. *Id.* art. IX.

224. *Id.* Article IX states:

The United States in Congress assembled shall never engage in a war, nor grant letters of marque or reprisal in time of peace, nor enter into any treaties or alliances . . . nor ascertain the sums and expenses necessary for the defense and welfare of the United States, or any of them . . . nor appropriate money, nor agree upon the number of vessels of war, to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander in chief of the army or navy, unless nine States assent to the same . . .

Id.

225. *Id.* art. VI.

226. *Id.*

227. *Id.*

admit of a delay till . . . Congress . . . be consulted”²²⁸ At the same time, states were required to “always keep up a well-regulated and disciplined militia, sufficiently armed and accoutered, and . . . [to] provide and constantly have ready for use, in public stores, a due number of filed pieces and tents, and a proper quantity of arms, ammunition and camp equipage.”²²⁹ State legislatures had the power to appoint officers of “land forces . . . raised by any State for the common defense”²³⁰ The states were required to share the costs of security, apportioned on the basis of property values within each state.²³¹ In periods of recess, a Committee of the States, consisting of one delegate from each, was authorized to conduct the day-to-day affairs of the national government, including figuring out a state’s defense quota.²³² Therefore, rather than place states in charge of security, each a little sovereign power, the national government under the Articles was given overall military authority, with the states required to contribute money and soldiers for national defense.

The problem of course was that the Articles of Confederation stopped midstream. Congress was empowered to wage war but was dependent on the cooperation of the states to do so. There was no provision for Congress to raise money itself to build warships or to create an army, and no mechanism to force the states to comply with their quotas. If states declined to contribute funds for war or to send soldiers to fight, Congress’s powers

228. *Id.*

229. *Id.*

230. *Id.* art. VII.

231. Article VIII states:

All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States in proportion to the value of all land within each State, granted or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled, shall from time to time direct and appoint.

The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several States within the time agreed upon by the United States in Congress assembled.

Id. art. VIII.

232. According to Article IX:

[The] “Committee of the States” . . . [has authority] to build and equip a navy, to agree upon the number of land forces, and to make requisitions from each State for its quota, in proportion to the number of white inhabitants in such State; which requisition shall be binding, and thereupon the legislature of each State shall appoint the regimental officers, raise the men and cloath, arm and equip them in a solid-like manner, at the expense of the United States; and the officers and men so cloathed, armed and equipped shall march to the place appointed, and within the time agreed on by the United States in Congress assembled.

Id. art. IX.

meant little or nothing. The only reliable fighting force was the militia, but here too Congress's hands were tied. While the Articles specified that the militia was to be armed and ready, there was no mechanism for Congress to enforce the requirement, much less compel the militia to battle.

In light of these various defects, in the spring of 1783, a Congressional Committee headed by Alexander Hamilton asked George Washington to prepare a plan for the "interior defence" that would be commensurate "with the principles of our government."²³³ Washington consulted his military advisers—notably Henry Knox, Timothy Pickering, and George Clinton—who pressed the importance of "reconcil[ing] the ideal of the citizen-soldier with the demonstrable effectiveness of a professional army."²³⁴ Though the role of the militia had to be preserved, it needed to be reorganized. In place of universal service, which was unworkable and ineffective, there should exist a national militia system, with a select group of citizens constantly ready to mobilize.²³⁵ Washington's plan had the following components: All white male citizens aged eighteen to fifty nominally would be enrolled in the militia but sorted into sharply different classifications. The core militia duties would fall on a select militia, comprised of volunteers willing to commit to a term of three to seven years. Alternatively, the select militia could consist of all men aged eighteen to twenty-five. The select militia would be organized under the same rules as the regular army, and it would operate under the command of former officers of the Continental Army. Washington's plan also recommended that Congress maintain a small number of regulars, 2631 officers and men with military experience who would be independent of the states and who would receive their orders, pay, and supplies from Congress. Washington also proposed the creation of a military academy to train officers.²³⁶

Hamilton received Washington's plan in May 1783 but instead presented Congress with his own proposal.²³⁷ Hamilton's proposal assigned the principal responsibility for defense to an army of volunteer, professional soldiers, leaving only a supplemental role for state militias.²³⁸ Under Hamilton's plan, Congress would control recruitment and the appointment of officers and also would be responsible for pay and equipment. Hamilton

233. CRESS, *supra* note 194, at 78–79.

234. *Id.* at 79.

235. *Id.* at 80.

236. George Washington, *Sentiments on a Peace Establishment* (May 1, 1783), in 26 THE WRITINGS OF GEORGE WASHINGTON 374, 375 (John C. Fitzpatrick ed., 1938).

237. Alexander Hamilton, *Continental Congress Report on a Military Peace Establishment* (June 18, 1783), in 3 THE PAPERS OF ALEXANDER HAMILTON 378, 381 (Harold C. Syrett ed., 1962).

238. *Id.*

recommended a 2500-strong force, with troops enlisted for periods of six years at a time, under the command of a select corps of officers.²³⁹ Hamilton reasoned that unless Congress prepared national forces in times of peace, the nation would be unable to defend itself in war.²⁴⁰ Moreover, Hamilton believed state forces were insufficient to protect the nation; the frontier beyond the state borders needed defending, and relying on states left “the care of the safety of the *whole* to a *part*,” giving “the keys of the United States” to a single state based on the “peculiarity of its situation,” and imposing an unfair responsibility on some states at the risk of the nation’s overall security.²⁴¹

In Congress, Hamilton’s plan was opposed on the ground that the Articles of Confederation did not authorize a national army during peacetime, and that the militia instead should be developed to provide security because it also would protect civil liberties.²⁴² It also was clear that states were reluctant to contribute to the defense efforts Hamilton envisaged. David Howell and William Ellery of Rhode Island asked, “Why [should] Rhode Island, New Jersey, or Delaware . . . be at the expence of maintaining a chain of forts from Niagara to Mississippi to secure the fur trade of New York, or the back settlements of Virginia!”²⁴³ With Hamilton’s plan dead, Congress did not bother reviewing Washington’s original proposal either.²⁴⁴

On June 2, 1784, with independence won, Congress dissolved the Continental Army save for 80 troops to secure federal arms depots.²⁴⁵ On June 3, Congress issued a resolution “recommend[ing]” that the states of Connecticut, New Jersey, New York, and Pennsylvania provide a 700-strong militia force for twelve months of service—the Secretary of War would organize the units, and they would be paid like the Continental Army.²⁴⁶ The states complied, leaving domestic security—aside from a few men in federal employ—once more to the state militia.

In 1786, after Congress requested a defense plan allowable under the Articles of Confederation, Secretary of War Henry Knox presented Congress with his *Plan for the General Arrangement of the Militia of the United States*.²⁴⁷ The Knox Plan provided for a strong national role in the militia and paralleled Washington’s earlier recommendations. Under the Knox Plan, male citizens

239. *Id.*

240. *Id.*

241. *Id.* (emphasis added).

242. CRESS, *supra* note 194, at 88–89.

243. KOHN, *supra* note 194, at 52 (alteration in original).

244. CRESS, *supra* note 194, at 90.

245. 27 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 70, at 524.

246. *Id.* at 538–59.

247. HENRY KNOX, PLAN FOR THE GENERAL ARRANGEMENT OF THE MILITIA OF THE UNITED STATES (1786).

between the ages of eighteen and sixty were divided into three militia classes.²⁴⁸ The Advanced Corps (ages eighteen to twenty) were to be trained in state camps for forty-two days per year with the United States bearing the expenses for arming and supplying them at a cost of almost \$400,000 per year.²⁴⁹ The Main Corps (ages twenty-one to forty-five) would be trained for four days per year.²⁵⁰ The Reserve Corps (ages forty-six to sixty) would be mustered twice per year.²⁵¹ At the end of their tour in the Advanced Corps, the soldiers would retain the uniforms they had been supplied.²⁵² State officials would direct the mobilization of militiamen, who would be expected to serve anywhere in the United States for a period of up to one year in cases of invasion or rebellion.²⁵³ The militia would therefore have principal responsibility for the nation's security, but there would be national coordination. Debate over the Knox plan, however, was delayed as a result of the start of the Constitutional Convention in Philadelphia.²⁵⁴

E. The Militia at Philadelphia

Control of the militia was among the most hotly debated issues at the Philadelphia Convention. To many of the delegates, the militia was the institutional manifestation of the body of the people, as it could revolt against a corrupt government.²⁵⁵ Granting the new national government any power over the militia was therefore problematic. Following some early comments on the militia,²⁵⁶ the Committee of Detail proposed giving Congress power "[t]o call

248. *Id.* at 8.

249. *Id.* at 14, 26–27.

250. *Id.* at 20.

251. *Id.* at 21.

252. *Id.* at 15–16.

253. *Id.* at 33. The obligation was three years for a term of service, up to one year for mobilization. *Id.* at 11, 16.

254. CRESS, *supra* note 194, at 92.

255. DAVID C. WILLIAMS, *THE MYTHIC MEANINGS OF THE SECOND AMENDMENT: TAMING POLITICAL VIOLENCE IN A CONSTITUTIONAL REPUBLIC* 46–60 (2003).

256. On June 8, 1787, Elbridge Gerry spoke of the militia in opposing any provision allowing Congress to veto state laws: "He observed that the proposed negative [would] extend to the regulations of the Militia, a matter on which the existence of a State might depend." MADISON'S NOTES, *supra* note 32, at 89 (footnotes omitted). Alexander Hamilton's plan offered on June 18 proposed: "No State to have any forces land or Naval; and the Militia of all the States to be under the sole and exclusive direction of the United States, the officers of which to be appointed and commissioned by them." *Id.* at 139. On July 20, James McClurg of Virginia asked

whether it would not be necessary, before a Committee for detailing the Constitution should be appointed, to determine on the means by which the Executive is to carry the laws into effect, and to resist combinations [against] them. Is he to have a military force for the purpose, or to have the command of the Militia, the only existing force that can be applied to that use?

Id. at 336.

forth the aid of the militia, in order to execute the laws of the Union, enforce treaties, suppress insurrections, and repel invasions” and made the President “commander in chief of the Army and Navy of the United States, and of the militia of the several States.”²⁵⁷ On August 18, 1787, George Mason of Virginia, “introduc[ing] the subject of regulating the militia,” argued in favor of a strong role for the militia in defense along with national powers to coordinate the disparate state units and achieve uniformity.²⁵⁸ Mason moved to give Congress authority “to make laws for the regulation and discipline of the militia of the several States reserving to the States the appointment of the officers.”²⁵⁹ Charles Pinckney of South Carolina supported the motion on the ground that “during the war . . . a dissimilarity in the militia of different States had produced the most serious mischiefs. Uniformity was essential. The States would never keep up a proper discipline of their militia.”²⁶⁰ Oliver Ellsworth of Connecticut opposed the degree of control that Mason’s proposal would give to the national government. He thought it was sufficient if the militia “have the same arms [and] exercise and be under rules established by the [General Government] when in actual service of the [United] States,” with Congress having power to “regulate[] [and] establish[]” the militia” if states failed to do so.²⁶¹ In response, Mason returned to the idea of a select militia and changed his motion to one authorizing Congress to regulate “one tenth part” of the militia in any year.²⁶²

Several delegates opposed a select militia. Pinckney, calling it “an incurable evil” for part of the militia to be under national control while the other is under state control, renewed Mason’s first motion.²⁶³ John Langdon of New Hampshire seconded the motion on the ground that a select militia would lead only to “confusion.”²⁶⁴ Madison also thought the national government should

257. *Id.* at 389, 392.

258. *Id.* at 478. According to Madison’s notes, Mason thought such a power necessary to be given to the [General] Government. He hoped there would be no standing army in time of peace, unless it might be for a few garrisons. The Militia ought therefore to be the more effectually prepared for the public defence. Thirteen States will never concur in any one system, if the disciplining of the Militia be left in their hands. If they will not give up the power over the whole, they probably will over a part as a select militia. He moved as an addition to the propositions just referred to the Committee of detail, [and] to be referred in like manner, “a power to regulate the militia.”

Id.

259. *Id.* at 483.

260. *Id.*

261. *Id.*

262. *Id.* at 483–84.

263. *Id.* at 484.

264. *Id.*

have control over the militia because regulation of the militia “naturally appertain[s] to the authority charged with the public defence” and was not “divisible between two distinct authorities.”²⁶⁵ Ellsworth found the “idea of a select militia . . . impracticable,” and predicted that it would lead to “a ruinous declension of the great body of the Militia.”²⁶⁶ However, he also thought that uniformity was impossible: “The States will never submit to the same militia laws. Three or four shilling’s as a penalty will enforce obedience better in New England, than forty lashes in some other places.”²⁶⁷ After Roger Sherman of Connecticut pointed out how “the States might want their Militia for defence [against] invasions and insurrections, and for enforcing obedience to their laws,”²⁶⁸ Mason changed his motion again to allow for an exception to the national government’s control of the militia for “such part of the Militia as might be required by the States for their own use.”²⁶⁹ George Read of Delaware identified another problem: He “doubted the propriety of leaving the appointment of the Militia officers in the States” because this would represent a further source of disparity, since “[i]n some States they are elected by the legislatures; in others by the people themselves.”²⁷⁰ Read suggested, therefore, that “at least an appointment by the State Executives ought to be insisted on.”²⁷¹ With all of these various issues unresolved, the delegates referred the matter to the Committee of Eleven.²⁷²

On August 21, New Jersey delegate (and governor) William Livingston for the Committee of Eleven reported a provision giving Congress power “[t]o make laws 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], reserving to the States respectively, the appointment of the officers, and the authority of training the Militia according to the discipline prescribed by the [United] States.”²⁷³ When the Convention took up the proposal on August 23, Sherman moved to strike the clause containing the state’s role on the ground that it was “unnecessary” in that “[t]he States will have this authority of course if not given up.”²⁷⁴ Ellsworth

265. *Id.*

266. *Id.*

267. *Id.* (footnotes omitted).

268. *Id.* at 485.

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.* at 494–95. When the Convention took up the provision on August 23, Madison reports the provision ending with “discipline prescribed.” *Id.* at 512.

274. *Id.* at 513.

thought the clause should stay because “discipline was of vast extent and might be so expounded as to include all power on the subject.”²⁷⁵ Rufus King of Massachusetts added, “by way of explanation . . . that by *organizing*, the Committee meant, proportioning the officers [and] men—by *arming*, specifying the kind size [and] caliber of arms—[and] by *disciplining* prescribing the manual exercise evolutions &c.”²⁷⁶ Sherman therefore withdrew his motion.²⁷⁷

Picking up on King’s definitions, Elbridge Gerry objected to the treatment of the states and argued that he had rather “let the Citizens of Massachusetts be disarmed, as to take the command from the States, and subject them to the [General] Legislature,” as “[i]t would be regarded as a system of Despotism.”²⁷⁸ Madison emphasized that the powers of the national government were in fact quite limited. “[A]rming” did not extend to supplying (or taking away) arms, “disciplining” did not include “penalties [and] Courts Martial for enforcing them.”²⁷⁹ King disagreed, explaining that “arming meant not only to provide for uniformity of arms, but included authority to regulate the modes of furnishing, either by the Militia themselves, the State Governments, or the National Treasury” and that “disciplin[ing]” of course included setting “penalties and every thing necessary for enforcing” them.²⁸⁰ Ellsworth and Sherman proposed an alternative provision that would give the national government authority only to “establish an uniformity of arms, exercise [and] organization for the Militia, and to provide for the Government of them when called into the service of the [United] States,” so as to “refer the plan for the Militia to the General [Government], but leave the execution of it to the State [Government].”²⁸¹ After Madison emphasized the pressing need for a more regularized militia,²⁸² Ellsworth and Sherman’s motion was defeated and the Convention

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.* at 514.

282. *Id.* at 514–15. Madison argued:

The primary object is to secure an effectual discipline of the Militia. This will no more be done if left to the States separately than the requisitions have been hitherto paid by them. The States neglect their Militia now, and the more they are consolidated into one nation, the less each will rely on its own interior provisions for its safety [and] the less prepare its Militia for that purpose; in like manner as the militia of a State would have been still more neglected than it has been if each County had been independently charged with the care of its Militia. The Discipline of the Militia is evidently a *National* concern, and ought to be provided for in the *National* Constitution.

Id.

approved the first clause of the provision, “[t]o make laws 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].”²⁸³

The Convention then approved separately the clause, “reserving to the States the appointment of the officers,” and the clause, “and the authority of training the Militia according to the discipline prescribed by the [United States].”²⁸⁴ On motion of Pennsylvania delegate Gouverneur Morris, the Convention altered the first clause to read: “to provide for calling forth the Militia, to execute the laws of the Union, suppress insurrections and repel invasions.”²⁸⁵ On August 27, without debate, the Convention also approved a provision giving the Executive command “of the Militia of the several States, *when called into the actual service of the [United States]*.”²⁸⁶ On September 14, the Committee of Style reported the final version.²⁸⁷

The proposed Constitution sent to the states therefore authorized Congress to declare war, to raise and support an army and a navy (with a two-year army appropriations limit), and to call out the state militias to protect the states from invasion and domestic violence, as well as to execute the laws of the Union.²⁸⁸ Congress was empowered to provide for organizing, arming, and disciplining the militia, and for governing them when employed in the service of the United States. The President was made Commander in Chief over federal troops and of the militia when in federal service. The states retained authority to train the militia and the right to appoint officers.²⁸⁹ In short, employing the militia would allow the national government to meet its protection mandate under Article IV, without the need for a large corps of federal personnel. For that scheme to work, the militia had to be kept in fighting form—hence Congress’s powers to organize, arm, discipline, and govern militiamen.

283. *Id.* at 515.

284. *Id.* at 516.

285. *Id.* at 517.

286. *Id.* at 535.

287. *Id.* at 639. Mason made a last minute effort, rejected by the delegates, to add a preamble to Congress’s militia powers, specifying, “[a]nd that the liberties of the people may be better secured against the danger of standing armies in time of peace.” *Id.* Randolph seconded the motion because it

did not restrain Congress from establishing a military force in time of peace if found necessary; and as armies in time of peace are allowed on all hands to be an evil, it is well to discountenance them by the Constitution, as far as will consist with the essential power of the [Government] on that head.

Id. Morris opposed the motion “as setting a dishonorable mark of distinction on the military class of Citizens,” and the delegates rejected the proposed change. *Id.*

288. *Id.* at 616–26.

289. *Id.*

F. The Militia at the State Conventions

The debates at the state ratifying conventions shed further light on these provisions for national employment of the state militia to protect the states and to execute federal law.²⁹⁰ At the Pennsylvania Convention in December 1787, delegates took up the familiar issue of the security benefit of a uniform militia versus the risk to liberty of national control.²⁹¹ At the Virginia Convention in 1788, there was lengthy debate on the Militia Clauses centering on the residual powers of the states. On June 5, Patrick Henry argued that the Constitution should be rejected on the ground that it gave exclusive power to Congress to arm the militia and that this would lead to tyranny because Congress simply could withhold arms altogether:

[A]ll power will be in . . . [Congress's] own possession. . . . [O]f what service would militia be to you, when, most probably, you will not have a single musket in the state? [F]or, as arms are to be provided by Congress, they may or may not furnish them. . . . [T]heir control over our last and best defence is unlimited. If they neglect or refuse to discipline or arm our militia they will be useless: the states can do neither—this power being exclusively given to Congress. The power of appointing officers over men not disciplined or armed is

290. On the interpretative authority of state ratifying conventions, see James Madison, Speech Before the House of Representatives (Apr. 6, 1796), in 5 ANNALS OF CONG. 774–80 (1796). Madison observed:

As the instrument came from . . . [the Philadelphia Convention] it was nothing more than the draft of a plan, nothing but a dead letter, until life and validity were breathed into it by the voice of the people, speaking through the several State Conventions. If we were to look, therefore, for the meaning of the instrument beyond the face of the instrument, we must look for it, not in the General Convention, which proposed, but in the State Conventions, which accepted and ratified the Constitution.

Id.

291. On December 11, 1787, James Wilson spoke in favor of Congress's power to regulate the militia for greater uniformity:

[A]ny gentleman who possesses military experience will inform you that men without a uniformity of arms, accoutrements, and discipline are no more than a mob in a camp; that in the field instead of assisting they interfere with one another. If a soldier drops his musket and his companion, unfurnished with one, takes it up, it is of no service because his cartridge does not fit it. By means of this system a uniformity of arms and discipline will prevail throughout the United States.

Debate before the Convention of the Commonwealth of Pennsylvania (Dec. 11, 1787) (statement of James Wilson), *supra* note 122, at 520–22. Wilson also thought that a uniform militia would deter foreign aggression and would obviate the need for a standing army. *Id.* at 522. Among the objections of the minority at the Pennsylvania Convention that opposed the ratification of the Constitution was that Congress's authority over the militia was destructive to liberty and that Congress should not be empowered to call militia out of a state without the state's consent. See PENNSYLVANIA AND THE FEDERAL CONSTITUTION, 1787–88, at 462 (John Bach McMaster & Frederick D. Stone eds., Lancaster, Inquirer Printing & Pub. Co. II, 1888).

ridiculous; so that this pretended little remains of power left to the states may, at the pleasure of Congress, be rendered nugatory.²⁹²

Henry pressed the point again four days later, arguing that the states would be prevented from arming and disciplining the militia.²⁹³ George Mason shared Henry's understanding of Congress's power, warning that the end result would be the destruction of the militia and the rise of a standing army.²⁹⁴

Madison disputed this reading of the Constitution's Militia Clauses. Arguing that Congress's power to organize and call forth the militia was "an additional security to our liberty without diminishing the power of the States in any considerable degree," Madison observed that the Constitution appropriately allowed Congress "to establish a uniform discipline throughout the states and to provide for the execution of the laws, suppress insurrections, and repel invasions," and that these "are the only cases wherein they can interfere with the militia."²⁹⁵ Congress's powers were limited to what was necessary for effective security purposes,²⁹⁶ and except when under federal command, the militia remained available for state purposes.²⁹⁷ Congress's power

292. Debate before the Convention of the Commonwealth of Virginia (June 5, 1788) (statement of Patrick Henry), *supra* note 185, at 51–52.

293. Debate before the Convention of the Commonwealth of Virginia (June 9, 1788), *supra* note 165, at 168–69 (arguing that if "Congress will not arm [the militia], they will not be armed at all").

294. Debate before the Convention of the Commonwealth of Virginia (June 14, 1788) (statement of George Mason), *supra* note 125, at 379. According to Mason:

Under various pretences, Congress may neglect to provide for arming and disciplining the militia; and the state governments cannot do it, for Congress has an exclusive right to arm them, &c. Here is a line of division drawn between them—the state and general governments. The power over the militia is divided between them. The national government has an exclusive right to provide for arming, organizing and disciplining the militia, and for governing such part of them as may be employed in the service of the United States. . . . Should the national government wish to render the militia useless, they may neglect them, and let them perish, in order to have a pretence of establishing a standing army.

Id.

295. Debate before the Convention of the Commonwealth of Virginia (June 6, 1788) (statement of James Madison), in 3 ELLIOT'S DEBATES, *supra* note 19, at 90.

296. Madison stated:

Without uniformity of discipline, military bodies would be incapable of action: without . . . power to call forth the strength of the Union to repel invasions, the country might be overrun and conquered by foreign enemies: without . . . power to suppress insurrections, our liberties might be destroyed by domestic faction, and domestic tyranny . . . established.

Id.

297. Debate before the Convention of the Commonwealth of Virginia (June 14, 1788) (statement of James Madison), *supra* note 125, at 383 ("The states are to have the authority of training the militia according to the congressional discipline, and of governing them at all times when not in the service of the Union.").

to arm the militia was not exclusive but rather “concurrent” with state power and corrected for states’ failures to arm their own militia.²⁹⁸ National authority to employ the militia dealt with the collective-action problem of relying on states to contribute to security,²⁹⁹ and diminished the need for standing armies.³⁰⁰

Henry Lee and Edmund Randolph agreed with Madison that the Constitution did not deprive the states of the power to arm their militia on their own.³⁰¹ Patrick Henry was not persuaded by this construction of the Militia Clauses. In his view, there could be no such thing as concurrent powers. Any assignment of authority to one level of government was exclusive: “To admit this mutual concurrence of powers,” he argued, “will carry you into endless absurdity—that Congress has nothing exclusive on the one hand, nor the States on the other.”³⁰² Reading the power to arm as a concurrent power would mean “our militia shall have two sets of arms, double sets of regimentals, &c., and thus, at a very great cost, we shall be doubly armed.”³⁰³ Accordingly, the “rational” understanding of the Militia Clauses is “that Congress shall have exclusive power of arming them, &c., and that the state governments shall have exclusive power of appointing the officers, &c.”³⁰⁴

298. *Id.* at 382 (“Have we not found, from experience, that, while the power of arming and governing the militia has been solely vested in the state legislatures, they were neglected and rendered unfit for immediate service?”).

299. *Id.* (“The assistance of one state will be of little avail to repel invasion. But the general head of the whole Union can do it with effect, if it be vested with power to use the aggregate strength of the Union.”).

300. *Id.* at 383 (“If you limit [Congress’s] power over the militia, you give them a pretext for substituting a standing army. If you put it in the power of the state governments to refuse the militia, by requiring their consent, you destroy the general government, and sacrifice particular states.”). Madison later emphasized that when not in the service of the national government, the militia fell under the control of the states:

[T]he state governments might do what they thought proper with the militia, when they were not in the actual service of the United States. They might make use of them to suppress insurrections, quell riots, &c., and call on the general government for the militia of any other state, to aid them, if necessary.

Id. at 416.

301. Debate before the Convention of the Commonwealth of Virginia (June 9, 1788) (statement of Henry Lee), *supra* note 165, at 177–79 (stating that “[t]he States are, by no part of the plan before you precluded from arming and disciplining the militia, should Congress neglect it”); Debate before the Convention of the Commonwealth of Virginia (June 10, 1788) (statement of Edmund Randolph), in 3 ELLIOT’S DEBATES, *supra* note 19, at 206 (“Should Congress neglect to arm or discipline the militia, the states are fully possessed of the power of doing it; for they are restrained from it by no part of the Constitution.”).

302. Debate before the Convention of the Commonwealth of Virginia (June 14, 1788) (statement of Patrick Henry), *supra* note 125, at 386.

303. *Id.*

304. *Id.*

However, George Nicholas showed the fallacies of Henry's approach to constitutional interpretation:

The power of arming [the militias] is concurrent between the general and state governments; for the power of arming them rested in the state governments before; and, although the power be given to the general government, yet it is not given exclusively; for, in every instance where the Constitution intends that the general government shall exercise any power exclusively of the state governments words of exclusion are particularly inserted. Consequently in every case where such words of exclusion are not inserted, the power is concurrent to the state governments and Congress, unless where it is impossible that the power should be exercised by both. It is, therefore, not an absurdity to say, that Virginia may arm the militia, should Congress neglect to arm them. But it would be absurd to say that we should arm them after Congress has armed them, when it would be unnecessary; or that Congress should appoint the officers, and train the militia when it is expressly excepted from their powers.³⁰⁵

Nicholas also emphasized the limited nature of Congress's power over the militia.³⁰⁶

The issue of divided militia powers apparently resolved in Virginia, another concern emerged: the role of the militia in enforcing federal law. On June 14, General Green Clay asked "to be informed why the Congress were to have power to provide for calling forth the militia, to put the laws of the Union into execution."³⁰⁷ Madison's explanation focused on the provision as limited to implementing laws that have generated opposition and resistance on the ground—implying that Congress's power is therefore not a general

305. *Id.* at 391 (statement of George Nicholas).

306. *Id.* at 391–92 ("There is a great difference between having the power in three cases, and in all cases. [The national government] cannot call [the militias] forth for any other purpose than to execute the laws, suppress insurrections, and repel invasions."). Similarly, according to Edmund Pendleton:

The power of the general government to provide for arming and organizing the militia is to introduce a uniform system of discipline to pervade the United States of America. But the power of *governing* the militia, so far as it is in Congress, extends only to such parts of them as may be employed in the service of the United States. When not in their service, Congress has no power to govern them. . . . [a]nd though Congress *may* provide for arming them, and prescribe the mode of discipline, yet the states have the authority of training them, according to the uniform discipline prescribed by Congress. But there is nothing to preclude them from arming and disciplining them, should Congress neglect to do it.

Debate before the Convention of the Commonwealth of Virginia (June 16, 1788) (statement of Edmund Pendleton) (emphasis added), *supra* note 166, at 440.

307. Debate before the Convention of the Commonwealth of Virginia (June 14, 1788) (statement of General Green Clay), *supra* note 125, at 378.

power to use the militia to carry out federal programs, but rather is closely tied to suppressing insurrections and repelling invasions. He noted:

If resistance should be made to the execution of the laws . . . it ought to be overcome. This could be done only in two ways—either by regular forces or by the people. By one or the other it must unquestionably be done. If insurrections should arise, or invasions should take place, the people ought unquestionably to be employed, to suppress and repel them, rather than a standing army. The best way to do these things was to put the militia on a good and sure footing, and enable the government to make use of their services when necessary.³⁰⁸

The militia would only be called forth to execute the laws when “resistance to the laws required it” because the sheriff’s “posse . . . were insufficient to overcome the resistance to the execution of the laws.”³⁰⁹ If, however, “the civil power was sufficient,” the use of the militia “would never be put in practice.”³¹⁰ On the other hand, Madison observes that to use the militia to execute laws, resistance did not have to rise to the level of an insurrection or invasion: “There are cases in which the execution of the laws may require the operation of militia, which cannot be said to be an invasion or insurrection. There may be a resistance to the laws which cannot be termed an insurrection.”³¹¹ For example, “a riot d[oes] not come within the legal definition of an insurrection. There might be riots, to oppose the execution of the laws, which the civil power might not be sufficient to quell.”³¹²

Patrick Henry, once more offering his unique perspective, thought instead that the Constitution (dangerously) allowed for the use of military power in the first instance, because there was no provision for Congress to use civil powers to enforce its laws:

If this be the spirit of your new Constitution, that the laws are to be enforced by military coercion, we may easily divine the happy consequences which will result from it. The civil power is not to be employed at all. . . . I . . . see nothing to warrant a belief that the civil power can be called for.³¹³

Again, George Nicholas offered a rebuttal. The Constitution, he argued, has not “said that the civil power shall not be employed,” and therefore does nothing to alter the normal practice that “[t]he civil officer is to

308. *Id.* at 378.

309. *Id.* at 384.

310. *Id.*

311. *Id.* at 408.

312. *Id.* at 410.

313. *Id.* at 387.

execute the laws on all occasions.”³¹⁴ If, however, the laws are “resisted, this auxiliary power is given to Congress of calling forth the militia to execute them, when it shall be found absolutely necessary.”³¹⁵ Edmund Randolph, agreeing with this interpretation, stressed the need for “common sense [as] the rule of interpreting this Constitution,” and, therefore, since there is no “exclusion of civil power,” or a suggestion “that the laws are to be enforced by military coercion in all cases,” the proper inference is that “when the civil power is not sufficient, the militia must be drawn out.”³¹⁶ George Mason also argued in favor of “some restrictions” on Congress’s power to call forth the militia. In his view,

[i]f . . . the militia of a neighboring state is not sufficient, the government ought to have power to call forth those of other states, the most convenient and contiguous. But in this case, the consent of the state legislatures ought to be had. On *real* emergencies this consent will never be denied, each state being concerned in the safety of the rest. . . . I wish such an amendment as this—that the militia of any state should not be marched beyond the limits of the adjoining state; and if it be necessary to draw them from one end of the continent to the other, I wish such a check, as the consent of the state legislature, to be provided.³¹⁷

Madison thought this proposal made little sense in view of the geographic differences among the states, with some states bordering several states and others bordering just one.³¹⁸ When it ratified the Constitution in June 1788, the Virginia Convention proposed several

314. *Id.* at 392 (statement of George Nicholas).

315. *Id.*

316. *Id.* at 400 (statement of Edmund Randolph).

317. *Id.* at 378 (statement of George Mason).

318. *Id.* at 382 (statement of James Madison). According to Madison:

Would this be an equal protection . . . or would it not be a most partial provision? Some states have three or four states in contact. Were this state invaded, as it is bounded by several states, the militia of three or four states would, by this proposition, be obliged to come to our aid; and those from some of the states would come a far greater distance than those of others. There are other states, which, if invaded, could be assisted by the militia of one state only, there being several states which border but on one state. Georgia and New Hampshire would be infinitely less safe than the other states. [This proposal would] set up those states as butts for invasion, invite foreign enemies to attack them, and expose them to peculiar hardships and dangers. Were the militia confined to any limited distance from their respective places of abode, it would produce equal, nay, more inconveniences. The principles of equality and reciprocal aid would be destroyed in either case.

Id.

(future) amendments to clarify the role of the militia and the respective power of the federal and state governments.³¹⁹

G. Summary

Captivated by an ideal of the militia as the fighting force that would safeguard liberties, but cognizant of the need for security to be provided at the national level, the ratifying generation put in place a uniquely federalist security apparatus. In meeting its constitutional mandate to protect the states from invasions and domestic violence, the national government is permitted, indeed encouraged, to rely on the state militia rather than resort to national troops. The Constitution therefore authorizes calling forth the militia into federal employ to carry out the requirements of the Protection Clause (and to deal with opposition to federal law). Militia troops from one state can be summoned to deal with security problems at home or to march into another state to deal with problems there. The remainder of the time, states are free to use their militia for their own purposes. To ensure a dependable and effective force, the Constitution also authorizes Congress to decide how best to organize, arm, and train militia units, and to set the rules for governing militiamen in the service of the United States under the Commander in Chief.

Militiamen no longer provide security, but these provisions of the Constitution remain relevant. In fulfilling its obligation today to protect the states, the national government should be entitled to employ police officers and other security personnel of modern state governments—just as in earlier years, the national government depended on militiamen for security work. Before considering more fully how the constitutional provisions involving protection and the militia can be applied to the modern context,

319. See Debate before the Convention of the Commonwealth of Virginia (June 27, 1788), *supra* note 192, at 657–59 (presenting amendments to specify the role of the militia in securing liberty and the right of the people to keep and bear arms; that standing armies should be avoided; the power of the states to provide for organizing, arming, and disciplining their militia if Congress neglects to do so; and the power of the states to impose punishments against the militia when not in the service of the United States). New York, North Carolina, Rhode Island, and Pennsylvania similarly presented amendments limiting national use of militias on ratifying the Constitution. See Debate before the Convention of the State of New York (July 26, 1788), in 1 ELLIOT'S DEBATES, *supra* note 19, at 330–31; Amendments (July 2, 1788), in 2 ELLIOT'S DEBATES, *supra* note 19, at 406; Debate before the Convention of the State of North Carolina (Aug. 1, 1785), in 4 ELLIOT'S DEBATES, *supra* note 19, at 245; Ratification of the Constitution by the Convention of the State of Rhode Island and Providence Plantations (May 29, 1790), in 1 ELLIOT'S DEBATES, *supra* note 19, at 334–36; Proceedings of the Meeting at Harrisburg, in Pennsylvania (Sept. 3, 1788), in 2 ELLIOT'S DEBATES, *supra* note 19, at 545–46.

it is useful first to understand their early operation. The next part therefore explores how, in practice, these constitutional provisions played out in the early Republic, including the early national government's fulfillment of its protection obligations, the dependence on the militia, and the compensation of militiamen for federal service.

III. THE PROTECTION TRADITION

From the earliest days of the Republic, the national government took seriously its constitutional duty to protect the states. In meeting that duty, the national government depended frequently on the state militia. Militiamen were the nation's very first "first responders" to invasions and insurrections. Congress put in place the mechanisms for calling forth the militia and for ensuring the militia would be organized and armed properly, as well as for paying militiamen for their services on behalf of the national government. This part traces the early history of the national government meeting its protection duty. It demonstrates that Congress and the Executive developed a strong protection tradition—putting in place the mechanisms for responding to threatened invasions and insurrections, fortifying coastal towns, and defending the frontiers. The discussion also examines closely the issue of expenses. It shows that while the militia existed as an alternative to the use of federal personnel for security purposes, the militia's availability did not alter the national government's underlying protection obligation. In particular, employing the militia was not a way for the national government to save the expenses that would be required to deploy national troops. Because the obligation of providing protection belonged to the national government, if it elected to rely upon the state militia to carry out security functions, Congress was responsible for the costs involved. To be "employed in the Service of the United States,"³²⁰ meant exactly that. The United States had to pay for services rendered.

Within a few months of its inception, Congress passed legislation to pay militiamen for their federal service. Thereafter, whenever the national government employed state militiamen for security, Congress footed the bill. To be sure, there were squabbles at times about how much militiamen were worth and which incidental expenses should be covered, but it was universally understood that the state militia did not work for the United States government for free. Fast-forwarding to present day circumstances, if, during the War on Terrorism, law enforcement and other state and local

320. U.S. CONST. art. I, § 8, cl. 16.

security personnel do the work required to meet the national government's protection obligation, the Constitution requires payment for their services. Governors and mayors are therefore right to demand that Congress cover the costs of counterterrorism programs, just as in earlier years, Congress was required to pay for uses of the militia.

A. Securing the New Republic

The First Congress opened for business on March 4, 1789. In August 1789 Congress established the War Department,³²¹ with an initial operating budget of \$137,000.³²² The following month, Congress continued in service 700 troops raised by the Continental Congress³²³ and authorized the President to call into service such part of the militia as he judged necessary for "the purpose of protecting the inhabitants of . . . the United States from the hostile incursions of the Indians."³²⁴ Congress knew that time was money: If called into service to protect against incursions, militiamen received the very same "pay and subsistence" as the federal troops.³²⁵ On April 30, 1790, Congress replaced these requisitions with an infantry regiment of 1216 troops in service for three years, with new pay rates, and set up a pension scheme for wounded soldiers.³²⁶ The statute reauthorized the President, "for the purpose of aiding the troops now in service, or to be raised by this act, in protecting the inhabitants of the frontiers," to "call into service from time to time such part of the militia of the states . . . as he may judge necessary," with "their pay and subsistence while in service . . . the same as the pay and subsistence of the troops" as specified in the statute.³²⁷ A year later, Congress authorized, for the purpose of frontier defense, the raising of an additional infantry regiment of 912 troops plus officers. Congress also gave the President, if he thought it "conducive to the good of

321. Act of Aug. 7, 1789, ch. 7, 1 Stat. 49 ("establish[ing] an Executive Department, to be denominated the Department of War").

322. Act of Sept. 29, 1789, ch. 23, 1 Stat. 95 ("making Appropriations for the Service of the present year").

323. 33 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 70, at 602-04 (1783).

324. Act of Sept. 29, 1789, ch. 25, §§ 1, 5, 1 Stat. 95, 95-96 ("recogniz[ing] and adopt[ing] to the Constitution of the United States the establishment of the Troops raised under the Resolves of the United States in Congress assembled").

325. *Id.* § 5, 1 Stat. at 96.

326. Act of Apr. 30, 1790, ch. 10, §§ 1, 5, 11, 1 Stat. 119, 120, 121 ("regulating the Military Establishment of the United States").

327. *Id.* § 16, 1 Stat. at 121. The statute contains detailed provisions about the rate of pay and other benefits. Pay rates ranged from \$60 per month for lieutenant-colonel commandant to \$3 per month for privates and musicians. *Id.* § 5, 1 Stat. at 120.

the service to engage a body of militia” the authority “to offer such allowances to encourage their engaging in the service, for such time and on such terms, as he shall deem it expedient to prescribe.” The President additionally could employ for six months up to 2000 levies (plus officers).³²⁸ The law specified that militiamen (and levies) were entitled to “the same pay, rations, and forage, and, in case of wounds or disability in the line of their duty, to the same compensation as the troops of the United States.”³²⁹ To cover the associated costs, Congress appropriated \$312,686 generated by a liquor tax.³³⁰

The Second Congress increased funding for defense,³³¹ added two regiments of 960 soldiers “for the Protection of the Frontiers of the United States,”³³² and increased military pay.³³³ It also passed two important laws concerning the militia. On May 2, 1792, Congress approved “An act to provide for calling forth the Militia to execute the laws of the Union, suppress insurrections and repel invasions,” thereby implementing Congress’s powers under Article I, Section 8 and furthering its obligations under Article IV, Section 4.³³⁴ The first three sections of the Act set out the procedures for the President to call forth the militia to respond to invasions and domestic insurrections and to enforce laws.³³⁵ Section 1 authorizes calling forth the

328. Act of Mar. 3, 1791, ch. 28, §§ 1, 7–8, 1 Stat. 222, 223 (raising “another Regiment to the Military Establishment of the United States, and for making further provision for the protection of the frontiers”).

329. *Id.* § 10, 1 Stat. at 223.

330. *Id.* § 15, 1 Stat. at 224.

331. See Act of Dec. 23, 1791, ch. 3, § 4, 1 Stat. 226, 228 (“making Appropriations for the Support of Government for the year one thousand seven hundred ninety-two,” with appropriations of \$532,449 for military expenses including \$102,686 for payment of troops, \$119,688 for subsistence, \$48,000 for clothing, \$4152 for forage, and \$37,339 for expenses in “the defensive protection of the frontiers”). Additional funds for military expenses were appropriated in the Act of Feb. 28, 1793, ch. 18, § 1, 1 Stat. 325, 328. Of the \$1,589,040 the Act allocates for the year, military expenses include \$304,308 for paying troops, \$312,567 for their subsistence, \$34,856 for forage, \$112,000 for clothing, and \$50,000 for “defensive protection of the frontiers.” *Id.* These five categories alone comprise more than 50 percent of the total allocation.

332. Act of Mar. 5, 1792, ch. 9, § 1, 1 Stat. 241, 241 (“making farther and more effectual Provision for the Protection of the Frontiers of the United States”).

333. *Id.* § 7, 1 Stat. at 242 (describing pay ranging from \$166 per month for major-generals to \$3 per month for privates).

334. Act of May 2, 1792, ch. 28, 1 Stat. 264.

335. The three sections read:

Section 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the President of the United States, to call forth such number of the militia of the state or states most convenient to the place of danger or scene of action, as he may judge necessary to repel such invasion, and to issue his orders for that purpose, to such officer or officers of the militia as he shall think proper; and in case of an insurrection in any state, against the

militia to fulfill Congress's obligations to protect the states from invasions and from domestic insurrections.³³⁶ Tracking the Protection Clause, application of a state is required before calling forth the militia to suppress insurrections but not required for repelling invasions.³³⁷ Importantly, under section 1 of the Act, the order calling forth the militia goes directly to the officers of the militia, not to the state legislature or the governor.³³⁸ Section 2 of the Act implements the additional permissive use of the militia to implement the laws of the United States.³³⁹ Here, Congress exercised a discretionary power (in contrast to its protection obligations) and imposed its own procedural requirements: Before the militia may be used, a district judge or Supreme Court justice must certify to the President that the obstruction to the laws is too great to be remedied by ordinary judicial proceedings or by the efforts of the U.S. marshals.³⁴⁰ The President is first to call forth the militia of the state in which the obstruction to the laws exists—if the state's militia refuses to comply or is ineffective, the President may call forth militia from other states only if the Congress is not itself in session to respond to the problem, and only until thirty

government thereof, it shall be lawful for the President of the United States, on application of the legislature of such state, or of the executive (when the legislature cannot be convened) to call forth such number of the militia of any other state or states, as may be applied for, or as he may judge sufficient to suppress such insurrection.

Sec. 2. *And be it further enacted*, That whenever the laws of the United States shall be opposed, or the execution thereof obstructed, in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act, the same being notified to the President of the United States, by an associate justice or the district judge, it shall be lawful for the President of the United States to call forth the militia of such state to suppress such combinations, and to cause the laws to be duly executed. And if the militia of a state, where such combinations may happen, shall refuse, or be insufficient to suppress the same, it shall be lawful for the President, if the legislature of the United States be not in session, to call forth and employ such numbers of the militia of any other state or states most convenient thereto, as may be necessary, and the use of the militia, so to be called forth, may be continued, if necessary, until the expiration of thirty days after the commencement of the ensuing session.

Sec. 3. *Provided always, and be it further enacted*, That whenever it may be necessary, in the judgment of the President, to use the military force hereby directed to be called forth, the President shall forthwith, and previous thereto, by proclamation, command such insurgents to disperse, and retire peaceably to their respective abodes, within a limited time.

Id. §§ 1–3, 1 Stat. at 264. Section 9 of the Act specifies that “the marshals of the several districts and their deputies, shall have the same powers in executing the laws of the United States, as sheriffs and their deputies in the several states have by law, in executing the laws of their respective states.” *Id.* § 9, 1 Stat. at 265.

336. *Id.* § 1, 1 Stat. at 264.

337. *Id.*

338. *Id.*

339. *Id.* § 2, 1 Stat. at 264.

340. *Id.* The certification provision was removed in 1795. Act of Feb. 28, 1795, ch. 36, 1 Stat. 424.

days after Congress resumes its session.³⁴¹ In addition, before calling forth the militia, the President must issue an order directing insurgents to disperse.³⁴² Section 4 of the Act specifies payment for militiamen when they are called forth, provides that they are subject to federal rules and articles of war, and specifies that militia service is limited to periods of three months at a time.³⁴³ Subsequent sections of the Act specify fines and other penalties against militiamen when in the service of the United States, and provide that any court martial is to be composed of militia officers.³⁴⁴ The Act of May 2 makes clear that the Second Congress understood that when it employed militiamen, either to fulfill its protection obligations under Article IV, Section 4 or to implement the nation's laws, it had to pay those militiamen, just as it paid its own troops. Power to call forth the militia was not a source of free labor.

That Congress understood payment was required for services rendered is confirmed by the fact that the payment provision for militiamen appears in the Act of May 2, furthering the national government's protection obligations, rather than the militia law Congress passed six days later to implement its permissive powers to organize, arm, and discipline the militia. On May 8, 1792, having tabled the Knox Plan, the Second Congress, at the very end of its first session, passed "[a]n Act more effectually to provide for the National Defence by establishing an Uniform Militia throughout the United States."³⁴⁵ For more than a century, this was the only federal statute under which the militia was organized. Under the May 8 Act, the role of the national government was limited. Doing away with Knox's three-tiered proposal, the Act enrolled every "free able-bodied white male citizen" between the ages of eighteen and forty-five in the militia company "within whose bounds such

341. Act of May 2, 1792, ch. 28, § 2, 1 Stat. 264, 264.

342. *Id.* § 3, 1 Stat. at 264.

343. *Id.* § 4, 1 Stat. at 264. Section 4 reads:

And be it further enacted, That the militia employed in the service of the United States, shall receive the same pay and allowances, as the troops of the United States, who may be in service at the same time, or who were last in service, and shall be subject to the same rules and articles of war: And that no officer, non-commissioned officer or private of the militia shall be compelled to serve more than three months in any one year, nor more than in due rotation with every other able-bodied man of the same rank in the battalion to which he belongs.

Id.

344. *Id.* §§ 5–8, 1 Stat. at 264–65.

345. Act of May 8, 1792, ch. 33, 1 Stat. 271. The Second Congress also added three infantry regiments to serve for three years and authorized the President to summon cavalry to protect the frontiers. Act of Mar. 5, 1792, ch. 9, §§ 2, 4, 13, 1 Stat. 241, 241–43.

citizen shall reside.”³⁴⁶ The Act required militiamen to equip themselves with muskets, bayonets, and other gear.³⁴⁷ Although this provision initially generated little opposition,³⁴⁸ when the Second Congress reconvened in November for its second session, Maryland Representative William Vans Murray sought to repeal the requirement that militiamen provide their own arms. Murray complained that the requirement was unfair in that men of all economic circumstances had to bear the same expense, working a “glaring instance of injustice,” and rendering implementation of the law “impracticable.”³⁴⁹ “It was,” Murray argued, “a principle of political justice . . . that protection and taxation should be commensurate. That wherever a tax was levied for the protection of society, its apportionment among individuals should be as exactly as possible correspondent with the property of each individual.”³⁵⁰ Moreover, muskets and other equipment were not easily obtained.³⁵¹ Rather than put the burden on militiamen to arm themselves or violate the law, Murray proposed that Congress provide for “the furnishing of the arms at the public expense.”³⁵² Although Murray’s criticisms received some support, there was strong opposition to changing the Act, and the House voted overwhelmingly against Murray’s

346. Act of May 8, 1792, § 1, 1 Stat. at 271. The Act exempted certain federal officials and continued existing exemptions under state law. *Id.* § 2, 1 Stat. at 272. Earlier, debate in the House had focused on whether there should be exemptions to service in the militia and whether those exemptions should be set by Congress or by the states. See Debate in the House of Representatives (Dec. 22, 1790), in 4 ELLIOT’S DEBATES, *supra* note 19, at 422–24. Part of the debate included whether members of Congress should be exempt from service in the militia. *Id.* Madison opposed the idea. See Speech in House of Representatives (Dec. 16, 1790), in 13 THE PAPERS OF JAMES MADISON 323 (Charles F. Hobson & Robert A. Rutland eds., 1977) (“They ought ever to bear a share of the burthens they lay on others, in order that their acts may not slide into an abuse of the power vested in them.”).

347. Act of May 8, 1792, § 1, 1 Stat. at 271.

348. The *Annals of Congress* report that in February when the bill was under consideration in the House, Rep. Thomas Fitzsimons moved “to exempt persons who are not able to arm and equip themselves, from any penalty on that account,” which “occasioned some debate.” 3 ANNALS OF CONG. 420 (1792). Rep. Thomas Sumpter thought that if militiamen were called into federal service it became “the duty of the General Government . . . to provide them with the means of defence” but that Congress had “no right to say that the militia, previous to thus being called out, shall be at the expense of arming themselves” and that it would be an “injustice” to require militiamen to furnish their own arms as well as to serve. *Id.* at 421. Rep. Nathaniel Niles, viewing the arming provision as a kind of tax, moved to strike it, but his motion was defeated. *Id.* Debate then shifted to the wisdom of Congress specifying that militiamen carry uniform arms. *Id.* at 421–22. The Senate approved the bill with no recorded opposition to the arming provision. *Id.* at 114–15.

349. *Id.* at 701–02.

350. *Id.* at 708.

351. *Id.* at 709.

352. *Id.*

proposal.³⁵³ In any event, as Secretary of War Henry Knox would soon complain, there was no mechanism under the Act for the federal government to penalize militiamen who failed to comply with the arming requirement.³⁵⁴ Hence, the burden of enforcement was on the states. The operation of the law depended on the willingness of states to enforce the provision against their own militiamen.³⁵⁵ Because the supply of arms was limited and their costs high, it was not always feasible for individuals to purchase their own arms, and many states furnished their militia units with a supply of muskets.³⁵⁶ After France declared war on England in February 1793, some states, including Massachusetts, New Jersey, Pennsylvania, Maryland, and North Carolina, passed laws imposing fines against militiamen who failed to equip themselves.³⁵⁷ However, because of the persistent shortage of arms, these fines produced little benefit.³⁵⁸ As a result, Congress was ever

353. Rep. John Francis Mercer spoke of the "injustice of the requisition, which enjoins, that a man who is not worth twenty shillings should incur an expense of twenty pounds in equipping himself as a Militia man" and warned that placing the burden on individual militia members "sanction[ed] the idea . . . that there is a disinclination on the part of [Congress] to provide for an effective Militia." *Id.* at 702. Rep. James Hillhouse argued that before amending the statute, Congress should wait to see how the states implemented the requirements. *Id.* Rep. Hugh Williamson thought arming the militia at the public expense worked "a most unequal and oppressive species of taxation, especially as it is concluded that more than one half of the militia are already armed." *Id.* at 710. Rep. John W. Kittera, estimating that the total cost to arm the militia would be £42 million at the rate of £20 per man, opposed Congress assuming the expense. *Id.* In the end, the House voted 50–6 against convening a committee to consider amendments to the Act. *Id.* at 710–11.

354. Report of the Secretary of War respecting the difficulties attending the execution of the act establishing a uniform militia throughout the United States (Dec. 10, 1794) in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 69 (reporting that "a difficulty of primary importance" is that "the militia are requested to arm and equip themselves, at their own expense; but there is no penalty to enforce the injunction of the law").

355. C. JOSEPH BERNARDO & EUGENE H. BACON, AMERICAN MILITARY POLICY: ITS DEVELOPMENT SINCE 1775, at 81 (1955).

356. See Michael A. Bellesiles, *The Origins of Gun Culture in the United States, 1760–1865*, 83 J. AM. HIST. 425 (1996).

357. See Report of the Secretary of War respecting the difficulties attending the execution of the law establishing a uniform militia throughout the United States (Dec. 10, 1794), *supra* note 354, at 70–71. For instance, the New Jersey law of June 5, 1793, provided that "if any . . . militiaman shall appear, when called out to exercise or into service, without a musket or a rifle, he shall forfeit and pay the sum of three shillings and nine pence; and for want of every other of the aforesaid articles six pence." *Id.* at 70.

358. *Id.* (concluding that "it is certain that, were the penalties greatly enhanced, an insuperable difficulty would occur in obtaining the requisite number of arms in any reasonable period" and advocating for the establishment of factories in each state).

exhorting the states to take steps to ensure that militia units were in compliance with the 1792 law.³⁵⁹

The May 8, 1792 Act also created the office of adjutant-general in each state. In addition to "distribut[ing] all orders from the commander-in-chief of the state to the several corps," each adjutant-general was responsible for providing the governor and the President with annual reports specifying the composition of militia units and their supply of arms.³⁶⁰ Militiamen injured while "called out into the service of the United States" were entitled to federal compensation.³⁶¹ Although the Act specified such things as the number and assignment of officers,³⁶² much of the actual organization of the militia was left to the states. The militia was to be "arranged into divisions, brigades, regiments, battalions and companies, as the legislature of each state shall direct."³⁶³ While the Act specified the size of brigades, regiments, battalions, and companies, the specification only applied "if the same be convenient."³⁶⁴ States were to train their militia according to Baron Steuben's rules of discipline,³⁶⁵ unless there were "unavoidable circumstances."³⁶⁶ States were free to exempt classes of individuals from militia service,³⁶⁷ and there were no fines or other penalties against the states or against individuals for failing to follow the law. The Act also allowed states to have separate military companies not part of the militia.³⁶⁸

The Third Congress further increased military spending³⁶⁹ and added a corps of 764 artillerists and engineers for service on the field, on the

359. See, e.g., Report of a committee on the militia laws of the United States (Feb. 7, 1803), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 163 (resolving that "the President . . . be requested to write to the Executive of each State, urging the importance and indispensable necessity of vigorous exertions, on the part of the State Governments, to carry into effect the militia system adopted by the national Legislature").

360. Act of May 8, 1792, ch. 33, §§ 6, 10, 1 Stat. 271, 273.

361. *Id.* § 9, 1 Stat. at 273.

362. *Id.* §§ 3-4, 1 Stat. at 272-73.

363. *Id.* § 3, 1 Stat. at 272.

364. *Id.*

365. Friedrich Wilhelm Augustus von Steuben, the Prussian general who volunteered at Valley Forge, published in 1779 a set of rules for organizing military units, known as the "Blue Book." See JOSEPH R. RILING, *BARON VON STEUBEN AND HIS REGULATIONS* (1966).

366. Act of May 8, 1792, ch. 33, § 7, 1 Stat. 271, 273.

367. *Id.* § 2, 1 Stat. at 272.

368. *Id.* §§ 10-11, 1 Stat. at 273-74.

369. The Third Congress allocated \$1,629,936 for military expenses in 1794, including \$303,684 for payment of troops, \$312,567 for subsistence, \$31,632 for forage, \$112,000 for clothing, and \$130,000 for defensive protection of the frontiers. Act of Mar. 21, 1794, ch. 10, 1 Stat. 346 ("making appropriations for the support of the Military establishment of the United States, for the year one thousand seven hundred ninety four"). In 1795, the Third Congress appropriated a total amount of \$1,469,439 for military expenditures. Act of Mar. 3, 1795, ch. 46, 1 Stat. 438 ("making further appropriations for the Military and Naval establishments, and for the support of government").

frontiers, and to protect seacoast fortifications.³⁷⁰ On May 6, 1794, Congress passed “An Act directing a Detachment from the Militia of the United States,”³⁷¹ authorizing the President to “require of the executives of the several states, to take effectual measures, as soon as may be, to organize, arm and equip, according to law, and hold in readiness to march at a moment’s warning” 80,000 militia.³⁷² The Act specified the quota from each state, ranging from 1256 in Delaware to 11,885 in Massachusetts.³⁷³ The militia units raised under the Act were limited to tours of three months.³⁷⁴ During federal service, militiamen received the same pay and allowances as federal troops plus a clothing stipend.³⁷⁵ In addition to the specific detachment, the Act “requested” the President to “call on the executives of the several states, to take the most effectual means, that the whole of the militia, not comprised within the foregoing requisition, be armed and equipped according to law.”³⁷⁶ Congress appropriated \$200,000 for the requisition.³⁷⁷

In January 1795, Congress revised the pay scales for militia called into federal service and began a new practice of compensating militiamen for use of their own arms, horses, and equipment.³⁷⁸ Legislation passed in that month set new, increased pay rates, ranging from \$6.66 per month for gunners, bombardiers, and privates, to \$9 per month for sergeant-majors and quartermaster-sergeants.³⁷⁹ In addition, Congress allocated forty cents per day to each militiaman “for the use of his horse, arms and accoutrements,” with a further twenty-five cents per day if militiamen provided their own “rations and forage.”³⁸⁰ Congress also specified that militia pay began “from the day of their appearing at the places of battalion, regimental or brigade rendezvous,” but that there would be a travel allowance of “a day’s pay and rations, for every fifteen miles from . . . home to such place of rendezvous,

370. Act of May 9, 1794, ch. 24, 1 Stat. 366 (“providing for raising and organizing a Corps of Artillerists and Engineers”). The Act lasted for one year and then to the end of the next session of Congress. *Id.* § 6, 1 Stat. at 367.

371. Act of May 9, 1794, ch. 27, 1 Stat. 367.

372. *Id.* § 1, 1 Stat. at 367.

373. *Id.*

374. *Id.* § 4, 1 Stat. at 367–68.

375. *Id.*

376. *Id.* § 5, 1 Stat. at 368.

377. Act of June 9, 1794, § 1, ch. 63, 1 Stat. 394, 394. The same law made available other military funds, including \$200,000 for the “further protection and defence of the southwestern frontier.” *Id.*

378. Act of Jan. 2, 1795, ch. 9, 1 Stat. 408 (“regulat[ing] the pay of the non-commissioned officers, musicians, and privates of the Militia of the United States, when called into actual service, and for other purposes”).

379. *Id.* § 1, 1 Stat. at 408.

380. *Id.* § 2, 1 Stat. at 408.

and the same allowance for traveling home from the place of discharge.”³⁸¹ When, therefore, on February 28, 1795, Congress reenacted the May 2, 1792 Act setting forth the procedures for calling forth the Militia, it deleted the original provisions that set militia pay at the same rates as regulars and also removed the requirement of judicial certification under the earlier law.³⁸² The following year, the Fourth Congress enacted a law specifying new pay rates for regulars and their rations, creating a compensation scheme for wounded soldiers and implementing an oath requirement.³⁸³ Congress also requisitioned 80,000 militia (apportioned among the states), giving commissioned officers the same pay as their regular counterparts, but leaving in place the pay rates for the other militiamen set under the January 1795 law.³⁸⁴ As a result of these statutes, militiamen were in fact better compensated than regulars.³⁸⁵

In the summer of 1798, Congress created an expanded national military structure independent of the state militia. The Provisional Army Act of May 28, 1798 authorized the President, “in the event of a declaration of war against the United States, or of actual invasion of their territory, by a foreign power, or of imminent danger of such invasion,” to raise an army of 10,000

381. *Id.* § 3, 1 Stat. at 408.

382. Act of Feb. 28, 1795, ch. 36, 1 Stat. 424 (“provid[ing] for calling forth the Militia to execute the laws of the Union, suppress insurrections, and repel invasions; and to repeal the Act now in force for those purposes”). The 1795 Act adopted all of the provisions (and the exact language) of the 1792 law with just four changes. Section 2 of the new law removed the requirement that a district judge or Supreme Court justice certify to the President that the laws are opposed in a manner that can not be addressed by normal judicial proceedings or the marshals. *Id.* § 2, 1 Stat. at 424. Section 2 also removed the provision that allowed the President to call forth militia from other states only if the Congress is not in session. *Id.* Section 4 of the new law deleted the provision that “the militia employed in the service of the United States, shall receive the same pay and allowances, as the troops of the United States, who may be in service at the same time, or who were last in service,” specifying simply that “the militia employed in the service of the United States, shall be subject to the same rules and articles of war, as the troops of the United States.” *Id.* § 4, 1 Stat. at 424. The 1795 Act also added a provision in section 5 that a court martial could prohibit a convicted militiamen from holding a commission in the militia for a period of up to twelve months. *Id.* § 5, 1 Stat. at 424.

383. Act of May 30, 1796, ch. 39, §§ 12, 19, 21, 1 Stat. 483, 484, 485, 486 (“ascertain[ing] and fix[ing] the Military Establishment of the United States”).

384. Act of June 24, 1797, ch. 4, 1 Stat. 522 (“authorizing a detachment from the Militia of the United States”).

385. Act of Jan. 2, 1795, § 1, 1 Stat. at 408; Act of May 30, 1796, § 12, 1 Stat. at 484. Sergeant-majors and quartermaster-sergeants in militia units called forth for federal service in 1796 earned \$9 per month while their counterparts in the regulars received \$8. Similar disparities existed with respect to sergeants (\$8 for militiamen, \$7.33 for regulars), corporals (\$7.33 versus \$6), and privates (\$6.66 versus \$4). Act of Jan. 2, 1795, § 1, 1 Stat. at 408; Act of May 30, 1796, § 12, 1 Stat. at 484.

men to serve for up to three years.³⁸⁶ The Act also authorized the President, at any time “in his opinion the public interest shall require,” to accept into federal service volunteer companies—to be “armed, clothed and equipped at their own expense”—but which would receive the same pay and provisions as regulars.³⁸⁷ Supplemental legislation exempted these volunteers from militia service.³⁸⁸ In July of 1798, Congress authorized the President to raise an additional twelve infantry regiments and six troops of light dragoons, “to be enlisted for and during the continuance of the existing differences between the United States and the French Republic,” and increased pay for army regulars.³⁸⁹ Additional legislation in March 1799 increased the size of the army and authorized the use of volunteers for the same purposes as the militia.³⁹⁰ Congress’s military budget for 1800 stood at \$3,042,576, including \$1,018,620 for paying soldiers.³⁹¹

Recall that the 1788 Constitution authorized but did not require Congress to arm the militia.³⁹² The result was predictable: Congress initially

386. Act of May 28, 1798, ch. 47, § 1, 1 Stat. 558, 558 (“authorizing the President of the United States to raise a Provisional Army”).

387. *Id.* § 3, 1 Stat. at 558.

388. Act of June 22, 1798, ch. 57, § 1, 1 Stat. 569, 569 (“An Act supplementary to, and to amend the act, intituled ‘An Act authorizing the President of the United States to raise a provisional army.’”).

389. Act of July 16, 1798, ch. 76, §§ 2, 6, 1 Stat. 604, 604–05 (“An Act to augment the army of the United States, and for other purposes.”). Privates now received \$5 per month. *Id.* § 6, 1 Stat. at 605. In February of the following year, Congress suspended additional enlistments under the July 16, 1798 statute unless war were to break out with France or the United States were to be invaded by French troops. Act of Feb. 20, 1800, ch. 9, 2 Stat. 7 (“An Act to suspend, in part, an act intituled ‘An act to augment the Army of the United States; and for other purposes.’”). In May, Congress directed the discharge of most of the officers, noncommissioned officers, and privates appointed under the statute. Act of May 14, 1800, ch. 69, §§ 1–2, 2 Stat. 85, 86 (“An Act supplementary to the act to suspend part of an act, intituled ‘An act to augment the Army of the United States, and for other purposes.’”).

390. Act of Mar. 2, 1799, ch. 31, §§ 1, 6–9, 1 Stat. 725, 726 (“An Act giving eventual authority to the President of the United States to augment the army.”). *See also* Act of Mar. 2, 1799, ch. 44, § 1, 1 Stat. 741, 741–42 (“An Act making appropriations for the support of the Military Establishment, for the year one thousand seven hundred and ninety-nine,” enacting additional military appropriations in the amount of \$4,288,549). Congress also enacted a new law specifying the composition and organization of the army and revised pay scales. Act of Mar. 3, 1799, ch. 48, 1 Stat. 749 (directing a “better organizing of the Troops of the United States, and for other purposes”). Under the Act, a private received \$5 per month, *id.* § 3, 1 Stat. at 750–51, as well as a travel allowance of pay at the rate of twenty miles per day, *id.* § 25, 1 Stat. at 754–55. On May 14, 1800, Congress authorized the President to suspend further appointments under the statute and directed the discharge of most officers, noncommissioned officers, and privates appointed pursuant to the statute. Act of May 14, 1800, ch. 69, §§ 1–2, 2 Stat. 85, 85–86 (“An Act supplementary to the act to suspend part of an act, intituled ‘An Act to augment the Army of the United States, and for other purposes.’”).

391. Act of May 10, 1800, ch. 48, § 1, 2 Stat. 66, 66–67 (“making appropriations for the Military Establishment of the United States; in the year one thousand eight hundred”).

392. U.S. CONST. art. I, § 8.

tried to shift the burden of arming the militia to individual militiamen and to the states.³⁹³ When the provision of the May 8, 1792 Act requiring militiamen to furnish their own arms proved unworkable,³⁹⁴ Congress responded with two programs: one lending out arms to militia; the other purchasing arms and reselling them to the states. The Act of May 28, 1798 authorized militia corps to borrow field artillery belonging to the United States, "to be taken, removed and returned, at the expense of the party requesting: who are to be accountable for the same, and to give receipts accordingly."³⁹⁵ The Act also permitted militia called forth into federal service and volunteer corps to borrow (upon request of the state executive, in the case of the militia) arms and artillery from federal arsenals, with "proper receipts and security" and acceptance of responsibility for "the accidents of . . . service." Further, the Act made available \$200,000 for the President to purchase "a quantity of caps, swords or sabres, and pistols with holsters" sufficient to equip 4000 cavalry, and to be loaned out to cavalry called into federal service.³⁹⁶ Under a statute passed on July 6, 1798, Congress appropriated \$400,000 for the purchase of 30,000 stands of arms, to be made available for sale to the states and their militia—unsold arms could be loaned to the militia when called into federal service.³⁹⁷ This gave the states a reliable source of weaponry.³⁹⁸

After Jefferson was elected President in 1800, he urged a return to reliance for security on the militia rather than on federal troops. Jefferson believed that each state should implement security mechanisms within its own borders—collectively, the nation's security would be assured.³⁹⁹ Accordingly, in March of 1802, Congress passed new legislation "fixing the military . . . Establishment of the United States," reducing the size of the regular army from 5500 to 3300 troops, and putting in place new pay and

393. By 1808, Congress would be forced to provide arms itself to ensure an effective fighting force that could be called into federal service. See *infra* text accompanying notes 417–419.

394. See *supra* notes 355–359 and accompanying text.

395. Act of May 28, 1798, ch. 47, § 11, 1 Stat. 558, 560 ("authorizing the President of the United States to raise a Provisional Army").

396. *Id.* § 13, 1 Stat. at 560. The June 22, 1798 statute also allowed the President to sell or lend artillery, small arms, and accoutrements from federal arsenals to volunteer companies. Act of June 22, 1798, ch. 57, § 3, 1 Stat. 569, 570.

397. Act of July 6, 1798, ch. 65, §§ 1–2, 1 Stat. 576, 576 ("providing Arms for the Militia throughout the United States"). A stand was a complete set of arms required by a soldier, typically a musket, bayonet, cartridge box, and belt—but possibly the musket and bayonet alone.

398. In practice, though, many states did not bother to buy these weapons. WILLIAM H. RIKER, *SOLDIERS OF THE STATES: THE ROLE OF THE NATIONAL GUARD IN AMERICAN DEMOCRACY* 21–22 (1957).

399. BERNARDO & BACON, *supra* note 355, at 95.

pension provisions.⁴⁰⁰ On March 2, 1803, Congress passed legislation requiring the adjutant-general of the militia in each state to provide the President with militia terms (the number of militiamen and their arms) by the first Monday of each January, and specifying that “every citizen duly enrolled in the militia, shall be constantly provided with arms, accoutrements, and ammunition.”⁴⁰¹ The statute studiously avoided the question of *who* had to provide militiamen with arms. The next day, Congress passed a statute authorizing the President, “whenever he shall judge it expedient, to require of the executives of such of the states as he may deem expedient . . . and . . . convenient,” to “organize, arm and equip, according to law, and hold in readiness to march at a moment’s warning a detachment of militia not exceeding eighty thousand, officers included.”⁴⁰² The detachment statute appropriated \$1.5 million for “paying and subsisting” troops called into federal service and an additional \$25,000 for building and equipping new arsenals.⁴⁰³ Congress also organized the militia for the District of Columbia, and authorized the President, “on an invasion, or insurrection, or probable prospect thereof, to call forth such a number of militia . . . as he may deem proper.” The statute specified that “when any militia shall be in actual service, they shall be allowed the same pay and rations as are allowed by law to the militia of the United States.”⁴⁰⁴ The military budget for 1801 dropped to \$2,093,001, including \$480,396 for army pay,⁴⁰⁵ and the budget halved again the following year.⁴⁰⁶

400. Act of Mar. 16, 1802, ch. 9, §§ 1–4, 14–15, 27, 2 Stat. 132, 133, 135, 137 (“fixing the military peace establishment of the United States”). The statute also established the military academy at West Point.

401. Act of Mar. 2, 1803, ch. 15, §§ 1–2, 2 Stat. 207, 207 (“An Act in addition to an act, intituled ‘An act more effectually to provide for the National defence, by establishing an uniform Militia throughout the United States.’”).

402. Act of Mar. 3, 1803, ch. 32, § 1, 2 Stat. 241, 241 (“directing a detachment from the Militia of the United States, and for erecting certain Arsenals”).

403. *Id.* §§ 1, 4, 5, 2 Stat. at 241.

404. Act of Mar. 3, 1803, ch. 20, § 23, 2 Stat. 215, 223 (proposing to “provide more effectually . . . for the organization of the Militia of the District of Columbia”).

405. Act of Mar. 2, 1801, ch. 18, § 1, 2 Stat. 108, 109 (“making appropriations for the Military establishment of the United States, for the year one thousand eight hundred and one”).

406. For 1802, the appropriation for the military establishment was \$977,261, including \$292,272 for army pay. Act of May 7, 1802, ch. 46, §§ 1–3, 2 Stat. 183, 183–84 (“making appropriations for the Military establishment of the United States, for the year one thousand eight hundred and two”). For 1803, the military budget was \$829,464.48, including \$299,124 for army pay. Act of Mar. 3, 1803, ch. 24, §§ 1–2, 2 Stat. 227, 227–28 (“making appropriations for the Military establishment of the United States, for the year one thousand eight hundred and three”). For 1804, the figure was \$858,851.09, including \$301,476 for army pay. Act of Feb. 10, 1804, ch. 11, § 1, 2 Stat. 249, 249–50 (“making appropriations for the Military establishment of the United States, for the year one thousand eight hundred and four”). For 1805, it was \$942,951.47 including \$302,796 for army pay. Act of Feb. 14, 1805, ch. 17, § 1, 2 Stat. 315, 315 (“making appropriations for the

In early 1806, with concerns looming that the United States would be drawn into hostilities between Britain and France, Samuel Smith of Maryland introduced legislation in the Senate that would make free, white male citizens between the ages of eighteen and forty-five members of the militia and classify them into a class of service depending on their age.⁴⁰⁷ Notably, men between the ages of twenty-one and twenty-five would be liable to serve for a period of one year at a time in "active services within the United States, or the countries next adjacent."⁴⁰⁸ The Senate approved the bill, but it was rejected in the House.⁴⁰⁹ Congress did, however, pass legislation allowing the President to require the governors to organize, arm, and equip 100,000 militiamen (apportioned among the states based on their militia returns or other "equitable" means) who could be called forth to serve for a period of six months.⁴¹⁰ The legislation, which repealed the 80,000 detachment of March 3, 1803, and lasted for two years, specified that the militia would receive the "same pay, rations and allowance for clothing, that are established by law . . . [for] the army of the United States," and appropriated \$2 million for those expenses.⁴¹¹ On February 24, 1807, Congress passed volunteer corps legislation, authorizing the President to accept the services of volunteer companies of up to 30,000 men, "who shall be clothed, and furnished with horses, at their own expense, and armed and equipped at the expense of the United States," and could be called into service for periods of up to twelve months, during which they

support of the Military establishment of the United States, for the year one thousand eight hundred and five"). For 1806, it was \$1,069,866.77, including \$302,556 for army pay. Act of Apr. 15, 1806, ch. 54, § 1, 2 Stat. 408, 408 ("making appropriations for the support of the Military establishment of the United States, for the year one thousand eight hundred and six"). For 1807, it was \$1,094,754.55, including \$302,952 for army pay. Act of Jan. 10, 1807, ch. 3, § 1, 2 Stat. 412, 412-13 ("making appropriations for the support of the Military establishment of the United States, for the year one thousand eight hundred and seven"). For 1808, the military budget was \$1,223,850.40, including \$302,952 for army pay. Act of Mar. 3, 1808, ch. 27, § 1, 2 Stat. 470, 470 ("making appropriations for the support of the Military establishment of the United States, for the year one thousand eight hundred and eight"). By way of comparison, in 1808, Congress appropriated just \$1,077,238.40 for other operating expenses. Act of Feb. 10, 1808, ch. 17, 2 Stat. 462, 462-66 ("making appropriations for the support of Government during the year one thousand eight hundred and eight"). The figures reported in this paragraph represent the aggregate amounts provided in the statute or calculated by summing the individual budget components.

407. 15 ANNALS OF CONG. 69 (1806).

408. *Id.*

409. *See id.*

410. Act of Apr. 18, 1806, ch. 32, § 1, 2 Stat. 383, 383 ("authorizing a detachment from the Militia of the United States").

411. *Id.* §§ 4, 6-7, 2 Stat. at 384. Congress reenacted the authorization the following year for a two-year period with an additional \$1 million appropriation. Act of Mar. 30, 1808, ch. 39, §§ 6-7, 2 Stat. 478, 479 ("authorizing a detachment from the Militia of the United States").

would “be entitled to the same pay, rations, forage and emoluments . . . with the regular troops of the United States,” and be exempt from militia service.⁴¹² The legislation appropriated \$500,000 for that purpose.⁴¹³ In 1807, following the Burr conspiracy, Congress authorized the use of regular troops, in addition to the militia, to execute the laws.⁴¹⁴ In March 1808, Jefferson again advocated for a classification of the militia, and a reliance on the most skilled portion rather than the undifferentiated masses, but Congress rejected the proposal, increasing the size of the regular Army the following month.⁴¹⁵ Congress also rejected James Madison’s similar calls to reform the militia after his election in 1808.⁴¹⁶

Arming the militia remained a problem. Individuals did not have the resources to purchase weapons, states were reluctant to expend funds, and supply was short. Accordingly, in April 1808, Congress passed legislation authorizing the President to sell to the states “any arms . . . which may be parted with without injury to the public.”⁴¹⁷ In the same month, Congress authorized an annual appropriation of \$200,000 “for the purpose of providing arms and military equipments for the whole body of the militia of the United States, either by purchase or manufacture, by and on account of the United States.”⁴¹⁸ The statute authorized the purchase of arms and the creation of additional arms manufactories, and directed the distribution of arms to the states and territories, in proportion to their militia enrollments, for outfitting militiamen “under such rules and regulations as shall be by law prescribed by the legislature of each state and territory.”⁴¹⁹ The appropriation represented the very first grant-in-aid in the history of the United

412. Act of Feb. 24, 1807, ch. 15, §§ 1–3, 2 Stat. 419, 419–20 (“authorizing the President of the United States to accept the service of a number of volunteer companies, not exceeding thirty thousand men”).

413. *Id.* § 5, 2 Stat. at 420.

414. Act of Mar. 3, 1807, ch. 39, 2 Stat. 443 (“authorizing the employment of the land and naval forces of the United States, in cases of insurrections”). The Act provided:

[I]n all cases of insurrection, or obstruction of the laws, either of the United States, or of any individual state or territory, where it is lawful for the President of the United States to call forth the militia for the purposes of suppressing such insurrection, or of causing the laws to be duly executed, it shall be lawful for him to employ, for the same purposes, such part of the land or naval force of the United States, as shall be judged necessary, having first observed all of the pre-requisites of the law in that respect.

Id.

415. Act of Apr. 12, 1808, ch. 43, 2 Stat. 481 (adding eight regiments for a five-year period “to raise for a limited time an additional military force”).

416. CRESS, *supra* note 194, at 169.

417. Act of Apr. 2, 1808, ch. 42, 2 Stat. 481 (“authorizing the sale of public arms”).

418. Act of Apr. 23, 1808, ch. 55, § 1, 2 Stat. 490, 490 (“making provision for arming and equipping the whole body of the Militia of the United States”).

419. *Id.* §§ 2–3, 2 Stat. at 490–91.

States. The total amount, equivalent to nearly \$3 million today,⁴²⁰ representing about 16 percent of military spending for that year and nearly two-thirds of army pay,⁴²¹ likely exceeded what the states themselves were spending on the militia.⁴²² With this appropriation, Congress expected every adult white male in the nation to possess a firearm—actual ownership of arms remained with the state.⁴²³ As a result of the appropriation, “[d]rawing upon the two major arsenals in Springfield, Massachusetts, and Harpers Ferry, Virginia, as well as private companies throughout the United States, the government absorbed the vast majority of guns produced prior to 1840.”⁴²⁴ This \$200,000 annual appropriation remained in place until 1887 when Congress increased the amount to \$400,000.⁴²⁵

420. Two hundred thousand dollars in 1808 is equivalent in purchasing power to \$2,910,000 in 2003. Samuel H. Williamson, Economic History Services, *What is the Relative Value?* (Apr. 15, 2004), at <http://www.eh.net/hmit/compare/> (last visited Oct. 14, 2004).

421. For 1808, the military budget was \$1,223,850.40, including \$302,952 for army pay. Act of Mar. 3, 1808, ch. 27, § 1, 2 Stat. 470, 470 (“making appropriations for the Military establishment of the United States, for the year one thousand eight hundred and eight”) (summarizing components).

422. See RIKER, *supra* note 398, at 22.

423. Act of Apr. 23, 1808 ch. 55, § 1, 2 Stat. 490, 490. There were different views on the wisdom of this program. In 1810, General Ebenezer Huntington wrote:

In respect to arming the militia by the General Government, I cannot believe it expedient in any point of view. If the public should be willing to place their arms in the hands of the soldiery, they would, under every care which would be taken, be nearly rendered useless in a very short period. If they should be placed under the care of the officers, they would soon be destroyed with rust, without a regular armorer to take care of them; if they should be put in the hands of the men on their responsibility, they would be sold by them in many instances, and loaned, and used for gunning in others, and, I have no doubt, might be considered a total loss in five years; besides, if the public were to furnish arms for the militia, the arms, now in our country, and many of them very fine pieces, would be totally neglected . . . I should consider a magazine in each State, supplied with field pieces, arms, ammunition, and all the equipments necessary for a thousand men, and under the care of a suitable man paid for the purpose, more to be relied on than a supply for three thousand, dealt out to the men, or placed under the care of militia officers, at the close of every training day.

Letter from Ebenezer Huntington to Benjamin Tallmadge (Jan. 5, 1810), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 264.

424. Bellesiles, *supra* note 356, at 445–46.

425. Act of Feb. 1, 1887, ch. 129, 24 Stat. 401. The annual amount was increased again in 1900 to \$1 million. Act of June 6, 1900, ch. 805, 31 Stat. 662. Nonetheless, many militiamen remained unarmed. For one thing, the \$200,000 often went unclaimed. CUNLIFFE, *supra* note 194, at 209–11. After the first five years of the program, by which time \$1 million had been appropriated, less than \$100,000 had actually been spent and only 26,000 stands of arms claimed. Arming the Militia (July 8, 1813), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 337. To receive funds, states had an incentive to report their militia enrollments (as required under the 1792 Act). Some states, like Connecticut, completed returns almost every year, but other states failed regularly to make any kind of report and thus forfeited funding. See H. RICHARD UVILLER & WILLIAM G. MERKEL, THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT 285–87 n.78.

Within a short period, therefore, Congress had provided for organizing, arming, and disciplining the militia so that it would be ready for federal service. Congress also had set out the procedures for calling forth militia units to fulfill the protection mandate of Article IV and for paying militiamen during their periods of federal employ. To be sure, the system sometimes had the deficiencies of any conscription of labor. States sometimes complained that Congress was not paying their militia enough,⁴²⁶ and lobbied for increases.⁴²⁷ At times, the administration tended to drag its feet in dispersing

(summarizing returns). New Jersey, for example, reported its enrollment only every other year or so. RIKER, *supra* note 398, at 22–27. In 1839, over half of the militia companies in Massachusetts sent returns. Bellesiles, *supra* note 356, at 450. In 1850, just seven states bothered at all. *Id.* For an example of the War Department's compilation of returns for transmission to Congress, see Message transmitting statements of the militia of the several States (Jan. 5, 1803), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, 159–62.

Gun production also did not meet demand. According to its 1808 quota, Massachusetts was to receive 5688 muskets, but it had received none by 1813. Bellesiles, *supra* note 356, at 446. “The state government responded by withholding taxes from the federal government in order to try and purchase arms elsewhere. This extortion actually worked, Massachusetts received 2,300 muskets in five shipments, but it did not receive its full 1808 allotment until 1817.” *Id.* Other states also did not receive their full arms quotas. *Id.* Only in the 1840s and 1850s did gun production increase sufficiently to meet demand. *Id.* at 446–47. Finally, militia practices did not meet the ideal of universal service. Militia service was often evaded. Many states provided for automatic exemptions for various occupations, and some states provided exemption based on payment of a commutation fee. Some states sought to compel militia participation through fines (a holdover from colonial practices). For the most part, however, fines proved unworkable because they were seen widely as allowing the rich to avoid service simply by paying a fine—by the 1840s, militia fines were largely abolished. See Lena London, *The Militia Fine 1830–1860*, 15 MILITARY AFFAIRS 133, 133–44 (1951). Many states therefore moved toward a volunteer system, including Massachusetts (1840), Maine (1844), Vermont (1844), and New Hampshire (1851). RIKER, *supra* note 398, at 29.

426. For example, Rep. Thomas Cobb of Georgia complained in 1818:

There . . . [are] at this time in service at least three thousand men of the Georgia and Tennessee militia. They ha[ve] been called out at a season of the year, above all others, of the most consequence to them; for that they would be in service just long enough to deprive them of the opportunity of making a crop upon their farms. In addition to this . . . a more inclement season . . . [has] hardly ever been witnessed in that part of the country where the militia were. . . . [T]hey . . . [have] been exposed to incessant rains from the time they were imbodyed . . . [T]he Tennessee militia . . . were compelled to return to their settlements in Georgia in order to be subsisted; and . . . the Georgia militia . . . [have] been reduced to an allowance of half a pint of corn a day. . . . [P]ersons suffering such hardships and privations . . . [are] entitled to a greater compensation than the pitiful sum of five dollars per month. . . . [H]ad the militia been properly fed and attended to, they would not have complained, or cared for the trifling pay now allowed them by law. But . . . the Government ought at least to increase the weight of their pockets, after failing to afford them food.

32 ANNALS OF CONG. 1673 (1818).

427. Alabama, for instance, pressed for increased funding in 1837:

It is not expected or desired . . . that you will authorize a reimbursement of the collateral or incidental deprivations of the citizen soldier, nor, indeed, that you will provide adequate compensation for his actual loss of time and property . . . but the present paltry

funds.⁴²⁸ There were also occasional disputes over which militia expenses would be covered. Settling the accounts for militia services during the Second Seminole War (1835–1842), for example, took two decades.⁴²⁹ Nonetheless, general practice and expectation were that when the militia served, the national government paid.⁴³⁰

The remainder of this part traces some of the occasions on which the early national government, in accordance with these statutes, fulfilled its constitutional obligation to protect the states. The examples considered are three domestic insurrections (the Whiskey Rebellion, Fries' Rebellion, and the Burr Conspiracy), the use of the

pay is so grossly inadequate, even below the compensation allowed our soldiers during the last war with Great Britain . . . that it does seem that wisdom, good policy, and even justice, require that . . . at least a reasonable compensation . . . should be provided for those who . . . forget self in the view of danger to their fellow-citizens, tear themselves from all the comforts and endearments of home, and voluntarily repair when duty calls, in defence of the frontier from savage massacre, or the shores of their beloved country from foreign invasion.

Application of Alabama that the pay and allowances of volunteers and militia when called into the service of the United States may be increased (Jan. 23, 1837), in 6 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 1003–04.

428. See, e.g., Act of May 13, 1800, ch. 63, 2 Stat. 82 (directing “settle[ment of] the accounts of the militia, who served on an expedition commanded by Major Thomas Johnson against the Indians, in [1794]”); Act of May 8, 1789, ch. 41, 1 Stat. 556 (“directing the payment of a detachment of Militia, for services performed in the year one thousand seven hundred and ninety-four, under Major James Ore”); Act of Jan. 2, 1795, ch. 9, § 4, 1 Stat. 408, 408 (directing payment to militia “lately called forth into the actual service of the United States, on an expedition to Fort Pitt”).

429. In 1840, Alabama still sought payment for its militia's services at the outbreak of the war. See U.S. SENATE JOURNAL, 26th Cong., 1st Sess. 203 (1839). In 1848, the Florida militia remained unpaid. See U.S. SENATE JOURNAL, 30th Cong., 1st Sess. 99 (1847–1848). In 1850, Georgia still sought payment for the services of its militiamen. See S. 211, 31st Cong., 1st Sess. (1850) (“A Bill To authorize the Secretary of War to settle the claims of the State of Georgia for horses and equipments lost by the volunteers and militia engaged in the suppression of hostilities of the Creek, Seminole and Cherokee Indians, in the years eighteen hundred and thirty-six and eighteen hundred and thirty-seven.”). Two years later the matter was still unresolved. See U.S. SENATE JOURNAL, 32d Cong., 1st Sess. 91 (1851–1852). This may not be surprising in light of the fact that on the very same day Georgia was pressing its Seminole war claims, a bill was introduced to obtain payment for service in the revolutionary army. See *id.* at 92.

430. Accordingly, the records of Congress and the War Department are filled with requests by states for payment for their militias' services. See, e.g., Application of the Legislature of Kentucky for the Payment of the militia of that State called out on the requisition of General Edmund P. Gaines in 1836 (Jan. 3, 1837), in 6 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 986, 986; Claim of Connecticut for a balance due for military services of the militia of that State during the war of 1812–1815 (Dec. 30, 1836), in 6 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 984, 984; U.S. HOUSE JOURNAL, 2d Cong., 2d Sess. 686 (Jan. 30, 1793) (recording a “letter from the Governor of Kentucky, enclosing a representation from the Legislature of the said State, respecting an adjustment of a claim of that State against the United States, for the expense of certain expeditions against the Indians”).

militia to defend against invasion in the War of 1812, and early programs to fortify ports and harbors and to defend the frontiers.⁴³¹

B. The Whiskey Rebellion and Fries' Rebellion

Soon after ratification of the Constitution, the Protection Clause of Article IV and the associated Militia Clauses of Articles I and II were put to test during two incidents that seemed to replay the rebellion by the Massachusetts farmers that had inspired these constitutional provisions. During both the Whiskey Rebellion of the early 1790s and Fries' Rebellion in 1799, the federal government's response differed dramatically from its tepid role in Shays' Rebellion. Required under the Protection Clause to protect the states, and authorized to employ the militia to do so, the new government proved willing and able to maintain domestic security.

The events of the Whiskey Rebellion require only brief repetition.⁴³² As part of Hamilton's 1790–1791 financial plan, the federal government imposed an excise tax on distilled whiskey. Protests broke out around the country, with opposition to the tax especially strong in western Pennsylvania among cash-strapped farmers who practiced small-scale, seasonal distilling. Beginning in the fall of 1791, federal agents were attacked when they arrived in the state to collect the whiskey tax. Recalling Shays' Rebellion, on September 15, 1792, Washington issued a proclamation "exhort[ing] all persons whom it may concern to refrain and desist from all unlawful combinations and proceedings whatsoever having for object or tending to obstruct the operation of the laws," and promising that "all lawful ways and means will be strictly put in execution for bringing to justice the infractors thereof and securing obedience thereto."⁴³³ After a period of relative quiet in 1793, in the spring of 1794 attacks on tax collectors in

431. Dozens of other occasions involving federal protection and the militia could make useful future case studies, including (to name a few) the Buckshot War in Pennsylvania in 1838, the Dorr Rebellion in Rhode Island in 1842, the Anthony Burns riots in Boston in 1854, the Kansas disturbances in 1854–1858, the Great Riots of 1877, disturbances in Coeur d'Alene in 1892, the draft riots in the Civil War, and security in the Reconstruction South.

432. Useful overviews include LELAND D. BALDWIN, *WHISKEY REBELS: THE STORY OF A FRONTIER UPRISING* (1939); ROBERT W. COAKLEY, *THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS 1789–1878*, at 28–68 (1988); THOMAS P. SLAUGHTER, *THE WHISKEY REBELLION: FRONTIER EPILOGUE TO THE AMERICAN REVOLUTION* (1986); RICHARD TAYLOR WILEY, *THE WHISKEY INSURRECTION* (1912); *THE WHISKEY REBELLION: PAST AND PRESENT PERSPECTIVES* (Steven R. Boyd ed., 1985).

433. George Washington, Proclamation of Sept. 15, 1792, reprinted in 1 *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS: 1789–1877*, at 14–25 (James D. Richardson ed., 1896) [hereinafter *MESSAGES AND PAPERS OF THE PRESIDENTS*].

western Pennsylvania renewed. Opposition to the tax also broke out in parts of Georgia, Kentucky, and North and South Carolina. On July 17, 1794, when federal marshals served court orders requiring distillers to appear in federal court in Philadelphia, a mob—which included many members of the state militia—attacked and burned the home of Inspector John Neville in Bower Hill. Regulars arrived from Pittsburgh to defend Neville, and one protester was killed in the ensuing confrontation. On August 4, Supreme Court Associate Justice James Wilson certified, pursuant to the May 2, 1792 Act, that the “laws of the United States are opposed, and the execution thereof obstructed, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshal of that district.”⁴³⁴

Although for domestic insurrections the Protection Clause is triggered “on Application of the Legislature, or of the Executive, (when the Legislature cannot be convened),”⁴³⁵ it is not clear that Pennsylvania actually applied for federal assistance. Governor Thomas Mifflin, who took the view that the militia could only be called forth to suppress insurrections and not to aid in the execution of federal civil law, told Washington in August of 1794 that he was reluctant to use military forces.⁴³⁶ Nonetheless, Mifflin pledged to cooperate with any action the President decided to take.⁴³⁷ On August 7, Washington issued a second proclamation directing the protesters to disperse before September 1 or face a military response.⁴³⁸ That same day, Governor Mifflin issued his own proclamation condemning the riots—on August 8, he directed the state’s militia leaders to prepare their units for federal service.⁴³⁹ It appears that Pennsylvania acquiesced in, rather than applied for, federal protection.

434. Letter from James Wilson to the President of the United States (Aug. 4, 1794), in 1 AMERICAN STATE PAPERS: MISCELLANEOUS 85, 85 (William S. Hein & Co., Inc. 1998) (1834).

435. U.S. CONST. art. IV, § 4.

436. COAKLEY, *supra* note 432, at 37–40.

437. *Id.* at 38.

438. George Washington, Proclamation of Aug. 7, 1794, reprinted in 1 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 433, at 159–60. The proclamation read in part:

Whereas it is in my judgment necessary under the circumstances of the case to take measures for calling forth the militia in order to suppress the combinations . . . and to cause the laws to be duly executed; and I have accordingly determined to do so, feeling the deepest regret for the occasion, but at the most solemn conviction that the essential interests of the Union demand it, that the very existence of Government and the fundamental principles of social order are materially involved in the issue, and that the patriotism and firmness of all good citizens are seriously called upon, as occasions may require, to aid in the effectual suppression of so fatal a spirit

Id. at 160.

439. COAKLEY, *supra* note 432, at 39.

In any event, on August 14, Secretary of War Henry Knox sent orders at Washington's request to the Pennsylvania Governor

for organizing and holding in readiness to march, at a moment's warning, a Corps of the Militia of Pennsylvania, amounting to Five thousand two hundred non-commissioned officers and privates, with a due proportion of commissioned officers . . . armed and equipped as completely as possible, with the articles in possession of the State of Pennsylvania, or of the Individuals who shall compose the corps.⁴⁴⁰

Orders were also issued for additional militia from New Jersey (2100 militiamen), Maryland (2350 militiamen) and Virginia (3300 militiamen).⁴⁴¹ In Pennsylvania, some regiments were unwilling to serve, and the state's quota was met only after volunteers were accepted.⁴⁴² The Pennsylvania and New Jersey troops were ordered to assemble at Carlisle—those from Maryland and Virginia, at Cumberland. They would be under the command of Virginia Governor Henry Lee.⁴⁴³ On September 25, with key militia units in place, Washington issued a further proclamation, warning the insurgents that “a force . . . adequate to the exigency is already in motion to the scene of disaffection” and offering amnesty to those who immediately ended their resistance.⁴⁴⁴ On October 4, Washington and Hamilton arrived in Carlisle to review the arriving militia units.⁴⁴⁵ By this time, the militiamen numbered more than 15,000.⁴⁴⁶ On October 20, at Bedford, Lee received the President's instructions “for the general direction of your conduct in command of the militia army with which you are charged.”⁴⁴⁷ The instructions specified that “The objects for which the militia have been called forth are: 1. To suppress the combinations which exist in some of the western counties of Pennsylvania in opposition to the laws laying duties upon spirits distilled within the United States and upon stills. 2. To cause the laws to be executed.”⁴⁴⁸

Confronted with this federal military presence, the insurgents swiftly retreated, resolving at a gathering on October 24 at Parkinsons Ferry to

440. Letter from Henry Knox, Sec. of War, to Thomas Mifflin, Governor of Pennsylvania (Aug. 7, 1794), in 4 PENNSYLVANIA ARCHIVES: SECOND SERIES 122, 122–23 (John B. Linn & William Henry Eagle eds., Harrisburg, Pa., B.F. Meyers 1876).

441. COAKLEY, *supra* note 432, at 39.

442. *Id.* at 43–45.

443. *Id.* at 41.

444. George Washington, Proclamation of Sept. 25, 1794, *reprinted in* 1 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 433, at 161–62.

445. COAKLEY, *supra* note 432, at 50.

446. *Id.* at 53.

447. Letter from Alexander Hamilton to Henry Lee (Oct. 20, 1794), in 1 AMERICAN STATE PAPERS: MISCELLANEOUS, *supra* note 434, at 112.

448. COAKLEY, *supra* note 432, at 54.

comply with the tax law, and to end their fighting.⁴⁴⁹ By early November, when Lee led the troops further westward, resistance in the remainder of the region had also ended, and on November 13, the federal troops began apprehending suspects, eventually taking twenty of them to stand trial in Philadelphia.⁴⁵⁰ On November 29, Congress authorized the President to station 2500 militiamen in the four western counties of the state (with no unit stationed for more than three months) if “necessary to suppress unlawful combinations, and to cause the laws to be duly executed.”⁴⁵¹

Most of the insurgents in the Whiskey Rebellion ultimately were pardoned. The exercise had cost the national government more than a million dollars in militia pay and expenses.⁴⁵² Moreover, the whiskey tax law was repealed in 1802. But the point had been made: The national government could and would act to prevent violence. Writing to Edmund Pendleton, George Washington observed:

[N]o money could have been more advantageously expended, both as it respects the internal peace and welfare of this country, and the impression it will make on others. The spirit with which the militia turned out in support of the [C]onstitution and the laws of our country . . . is the most conclusive refutation, that could have been given to the assertions . . . that, without the protection of Great Britain, we should be unable to govern ourselves, and would soon be involved in confusion. They will see, that republicanism is not the phantom of a deluded imagination. On the contrary, that, under no form of government, will laws be better supported, liberty and property better secured, or happiness be more effectually dispensed to mankind.⁴⁵³

449. *Id.* at 59–60.

450. *Id.* at 61–62.

451. Act of Nov. 29, 1794, ch. 1, § 1, 1 Stat. 403, 403.

452. Act of Dec. 31, 1794, ch. 6, § 1, 1 Stat. 404, 404–05 (appropriating \$1,122,569.01 “for the pay, subsistence, forage and other expenses attending the militia in their late expedition to the western counties of Pennsylvania”).

453. Letter from George Washington to Edmund Pendleton (Jan. 22, 1795), in 13 THE WRITINGS OF GEORGE WASHINGTON 33–34 (Worthington C. Ford ed., 1892). On the other hand, many observers thought the Whiskey Rebellion underscored the dangers of relying on the militia for security. Most militiamen called into service in fact had failed to show up, those who did proved poorly trained, and coordinating the various units was difficult. CRESS, *supra* note 194, at 143–44. In his annual message in 1794, Washington praised the militiamen who put down the rebellion but called on Congress to reform the militia system and put in place a select corps. See George Washington, Sixth Annual Address to Congress (Nov. 19, 1794), in 34 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 236, at 29, 34–35. The Third Congress considered putting in place a select corps of 80,000 militiamen who would be ready to march on short notice. U.S. HOUSE JOURNAL, 3d Cong., 1st Sess. 100, 100–01 (Mar. 24, 1794); Increasing the Army and Calling into Service 80,000 Militia (Mar. 27, 1794), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 67. The ultimate outcome, though, was the Act of February 28, 1795, making minor reforms to the 1792 law. See *supra* note 382.

Fries' Rebellion of 1799 provided the national government with a second occasion to protect the states from domestic violence.⁴⁵⁴ In the summer of 1798, Congress passed a revenue law that imposed taxes based on the value of property—federal tax commissioners were required to determine the value of homes by taking account of “their situation, their dimensions or area, their number of stories, the number and dimensions of their windows, the materials whereof they are built whether wood, brick or stone, the number, description and dimensions of the out-houses appurtenant to them, etc.”⁴⁵⁵ When federal “measurers” arrived in southeastern Pennsylvania, they faced violence from homeowners who resented the intrusion on their domestic lives.⁴⁵⁶ Men threw the measurers out onto the street, and women poured boiling water on them from the upper levels of their homes.⁴⁵⁷ In Bethlehem, on March 7, 1799, one hundred men under the leadership of John Fries attacked the local marshal, William Nichols, and set free thirty insurgents that Nichols had arrested.⁴⁵⁸ A local judge notified Secretary of State Timothy Pickering that the laws were opposed.⁴⁵⁹

Although the state had not actually applied for federal assistance,⁴⁶⁰ on March 12, President John Adams issued a proclamation directing the insurgents “to disperse and retire peaceably to their respective abodes” and threatening a military response.⁴⁶¹ On March 20, Secretary of War James McHenry directed Governor Mifflin to provide nine troops of militia cavalry and two troops of volunteers from the Philadelphia region, who would join a contingent of regulars under the command of Brigadier General William McPherson of the Pennsylvania militia.⁴⁶² In early April, under McHenry's orders, McPherson marched the troops to the region of the disturbances—and resistance to the law ended immediately.⁴⁶³ Fries was convicted of treason, and other ringleaders were convicted of resisting the

454. See generally COAKLEY, *supra* note 432, at 69–77; WILLIAM W. DAVIS, THE FRIES REBELLION, 1798–99 (1899); PAUL D. NEWMAN, FRIES'S REBELLION: THE ENDURING STRUGGLE FOR THE AMERICAN REVOLUTION (2004).

455. Act of July 9, 1798, ch. 70, 1 Stat. 580 (“provid[ing] for the valuation of Lands and Dwelling-Houses, and the enumeration of Slaves within the United States”).

456. COAKLEY, *supra* note 432, at 70.

457. *Id.*

458. *Id.* at 71.

459. *Id.*

460. *Id.* at 71–72.

461. John Adams, Proclamation of Mar. 12, 1799, reprinted in 1 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 433, at 287.

462. COAKLEY, *supra* note 432, at 73.

463. *Id.* at 73–76.

law—on May 21, 1800, Adams pardoned them all.⁴⁶⁴ Again, the federal government had demonstrated its willingness and capacity to respond quickly and powerfully to domestic insurrections in accordance with Article IV.

C. The Burr Conspiracy

A third incident, the Burr conspiracy, led to the passage of the March 3, 1807 law allowing the use of regulars as well as militiamen to deal with domestic insurrections.⁴⁶⁵ In June 1806, after a Spanish force of 1200 men crossed the Sabine River to assemble close to Nachitoches in the Orleans Territory, Jefferson ordered militia units from Orleans and Missouri to march to the frontier under the command of General James Wilkinson, the governor of the Louisiana Territory.⁴⁶⁶ While at the frontier, Wilkinson received correspondence from Aaron Burr, outlining a plot in which a military force would seize territory from Louisiana, take Mexico, and apparently build an empire headed by Burr.⁴⁶⁷ Burr had joined up with Herman Blennerhassett, who owned an island in the Ohio River, in the state of Virginia, from where Burr was assembling forces to travel down the Ohio and the Mississippi.⁴⁶⁸ Wilkinson's prior knowledge of and exact role in the scheme remain unclear, but in October 1806, he sent a warning to Jefferson that "[a] numerous [and] powerful association, extending from New York through the Western States, to Territories bordering on the Mississippi, has been formed with the design to levy [and] rendezvous eight or ten thousand men in New Orleans" for an attack on the Spanish territory.⁴⁶⁹ On Jefferson's instructions, Wilkinson reached an agreement with the Spanish commander under which disputed territory east of the Sabine became neutral.⁴⁷⁰ Wilkinson then returned to New Orleans to defend the city from the arrival of Burr's forces.⁴⁷¹

464. John Adams, Proclamation of May 21, 1800, *reprinted in* 1 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 433, at 303–04.

465. Act of Mar. 3, 1807, ch. 39, 2 Stat. 443 ("authorizing the employment of the land and naval forces of the United States, in cases of insurrections"). For useful overviews of the events, see THOMAS P. ABERNETHY, THE BURR CONSPIRACY (1945); MILTON LOMASK, AARON BURR: THE CONSPIRACY AND YEARS OF EXILE (1982); BUCKNER F. MELTON, JR., AARON BURR: CONSPIRACY TO TREASON (2002).

466. Federal Aid in Domestic Disturbances: 1787–1903, S. DOC., 67th Cong., 2d Sess. 37 (1922).

467. *Id.*

468. *Id.*

469. ABERNETHY, *supra* note 465, at 86. By this time, Jefferson already knew about the threat. See Letter from Thomas Jefferson to Congress (Jan. 22, 1807), in 1 AMERICAN STATE PAPERS: MISCELLANEOUS, *supra* note 434, at 468.

470. *Id.*

471. *Id.* at 469.

On November 27, Jefferson issued a proclamation that “sundry persons . . . are conspiring and confederating together to begin . . . the means for a military expedition or enterprise against the dominions of Spain” and “are deceiving and seducing honest and well-meaning citizens, under various pretenses, to engage in their criminal enterprises.”⁴⁷² Jefferson ordered the perpetrators to disband or face punishment and directed the federal and state civil and military officers, including militia officers, to “search[] out and bring[] to condign punishment all persons engaged or concerned in such enterprise.”⁴⁷³

Jefferson also ordered troops and militia to points along the Ohio and the Mississippi from Pittsburgh to New Orleans.⁴⁷⁴ The Ohio militia assembled in Marietta opposite Blennerhassett Island, but by the time a Virginia militia unit seized the island, Burr had already left.⁴⁷⁵ The governors of Kentucky and Tennessee assembled militia units at river points, but Burr also bypassed these troops.⁴⁷⁶ On December 19, 1806, Jefferson ordered the governors of the Mississippi and Orleans territories to prepare their militia to serve with regulars under Wilkinson’s command.⁴⁷⁷ Wilkinson, meanwhile, had imposed tight control over New Orleans, instituting curfews and searching vessels, and he arrested several of Burr’s co-conspirators and sent them to Baltimore.⁴⁷⁸ On January 15, 1807, the Mississippi militia caught up with Burr thirty miles from Natchez. After a grand jury in Mississippi decided that Burr had not committed any crimes (and that there had been no need to call out the militia), he fled. Burr was arrested again in February before he could enter Spanish territory, and in August 1807, he was prosecuted in Richmond for treason. Acquitted, Burr left the country.

Once again, the national government had reacted quickly to provide security against an imminent domestic insurrection, employing the militia to capture Burr and his co-conspirators. Afterward, while declaring the success of the militia in dealing with the conspiracy, Jefferson urged

472. Thomas Jefferson, Proclamation of Nov. 27, 1806, *reprinted in* 1 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 433, at 392.

473. *Id.*

474. See Letter from Thomas Jefferson to Congress (Jan. 22, 1807), in 1 AMERICAN STATE PAPERS: MISCELLANEOUS, *supra* note 434, at 468.

475. See NORRIS F. SCHNEIDER, *BLANNERHASSETT ISLAND AND THE BURR CONSPIRACY* (1966).

476. See Letter from Thomas Jefferson to Congress (Jan. 22, 1807), in 1 AMERICAN STATE PAPERS: MISCELLANEOUS, *supra* note 434, at 468.

477. *Id.* at 469.

478. See Letter from James Wilkinson (Dec. 14, 1806), in 1 AMERICAN STATE PAPERS: MISCELLANEOUS, *supra* note 434, at 470. On January 23, 1807, the Senate passed a bill retroactively suspending habeas corpus in order to justify Wilkinson’s actions, but the House rejected the bill. 16 ANNALS OF CONG. 401–25 (1807).

Congress to pass a statute specifically authorizing the use of regulars to deal with domestic insurrections. Congress passed the Act of March 3, 1807.⁴⁷⁹

D. The War of 1812

The War of 1812 against Great Britain raised important issues of federal protection and the role of the states and their militias. The war originated when, following British interference with American trade with France, Congress acted to defend the right of the United States to trade with other nations even during wartime. With the dominance in Congress of the so-called "War Hawks" (a group that included John C. Calhoun of South Carolina, Henry Clay of Kentucky, and Felix Grundy of Tennessee), on January 11, 1812, Congress increased the regular army to 35,000 men and reauthorized the use of 100,000 militiamen.⁴⁸⁰ On April 10, 1812, Congress authorized the President to direct the states to prepare in readiness 100,000 militiamen, to be apportioned among the states on the basis of the most recent militia returns.⁴⁸¹ The Secretary of War issued orders to the governors on April 15, 1812.⁴⁸² Congress passed and Madison signed a declaration of war on June 18, 1812.⁴⁸³

In New England, where there was already a strong antiwar movement, it was widely believed that any use of the militia to stage an offensive war was unconstitutional.⁴⁸⁴ The governors of Massachusetts, Connecticut, and Rhode Island therefore refused to comply fully with the President's call for the militia.⁴⁸⁵ These three states took the view that before the President

479. COAKLEY, *supra* note 432, at 83.

480. Act of Jan. 11, 1812, ch. 11, 2 Stat. 670 (raising an additional military force).

481. Act of Apr. 10, 1802, ch. 55, § 1, 2 Stat. 705, 705-06 ("authoriz[ing] a detachment from the Militia of the United States").

482. Letter from William Eustis, Secretary of War, to the Governors of States (Apr. 15, 1812), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 607.

483. Act of June 18, 1812, ch. 102, 2 Stat. 755.

484. See BERNARDO & BACON, *supra* note 355, at 120-22.

485. Letter from James Monroe to the Senate (Feb. 11, 1815), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 605; see also Extract of a letter from His Excellency William Jones to the Secretary of War (Aug. 22, 1812), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 621 (advising that Rhode Island will comply with the requisition "when, in my opinion, any of the exigencies provided for by the constitution . . . exists"); Letter from John Cotton Smith to William Eustis, Secretary of War (July 2, 1812), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 615 (conveying refusal of Connecticut to comply with requisition).

They were not the only recalcitrant states. The Governor of Vermont refused to allow his state's militia to march out of state. RIKER, *supra* note 398, at 37. At Niagara River, the New York Militia determined that its duty to "repel Invasions" did not extend to crossing into Canada to fight the British there, and it refused to do so. Frederick Bernays Wiener, *The Militia Clause of*

could call forth state militia to repel invasions or suppress insurrections, the governor of the state had the right to determine whether the risk of invasion or insurrection was sufficient to justify the call.⁴⁸⁶ These states also adopted the view that militia could only be called forth under the personal command of the President: No other officer of the United States could command militia troops.⁴⁸⁷

Massachusetts was especially strident in its refusal to comply with the national requisition. On June 12, 1812, Secretary of War William Eustis directed Governor Caleb Strong to place militiamen in the command of Major General Henry Dearborn to defend the coastline.⁴⁸⁸ The governor did nothing, prompting Secretary Eustis to demand again on July 21 that “the necessary order . . . be given for the immediate march of the several detachments” since “[t]he danger of invasion . . . increases.”⁴⁸⁹ Eustis informed Strong that his state’s militiamen were needed to replace regulars who would be marched north.⁴⁹⁰ Meanwhile, Strong had asked the state’s Supreme Judicial Court its view of whether he was obligated to comply with the requisition. The state judges concluded that while the federal Constitution provides for the militia to be called forth to deal with three kinds of exigencies, because the Constitution does not specifically give to the President or to Congress authority to determine *when* such exigencies exist, that power remains with the states under the Tenth Amendment.⁴⁹¹ “A different construction,” the Court advised, “would place all the militia, in effect, at the will of Congress, and produce a military consolidation of the States, without any constitutional remedy, against the intentions of the people when ratifying the constitution.”⁴⁹² In addition, the Court declared that the Constitution allows only the President, in person, to command militia units called forth into federal service:

The officers of the militia are to be appointed by the States, and the President may exercise his command of the militia by officers of the

the Constitution, 54 HARV. L. REV. 181, 188 (1940). The Governor of New Jersey took the view that its forces could not be mobilized to protect New York. See Letter from James Monroe, Secretary of War to William Pennington, Governor of New Jersey (Nov. 22, 1814), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 623.

486. Wiener, *supra* note 485, at 188–89.

487. *Id.*

488. Letter from William Eustis to the Governor of Massachusetts (June 12, 1812), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 607.

489. Letter from William Eustis to Caleb Strong, Governor of Massachusetts (July 21, 1812), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 607.

490. *Id.* If money was the issue, Eustis noted, the militiamen “will, of course, be considered in the actual service and pay of the United States.” *Id.*

491. Opinion of the Supreme Judicial Court (Feb. 28, 1815), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 611.

492. *Id.* at 611–12.

militia duly appointed; but we know of no constitutional provision, authorizing any officer of the army of the United States to command the militia, or authorizing any officer of the militia to command the army of the United States.⁴⁹³

Thus, the governor did not need to send troops to serve under Major General Dearborn.

On August 5, Governor Strong responded to Eustis. "The people of this State," he informed Eustis, "appear to be under no apprehension of an invasion."⁴⁹⁴ If there really were a "great danger of invasion," Strong further reasoned, regulars surely would not have been sent "to carry on offensive operations in a distant province."⁴⁹⁵ Though some towns in the state had asked for arms and ammunition, Strong noted that the people "expressed no desire that any part of the militia should be called out for their defence; and, in some cases, we were assured that such a measure would be disagreeable to them."⁴⁹⁶ However, Strong advised that at Passamaquoddy, in the eastern part of the state, there had been a series of incursions.⁴⁹⁷ He therefore had authorized three militia companies to enter into federal service to protect that border.⁴⁹⁸ Strong thought that beyond that particular problem, further attacks on the state were unlikely, and in any event, "[a]gainst predatory incursions, the militia of each place would be able to defend their property, and in a very short time they would be aided, if necessary by the militia of the surrounding country."⁴⁹⁹ Dearborn's apparent plans to disperse the militia to various locations would only "tend to impair the defensive power."⁵⁰⁰ Though he had "no intention officially to interfere in the measures of the General Government," Strong wrote, "if the President was fully acquainted with the situation of this State . . . he would have no wish to call our militia into service in the manner proposed by General Dearborn."⁵⁰¹ Strong promised that he was "fully disposed to afford all the aid to the measures of the National Government which the constitution require[d] of [him]; but [he] presume[d], it [would] not be expected or desired that [he should] fail in the duty which [he] owe[d] to the people of

493. *Id.* at 612.

494. Letter from Caleb Strong, Governor of Massachusetts, to William Eustis (Aug. 5, 1812), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 610.

495. *Id.*

496. *Id.*

497. *Id.* at 611.

498. *Id.*

499. *Id.*

500. *Id.*

501. *Id.*

this State.”⁵⁰² Citing the opinion of the Supreme Judicial Court, Strong informed Eustis that the state would not comply with the Dearborn requisition.⁵⁰³ Madison quickly denounced Strong’s refusal as unconstitutional.⁵⁰⁴

It was not the end of the matter. In July of 1814, following a series of intense attacks on coastal cities, Major General Dearborn again wrote to Governor Strong, explaining that “daily depredations committed by the enemy on our coast, renders [sic] it desirable to afford some additional protection to the citizens,” and requesting a detachment of an artillery and an infantry corps for a three month period of federal service to be posted on the seaboard.⁵⁰⁵ This time, agreeing with Dearborn’s assessment, Strong complied with the request.⁵⁰⁶ In addition, on September 6, 1814, Strong issued his own general order, mobilizing the entire state militia for defensive purposes.⁵⁰⁷ The very next day, Strong wrote to James Monroe, the Acting Secretary of War, to inquire whether “the expenses thus necessarily incurred for our protection will be ultimately reimbursed to this State by the General Government.”⁵⁰⁸ Monroe’s carefully crafted response ten days later began with a thinly veiled reminder of Massachusetts’s earlier refusal to cooperate with the national government:

It was anticipated, soon after the commencement of the war, that, while it lasted, every part of the Union, especially the sea board, would be exposed to some degree of danger . . . It was the duty of the Government to make the best provision against that danger which might be practicable. . . . The arrangement of the United States into military districts, with a certain portion of the regular force . . . under an

502. *Id.*

503. *Id.*

504. In his message to Congress, Madison stated (regarding Strong’s refusal):

It is obvious that if the authority of the United States to call into service and command the militia for the public defense can be thus frustrated, even in a state of declared war and of course under apprehensions of invasion preceding war, they are not one nation for the purpose most of all requiring it, and that the public safety may have no other resource than in those large and permanent military establishments which are forbidden by the principles of our free government, and against the necessity of which the militia were meant to be a constitutional bulwark.

James Madison, Fourth Annual Message to Congress (Nov. 4, 1812), *reprinted in* 1 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 433, at 516.

505. Letter from General Dearborn to Caleb Strong, Governor of Massachusetts (July 8, 1814), *in* 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 612.

506. Letter from Caleb Strong, Governor of Massachusetts, to the Secretary of War (Sept. 7, 1814), *in* 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 613.

507. General Orders (Sept. 6, 1814), *in* 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 613, 613–14.

508. Letter from Caleb Strong, Governor of Massachusetts, to the Secretary of War, *supra* note 506, at 613.

officer of the regular army . . . with power to call for the militia as circumstances might require, was adopted, with a view to afford the best protection. . . . In this mode the National Government acts, by its proper organs, over whom it has control, and for whose engagements it is responsible.⁵⁰⁹

Accordingly, Monroe told Strong that the federal government would reimburse the state for the costs of the state's forces requested by Dearborn or otherwise serving under his command.⁵¹⁰ Beyond that, "measures . . . adopted by a State Government for the defence of a State must be considered as its own measures, and not those of the United States."⁵¹¹ A request for reimbursement would have to be "judged . . . by the competent authority, on a full view of all the circumstances attending it."⁵¹² And the final zinger: Because the present war conditions made it difficult for the national government to provide immediate funding to the Massachusetts militiamen currently under Dearborn's command, Monroe requested that the state advance funds for disbursement to troops.⁵¹³ Not only should Strong not expect reimbursement for costs he ran up on his own, but he would have to cover federal expenses in the first instance.

In light of these experiences with the state militia, in October 1814, Monroe proposed to augment the military by a conscription plan.⁵¹⁴ Under Monroe's plan, free men between the ages of eighteen and forty-five were to be arranged in classes of one hundred, with each class meeting a standardized distribution of property ownership by its members.⁵¹⁵ Each class would contribute four men for the duration of hostilities, replacing casualties as

509. Letter from James Monroe, Secretary of War, to Caleb Strong, Governor of Massachusetts (Sept. 17, 1814), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 614.

510. *Id.*

511. *Id.*

512. *Id.* Explaining his position further, Monroe wrote that the national government has no other alternative than to adhere to a system of defence, which was adopted, on great consideration, with the best view to the general welfare, or to abandon it, and with it a principle held sacred, thereby shrinking from its duty, at a moment of great peril, weakening the guards deemed necessary for the public safety, and opening the door to other consequences not less dangerous.

Id. In other words, if the state goes ahead on its own, it should not expect the nation to foot the bill.

513. *Id.* (stating that "[a]ny aid which the State of Massachusetts may afford to the United States to meet . . . expenditures, will be cheerfully received" and "should be deposited in some bank in Boston" so that the funds may be "disburse[d] . . . under the authority of the Government of the United States," although "[c]redit will be given to the State for such advances" as a "loan to the United States").

514. See James Monroe, Improvement and Increase of the Military Establishment (Oct. 17, 1814), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 514.

515. *Id.* at 515-16.

they occurred.⁵¹⁶ If a class failed to meet the quota, there would be a draft.⁵¹⁷ As an alternative, Monroe proposed classifying the militia into three groups based on age, allowing the President to call forth any group when needed.⁵¹⁸ New England states rallied against Monroe's proposals.⁵¹⁹ They saw Monroe as attempting to place the burden of security on particular states, when it should be shared by the entire nation. Convening at Hartford on December 15, 1814, delegates from New England proposed a series of resolutions to be presented to Congress, centering on the national government's role under the Constitution to "provide for the common defense."⁵²⁰ With the signing of the peace treaty on December 24, 1814, Monroe's plan and the convention's resolutions became moot.

The end of the war was not, however, the end of disputes between the states and the federal government. In February 1815, Monroe sent to Congress a scathing critique of the refusal by the New England states to comply with the federal requisition.⁵²¹ Monroe deemed national power to call forth the militia "unconditional" and warned that to view the exercise of that power as "dependent on the assent of the Executives of the individual States" would spark "an entire and radical change."⁵²² Under the Constitution, Monroe observed, the militia is the "principal resource" for security purposes—to hinder the national government's authority to call forth the militia "would be to force the United States to resort to standing armies."⁵²³ Monroe explained that Congress's power to call forth the militia

516. *Id.*

517. *Id.*

518. *Id.* at 516.

519. See BERNARDO & BACON, *supra* note 355, at 139–40.

520. *Id.* at 140. In the House of Representatives, in January 1812, there was debate over whether the militia could be sent to serve outside the United States. Representative George Poindexter argued that there was no national authority under Article I, Section 8 to send the militia abroad. Peter B. Porter contended that if the militia could be called to repel invasions, "they might pursue the enemy beyond the [geographical] limits until the invaders were effectively dispersed." See U.S. House of Representatives, On the Bill for raising a Volunteer Corps (Jan. 12, 1812), in 4 ELLIOT'S DEBATES, *supra* note 19, at 459–60.

521. Letter from James Monroe to the Senate (Feb. 11, 1815), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 605, 605–07.

522. *Id.*

523. *Id.* Moreover, the power to call forth the militia to repel invasions, according to Monroe, is "an exemplification of the power over the militia, to enable the Government to prosecute the war with effect, and not the limitation of it, by strict construction, to the special case of a descent of the enemy on any particular part of our territory." *Id.* at 605–06. In other words, the power includes an offensive component: "War exists; the enemy is powerful; his preparations are extensive; we may expect his attack in many quarters. Shall we remain inactive spectators of the dangers which surround us, without making the arrangements suggested by an ordinary instinctive foresight, for our defence?" *Id.* at 605.

for certain purposes necessarily includes the power to “judge of the means necessary for the purpose.”⁵²⁴ When militiamen are called forth into federal service, “all State authority over them ceases. They constitute a part of the national force, for the time, as essentially as do the troops of the regular army.”⁵²⁵ Monroe complained that there is “nothing in the [C]onstitution to afford the slightest pretext” to the idea that the President is, as the New England states had asserted, the only federal officer who may command state militia—an idea which “pushes the doctrine of State rights further than . . . it [has been] carried in any other instance.”⁵²⁶

States naturally sought reimbursement for the costs of their militia services during the war.⁵²⁷ Throughout, the national government had told the states not to expect payment for unauthorized militia costs. Thus, in September 1814, Monroe, reviewing a request from Virginia, had told the governor that sufficient forces were already in place to defend Richmond,⁵²⁸ and the following month Monroe warned that payment for additional militiamen might be denied.⁵²⁹ Nonetheless, after the war, states took the position that they were entitled to recover all of the militia expenses they had incurred.⁵³⁰ The War Department processed some

524. *Id.* at 606.

525. *Id.*

526. *Id.*

527. See George Graham, Secretary of War, Report on Militia Claims (Jan. 23, 1817), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 666, 667 (tabulating claims by five states).

528. Letter from James Monroe (Sept. 19, 1814), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 642.

529. Writing to the governor, Monroe explained:

The President is aware, that the predatory incursions of the enemy, and the menace of a more serious attack on the principal cities along our seaboard, made an extra call of militia, in certain cases, necessary. Whether the troops which were called into service by the Executive of Virginia, for the defence of Richmond, are more than were necessary for the purpose, is a question which [can] not be immediately decided; it will be attended to as soon as circumstances will admit. In making the decision, regard must be had to just principles, taking into view similar claims of other States.

Letter from James Monroe (Oct. 6, 1814), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 642.

530. For example, in presenting militia claims for Maryland in the amount of \$265,347, John Leeds Kerr, the state's agent, took the position before the War Department that the national government was required to reimburse all costs, even those not specifically authorized. Letter from John Leeds Kerr to George Graham (Feb. 22, 1817), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 668. Kerr argued that given the exigencies of warfare, there often was insufficient time to obtain federal authorization before deploying the militia, but that the federal government, “being bound by the [C]onstitution to provide for the common defence, and to protect each State against invasion,” should “ratify the measure[s] taken” and assume the expenses incurred.” *Id.* Otherwise, Kerr argued, states will be reluctant to respond quickly to threats, placing national security at risk. See *id.*

claims quickly.⁵³¹ When, however, the Department took the view that a claim was unjustified or excessive, it refused to pay.⁵³² Congress, in reviewing denied claims, insisted on detailed evidence in support of the state's expenditures and directed multiple audits down to the last cannonball.⁵³³ As a result, years passed before all of the states' claims arising out of the war were settled.⁵³⁴

Resolving Massachusetts's claims was particularly difficult. Initially, the Secretary of War rejected most of the state's claims on the ground that the state had, at the outset of the war, refused to allow its militia into federal service:

The several States have . . . the right to employ their militia in military operations, where it can be done without infringing the rights of the national Executive over the same force. But it never can be admitted, that . . . expenses incurred upon militia service, under State authority, with the declared intention of directing and controlling that force to the exclusion of the national authority, can form no such charge. No claims of this nature will be recognised by the Executive . . . unless provision shall be made by law for that purpose.⁵³⁵

531. See Report from William H. Crawford, Secretary of War, to House of Representatives (Mar. 7, 1816), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 639 (discussing payment of claims from Virginia, North Carolina, and Rhode Island).

532. See *id.* (discussing the denial of certain claims from Massachusetts, New York, Virginia, and New Hampshire).

533. See, e.g., On the Claims of Connecticut for the Services of the Militia of that State during the War of 1812–1815 (Feb. 23, 1832), in 4 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 876–933 (report of audit of Connecticut claims); On the Claim of South Carolina for Payment for the Services of the Militia of that State in the War of 1812–1815 (Jan. 11, 1830), in 4 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 219–47 (reporting on the claims of South Carolina); Claim of Massachusetts on Account of Militia Services during the War of 1812, 1815, Classified, Arranged, and Exemplified by Documentary Evidence (May 10, 1828), in 3 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 835–928 (reporting the audit of Massachusetts claims); On the Audit of the Claims of Massachusetts for the Services of the Militia of that State during the War of 1812–15 (Feb. 22, 1825), in 3 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 104–08 (reporting on the audit of Massachusetts claims); On the Services of the Militia of Massachusetts During the War of 1812–15 and Claim of that State for Pay Therefor (Feb. 23, 1824), in 3 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 8–87 (reporting evidence in support of Massachusetts's claim).

534. See Act of Mar. 22, 1832, ch. 51, 4 Stat. 499, 499–50 (paying interest to the state of South Carolina on a longstanding claim and authorizing additional claims including \$7500 for blankets and the present value of muskets purchased for militiamen); Act of Mar. 3, 1827, ch. 79, 4 Stat. 240, 240–41 (“authorizing the payment of interest to the state of Pennsylvania”); Act of May 22, 1826, ch. 151, 4 Stat. 192, 192–93 (“authorizing the payment of interest due to the state of New York”); Act of May 13, 1826, ch. 39, 4 Stat. 161, 161–62 (“authorizing the payment of interest due to the state of Maryland”); Act of Mar. 3, 1825, ch. 106, 4 Stat. 132, 132 (“authorizing the payment of interest due to the state of Virginia”); Act of Mar. 3, 1817, ch. 86, 3 Stat. 378, 378 (regarding payment of \$300,000 to Pennsylvania for militia services).

535. Report from Secretary of War, William H. Crawford, to House of Representatives (Mar. 7, 1816), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 639.

After years of wrangling, in February 1824, Secretary Monroe recommended that Congress pay Massachusetts's claims.⁵³⁶ The basis for the turnabout was that

the present executive of Massachusetts has disclaimed the principle which was maintained by the former executive, and . . . in this disclaimer both branches of the legislature have concurred. By this renunciation the State is placed on the same ground . . . with the other States, and this very distressing anomaly in our system is removed.⁵³⁷

In other words, Massachusetts had renounced any power to refuse to comply with a federal militia requisition. Because the state's own defensive activities during the war had nonetheless generated expenses, Monroe reasoned that "principles of justice, as well as a due regard for the great interests of our Union," tilted in favor of payment for the "[e]ssential service rendered . . . by the militia of Massachusetts."⁵³⁸ In May 1824, the Committee of Congress on Military Affairs decided that it was appropriate to pay all of the state's war claims except where "the acts of the executive of Massachusetts gave a direction to the services of the militia of that State in opposition to the views of the general government."⁵³⁹ That decision set in motion additional audits to determine which expenses would count. By May 1828, the Secretary of War had determined, in accordance with the committee's formula, that the state was entitled to \$430,748—expenses of \$412,601 should be disallowed.⁵⁴⁰ Still unpaid in February 1830, the Massachusetts legislature passed a resolution

[t]hat the citizens of this Commonwealth entertain a deep sense of the great advantages of that form of general government adopted by the independent States of this Union; and . . . would view with great solicitude and regret any appearance of a disposition in the Congress of the United States to refuse a prompt adjudication of the just claims of any of its members, as tending to lessen, in every part of the confederacy, that perfect confidence in the justice of the government which can alone insure its permanency.⁵⁴¹

536. On the Services of the Militia of Massachusetts during the War of 1812–15 and Claim of that State for Pay Therefor (Feb. 23, 1824), in 3 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 8, 8–10 (communication to the Senate by James Monroe).

537. *Id.* at 9.

538. *Id.* at 10.

539. Report of Samuel M. McKay (Jan. 1830), in 4 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 293, 294.

540. Claim of Massachusetts on Account of Militia Services during the War of 1812, 1815 (May 10, 1828), in 3 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 835–928.

541. Resolves of the Commonwealth of Massachusetts (Feb. 13, 1830), in 4 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 294–95.

Finally, on May 31, 1830, Congress authorized reimbursement to Massachusetts for militia costs in the amount of \$430,748.⁵⁴² However, the authorization stressed that reimbursement was limited to three circumstances: (1) “where the militia of the said state were called out to repel actual invasion, or under a well-founded apprehension of invasion” and “their numbers were not in undue proportion to the exigency;” (2) when the militia “were called out by the authority of the state and afterwards recognised by the federal government;” and (3) when the militia were “called out by, and served under, the requisition of the President”⁵⁴³

Two important principles had emerged. First, the national government was entitled to determine how best to fulfill its security duty. If the national government decided it needed to employ a state’s militia, the state had no power to second-guess the wisdom of that decision, to assess whether an insurrection or invasion truly existed, or to withhold militiamen because the state did not agree with the national government’s security strategy. Second, the national government was required to pay for the services of a state’s militia. In figuring out what the national government would pay, clearly, the expenses of militia called into federal service were covered—and other reasonable expenses that the state’s militia incurred in repelling an invasion or suppressing an insurrection would also be paid. However, a state could not recover expenses arising from the state’s own use of its militia for a security program necessitated by the state’s refusal to comply with a federal requisition. This made considerable sense. State officials likely had more immediate access to information about local conditions and the degree of response required than did the Secretary of War. It would be dangerous if, out of concern for reimbursement of expenses, a state were to take no action to repel an invasion or to quiet an insurrection until the Secretary had issued a specific authorization or the exact degree of the risk became known to the national government. Payment of reasonable expenses, even without specific authorization, therefore ensured a state’s response to dangers before they escalated. On the other hand, sanctioning a state’s refusal to comply with national orders once issued would undermine the very purposes of the Protection Clause.

The War of 1812 also gave the Supreme Court opportunity to consider, in two cases, the relationship between the states and the federal

542. Act of May 31, 1830, ch. 234, 4 Stat. 428 (“authoriz[ing] the payment of the claim of the state of Massachusetts, for certain services of her militia during the late war”).

543. *Id.*

government regarding the militia. *Houston v. Moore*⁵⁴⁴ involved the constitutionality of an 1814 Pennsylvania statute providing for a state court martial to punish militiamen who refused to serve when called forth by the United States. In July 1814, the President had called forth units of the Pennsylvania state militia. The governor ordered the plaintiff's detachment to march to the point of rendezvous,⁵⁴⁵ but the plaintiff refused the order and was tried before a state court martial, where he was convicted and fined.⁵⁴⁶ The plaintiff contested the state court martial on the ground that once the militia had been called forth, the power to govern the militia belonged exclusively to the national government—hence the state could not punish a militiaman who refused an order.⁵⁴⁷ The Supreme Court rejected the argument, holding that under the federal militia statutes, the militia of a state was not in the service of the United States until actually mustered at the place of rendezvous.⁵⁴⁸ Moreover, the Court found that Congress, in providing for courts martial, had not vested exclusive jurisdiction over delinquent militiamen in federal tribunals.⁵⁴⁹ Accordingly, the states had authority to enforce federal law and punish militiamen who had refused the President's order.⁵⁵⁰ In other words, federal power over the militia was enhanced by allowing the state to proceed with a court martial, at least where Congress has not prohibited it.

*Martin v. Mott*⁵⁵¹ involved a federal court martial of militiaman James Mott, who ignored the orders of the governor of New York in August 1814 and refused to rendezvous in federal service. Mott was convicted and fined \$96.⁵⁵² He contested the fine on various grounds, including that there had been no invasion or imminent danger of invasion, and thus, the President had lacked authority to call out the militia.⁵⁵³ The Supreme Court rejected the argument on the basis that, under the 1795 Militia Act, "the authority to decide whether the exigency has arisen, belongs exclusively to the President, and . . . his decision is conclusive upon all other persons."⁵⁵⁴ There was therefore no basis for militiamen to question the order once it

544. 18 U.S. (5 Wheat.) 1 (1820).

545. *Id.* at 1–3.

546. *Id.* at 3.

547. *Id.* at 4.

548. *Id.* at 18–21.

549. *Id.* at 21.

550. *Id.* at 32.

551. 25 U.S. (12 Wheat.) 19 (1827).

552. *Id.* at 22.

553. *Id.* at 23–24.

554. *Id.* at 30.

issued.⁵⁵⁵ Moreover, in view of military necessities, the order could not later be challenged as a defense to a court martial.⁵⁵⁶ The ruling therefore applied at the level of individual militiamen the national government's own understanding of the Constitution's Militia Clauses. Just as a state governor lacks power to judge whether the exigency for calling forth the militia truly exists, and may not refuse a requisition, members of the militia must comply with the President's orders and may not refuse to rendezvous because they believe there is no insurrection or invasion, or to litigate the propriety of the order in a later court martial.

E. Frontier Defense

The early national government also fulfilled its protection obligation with programs to defend the frontiers. Congress regularly appropriated funds for frontier defense.⁵⁵⁷ In the early years of the Republic, with few available federal personnel, states typically had to dispatch their own militia to defend adjacent frontiers.⁵⁵⁸ Indeed, Congress preferred to rely on militiamen for frontier

555. *Id.*

556. *Id.*

557. See, e.g., Act of Mar. 3, 1795, ch. 46, § 1, 1 Stat. 438, 438 ("making further appropriations for the Military and Naval establishments, and for the support of Government," appropriating \$130,000 for protection of the frontiers); Act of June 9, 1794, ch. 63, 1 Stat. 394, 395 ("making appropriations for certain purposes therein expressed," and appropriating \$200,000 for the protection and defense of the southwestern frontier); Act of Mar. 21, 1794, ch. 10, § 1, 1 Stat. 346, 346–47 (appropriating \$130,000 for frontier defense); Act of Mar. 2, 1793, ch. 21, 1 Stat. 333 (appropriating \$100,000 for "defraying the expense of negotiating and treating with the hostile Indian tribes northwest of the river Ohio"); Act of Feb. 28, 1793, § 1, 1 Stat. 325, 328 ("making appropriations for the support of Government for the year one thousand seven hundred and ninety-three," and appropriating \$50,000 for frontier defense); Act of May 2, 1792, 1 Stat. 259 ("raising a farther sum of money for the protection of the frontiers, and for other purposes therein mentioned," and imposing duties on various goods to raise revenue for the protection of the frontiers); Act of Dec. 23, 1791, ch. 3, § 4, 1 Stat. 226, 228 ("making appropriations for the support of Government for the year one thousand seven hundred ninety-two," and appropriating \$37,339 for the "defensive protection of the frontiers"); Act of Feb. 11, 1791, ch. 6, 1 Stat. 190 ("making appropriations for the support of Government during the year one thousand seven hundred ninety-one, and for other purposes").

558. Mahon, *supra* note 194, at 45–55. Under the Articles of Confederation, the Continental Congress also paid militiamen for their frontier defense—although the Congress had authority only to request states to furnish them. Thus, for example, in July 1787, upon receiving from the Secretary of War a report of Indian attacks upon Virginia, the Continental Congress voted to deploy federal troops and to request the state executive to place militiamen into federal service. Congress specified that "the militia which shall be called into the actual service of the United States . . . shall be paid, supported, and equipped by the state, and the state shall be credited in the requisition of the current year the amount of their pay and rations only, computed on the federal establishment." 32 JOURNALS OF THE CONTINENTAL CONGRESS: 1774–1789, *supra* note 70, at 370–75. States were reluctant to provide militia for frontier defense unless they could be confident they would be reimbursed for the associated costs. Thus, in May 1786, Governor Patrick Henry of Virginia, when "requesting federal troops to attack hostile Indian tribes in Kentucky in retaliation for depredations

defense because they were superior to regulars.⁵⁵⁹ States sent the national government a bill for reimbursement of the associated costs—scores of early federal statutes involved payment to states for the work of militiamen in defending the frontiers.⁵⁶⁰ Determining a state's eligibility for payment was such a frequent activity that a congressional committee was charged with the task.⁵⁶¹ Not surprisingly, there sometimes was disagreement between the national government and the state over the precise amounts due, and some claims took years to resolve.⁵⁶² Nonetheless, the national government understood that frontier defense ultimately was its responsibility, including when militiamen did the actual work.

The case of Georgia in the early 1790s illustrates the national government's dependence on state militiamen for frontier defense and the disputes

committed against Virginia settlers . . . was . . . reluctant to engage state militia since Congress had hitherto failed to reimburse Virginia for expenses incurred by George Rogers Clark in his campaign against the Indians during the war." Letter from James Monroe to Elbridge Gerry (July 14, 1786), in 23 LETTERS OF DELEGATES TO CONGRESS: 1774-1789, at 399 n.2 (Paul H. Smith & Ronald M. Gephart eds., 1995); see also 30 JOURNALS OF THE CONTINENTAL CONGRESS: 1774-1789, *supra* note 70, at 372-74 (referring to letter of May 16, 1786 from the governor of Virginia requesting troops in federal employ).

559. For example, in debating a 1792 bill to raise additional troops for defending the frontier, members of the House emphasized the greater suitability of militiamen over regulars. One member argued: "[T]he frontier militia are . . . infinitely superior to any regular troops whatever, for the defence of the borders, and . . . are, in fact, the only force that can be effectually employed in expeditions against the hostile Indians." 3 ANNALS OF CONG. 341 (1792).

560. See, e.g., Act of Mar. 3, 1825, ch. 86, 6 Stat. 333 (directing payment to ten members of the Mississippi militia for frontier defense); Act of May 18, 1824, ch. 90, 6 Stat. 303 (directing the Secretary of Treasury to pay Mareen Duval \$57.18 for goods supplied to his militia unit in Ohio for frontier defense); Act of May 7, 1822, ch. 101, 6 Stat. 274 (directing payment of \$266.64 to Samuel Walker for militia supplies in Indiana); Act of Apr. 26, 1816, ch. 84, 6 Stat. 164 (directing payment of the Virginia militia while in service of the United States in Norfolk); Act of Mar. 3, 1797, ch. 17, § 1, 1 Stat. 508, 509 (appropriating \$70,496 for militia service on the frontiers of Georgia; \$3836 for militia service on the frontiers of Kentucky; and \$48,400 for militia service on the frontiers of South Carolina); Act of Mar. 2, 1793, ch. 30, 1 Stat. 339 (appropriating \$569 for pay, subsistence, and forage due to General Winthrop Sergeant).

561. See, e.g., 29 ANNALS OF CONG. 591, 591-92 (1816) (recounting the committee's report on claims for payment). For example, in 1816, in considering a claim by the Mississippi militia, the committee determined that territorial militia fell under national authority whenever called out by the executive of the territory. *Id.* at 592.

562. In 1797, for instance, Congress by a special appropriation settled longstanding claims from Georgia, Kentucky, and South Carolina for using their militias to defend the frontiers. Act of Mar. 3, 1797, ch. 17, § 1, 1 Stat. 508, 509 ("making appropriations for the Military and Naval establishment for the year one thousand seven hundred and ninety-seven"); see also Advances Made to a Regiment in Pennsylvania in 1813 (Jan. 15, 1818), in 1 AMERICAN STATE PAPERS: CLAIMS 375-76 (William S. Hein & Co., Inc. 1998) (1834) (recording a claim by a Pennsylvania militia commander for advances made to his troops in the service of the United States); Claim for Militia Services against the Southwestern Indians in 1793 (Dec. 26, 1796), in 1 AMERICAN STATE PAPERS: CLAIMS, *supra*, at 192 (reporting a disputed claim for offensive operations by the Tennessee militia).

that sometimes arose. Beginning in 1793, Georgia became embattled with the United States over militia payments for defending the state's frontier from hostilities by Creek Indians. The troubles originated in October 1792, when the Secretary of War, responding to a request from the state for assistance, authorized the Georgia governor to "take the most effectual measures for the defence [of the frontiers] as may be in your power, and which the occasion may require."⁵⁶³ Pursuant to that general authorization, in April 1793, Georgia began mobilizing militiamen.⁵⁶⁴ On May 30, 1793, the Secretary emphasized in response to further correspondence from the Governor that

from considerations of policy, at this critical period, relative to foreign Powers, and the pending treaty with the Northern Indians, it is deemed advisable to avoid, for the present, offensive operations into the Creek country; but, from the circumstances of the late depredations on the frontiers of Georgia, it is thought expedient to increase the force in that quarter for defensive purposes.⁵⁶⁵

To that end, the Secretary advised, the President had authorized the deployment of two hundred militiamen in addition to regulars stationed in the state.⁵⁶⁶ "As it does not yet appear that the whole force of the Creek nation is disposed for or engaged in hostility," the Secretary wrote, "the above force will be sufficient."⁵⁶⁷

Meanwhile, on May 8, the Georgia governor had sent the Secretary a letter advising that he had raised a large militia force. Receiving that notice on June 10, the Secretary responded that "[t]he State of Georgia being invaded, or in imminent danger thereof, the measures taken by your excellency may be considered as indispensable. You are the judge of the degree of danger and of its duration, and will undoubtedly proportion the defence to the exigencies."⁵⁶⁸ Nonetheless, the Secretary now advised:

The President . . . expresses his confidence that, as soon as the danger which has induced you to call out so large a body of troops shall have subsided, you will reduce the troops to the existing state of

563. Letter from Secretary of War Henry Knox to Governor Edward Telfair (Oct. 27, 1792), in 1 AMERICAN STATE PAPERS: CLAIMS, *supra* note 562, at 279.

564. See Letter from Governor John Habersham to Edward Telfair, Agent for Supplying Troops in Georgia (Apr. 23, 1793), in 1 AMERICAN STATE PAPERS: CLAIMS, *supra* note 562, at 279.

565. Letter from Secretary Henry Knox to Governor Telfair (May 30, 1793), in 1 AMERICAN STATE PAPERS: CLAIMS, *supra* note 562, at 279.

566. *Id.*

567. *Id.*

568. Letter from Secretary Knox to Governor Telfair (June 10, 1793), in 1 AMERICAN STATE PAPERS: CLAIMS, *supra* note 562, at 280.

things—indeed, to the number mentioned in my letter of the 30th. . . provided the safety of the frontiers will admit the measure.⁵⁶⁹

Underscoring the fragility of the situation, the Secretary noted that “a general and open Creek war, in the present crisis of European affairs, would be complicated and of great magnitude,” and that the President was “anxiously desirous of avoiding such an event.”⁵⁷⁰ The Secretary wrote again on July 19, reiterating the President’s position.⁵⁷¹

Within a few months, the situation soured greatly. In September 1793, the Secretary instructed Captain Constant Freeman that he was “not to concur in any arrangements, at the expense of the United States, which the Governor . . . may choose to make for the purpose of invading the Creeks.”⁵⁷² In February 1794, having learned (apparently from the federal supply agent) that the governor had raised more than one thousand militiamen to defend the frontier, the Secretary wrote again to the Governor, warning that the national government was not going to pay for them without specific congressional authorization.⁵⁷³ On the same day, the Secretary directed John Habersham, the federal agent responsible for supplying the militia, not to equip more than two hundred militiamen without further authorization from the Department.⁵⁷⁴

The Georgia Governor then presented the War Department with claims for \$142,535.29 in militia costs for defending the frontier from the period of October 1792 through the end of 1794.⁵⁷⁵ Of that amount, the state claimed \$13,159.63 for services specifically authorized in 1794 pursuant to the Secretary’s correspondence.⁵⁷⁶ The state justified the remaining amount on the ground that from October 1792 to May 1793, the Governor had been authorized by the Secretary’s letter of October 27, 1792 to use his own discretion in determining an appropriate militia force. The Secretary’s May 30, 1793 letter suspended that discretion briefly until it was revived by

569. *Id.*

570. *Id.*

571. Letter from Secretary Knox (July 19, 1793), in 1 AMERICAN STATE PAPERS: CLAIMS, *supra* note 562, at 280, 280–81.

572. Letter from Secretary Knox (Sept. 5, 1793), in 1 AMERICAN STATE PAPERS: CLAIMS, *supra* note 562, at 281.

573. Letter from Henry Knox (Feb. 22, 1794), in 1 AMERICAN STATE PAPERS: CLAIMS, *supra* note 562, at 281, 281 (explaining that “Congress alone are competent to decide . . . whether any expenses incurred, or what proportion of them, are to be defrayed by the United States”).

574. Letter from Henry Knox to John Habersham (Feb. 22, 1794), in 1 AMERICAN STATE PAPERS: CLAIMS, *supra* note 562, at 281, 281–82.

575. Secretary of War Report to the House of Representatives on Georgia Military Claim (Feb. 4, 1803), in 1 AMERICAN STATE PAPERS: CLAIMS, *supra* note 562, at 277–78.

576. *Id.* at 277.

the letter of June 10. The discretion was not again suspended until the Secretary's letter of July 19, 1793. Moreover, during all of these periods of discretion, the Governor fully expected that the national government would assume responsibility for the expenses incurred.⁵⁷⁷

Reviewing these claims in 1803, the new Secretary of War (none other than Henry Dearborn) recommended that Congress pay them because they represented reasonable costs for the state's protection.⁵⁷⁸ The Secretary's recommendation was referred to a House select committee, which also recommended payment.⁵⁷⁹ On February 17, 1803, the House, sitting as the Committee of the Whole, took up the matter. Speaking in favor of payment, Georgia Representative Peter Early emphasized that the claims were

for services of the most meritorious kind, performed in defence of an exposed part of the Union . . . performed under circumstances which called for the interposition and aid of the Government itself, and in the exercise of an almost unlimited discretion delegated by the Executive of the United States to the Governor of Georgia.⁵⁸⁰

Indeed, Early claimed, the Governor merely was fulfilling the obligations of the national government.⁵⁸¹ Without payment, he cautioned, consider who would lose out: The individual militiamen who had performed the duties of the national government.⁵⁸² This would set a disastrous precedent. If the national government wished to rely on the militia ever again, payment to Georgia was essential.⁵⁸³ Further, Early argued that because the obligation of protection fell on the national government, the governor was only ever its agent. The federal government had

constituted an agent in Georgia with full powers. That agent . . . exercised his powers, and incurred an expenditure. This expenditure must fall upon the principal. . . . If the discretion given by the War

577. *Id.*

578. *Id.* at 278.

579. 7 ANNALS OF CONG. 535 (1803).

580. *Id.* at 535–36.

581. *Id.* at 537–38.

582. *Id.* at 539. Early stated:

In the present case that protection was afforded, not immediately by the Government itself, but by individuals called upon for that purpose by one who, as to that occasion, was the agent of the Government. Is there . . . a principle to be established which will deprive a man of his right to compensation for [militia] services which he is not at liberty to refuse to perform? We are told that the State of Georgia ought to pay them. . . . The obligation to obedience was not to State authority. . . . All the ties in which the soldier was bound were to the Federal Government.

Id.

583. *Id.* at 541.

Department was too great, the blame rests with that department. If the agent of the Government abused the trust reposed with him, the fault is there.⁵⁸⁴

Early also pointed to the fact that claims made by the Tennessee militia during the same period had been promptly paid even though that state's claims pertained to offensive operations.⁵⁸⁵ There was, therefore, a principle of fairness at stake: "Will not equal justice be extended to the militia of Georgia? . . . Shall the distant and exposed Southern frontier settlements continue to supplicate the protection of their parent, and continue to meet with a cold repulse?"⁵⁸⁶

Though a few members of the House complained that the Governor of Georgia had acted contrary to the orders of the national government, others favored reimbursing the state for all of the militia costs.⁵⁸⁷ By a margin of two votes, the House decided to postpone making a final decision⁵⁸⁸ — although not before New York Representative Thomas Morris explained why, in his view, the Georgia claims had already been settled. On August 26, 1802, Georgia and the United States had reached an agreement in which the state ceded to the national government the lands involved in the infamous Yazoo land fraud in exchange for a payment of \$1.25 million.⁵⁸⁹ Morris declared that he understood, based on his own conversations with one of the commissioners who had brokered that deal, that the sum included payment of the militia costs now sought.⁵⁹⁰ In the House in February 1803, Morris's argument generated little interest.⁵⁹¹ However, by the end of the year, on the advice of Attorney General Levi Lincoln, the House Committee on Claims had adopted the view that all the frontier militia claims had been settled under the August 26, 1802 agreement.⁵⁹² It

584. *Id.* at 539.

585. *Id.* at 540–41.

586. *Id.* at 541.

587. *See id.* at 541–42.

588. *Id.* at 543.

589. *See generally* C. PETER MAGRATH, *YAZOO: LAW AND POLITICS IN THE NEW REPUBLIC* (1966).

590. 12 *ANNALS OF CONG.* 542–43 (1803).

591. *Id.* at 543.

592. Report of the Committee of Claims (Dec. 16, 1803), in 1 *AMERICAN STATE PAPERS: CLAIMS*, *supra* note 562, at 289 (concluding that the payment of \$1.25 million under the convention as "consideration for the expenses incurred by [Georgia] . . . in relation to the said territory" settled the militia claims) (emphasis omitted); *see also* 13 *ANNALS OF CONG.* 968, 968–75 (1804) (recording discussion of the report in the House as Committee of the Whole and the vote against allowing further Georgia militia claims).

was an ingenious solution: Whatever payment the government owed Georgia for militia services, the obligation was already satisfied.

F. Ports and Harbors

With coastal cities vulnerable to attack by sea, protecting them required fortifying ports and harbors. In 1794, Congress began a massive program to fortify the ports and harbors of twenty-one coastal towns from Portland to Savannah.⁵⁹³ Through a series of appropriations, Congress provided troops and equipment, or simply paid the states to fortify their ports and harbors themselves.⁵⁹⁴ Because these fortifications were built on state

593. See Fortifications: Copy of a Letter from the Secretary of War to the Secretary of the Treasury (July 9, 1794), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 105–06 (reporting initial disbursements of \$104,025.52 for fortifying twenty-one towns); Report of a committee of the House of Representatives respecting fortifications (Feb. 28, 1794), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 61 (setting out initial fortification plans).

594. See, e.g., Act of Feb. 10, 1809, ch. 15, 2 Stat. 516 (appropriation of \$450,000); Act of June 14, 1809, ch. 2, 2 Stat. 547 (appropriation of \$750,000); Act of June 23, 1797, ch. 3, 1 Stat. 521 (“provid[ing] for the further Defence of the Ports and Harbors of the United States,” and appropriating \$115,000 and authorizing payment to the states for their efforts); Act of June 9, 1794, ch. 63, 1 Stat. 394 (appropriation of \$30,000); Act of May 9, 1794, ch. 25, 1 Stat. 367 (supplementing “An act to provide for the Defence of certain Ports and Harbors in the United States” and authorizing employment of garrison and cannon and other equipment to defend the port and harbor of Annapolis, Maryland); Act of Mar. 20, 1794, ch. 9, 1 Stat. 345 (“provid[ing] for the Defence of certain Ports and Harbors in the United States,” and authorizing the use of troops and equipment for fortification of ports and harbors at Portland, Portsmouth, Gloucester, Salem, Marblehead, Boston, Newport, New London, New York, Philadelphia, Wilmington, Baltimore, Norfolk, Alexandria, Cape Fear River, Charleston, Georgetown, Savannah, and St. Mary’s); see also Report to the House of Representatives on the Fortifications of the Defences of the United States and an Estimate of the Sums Necessary to Complete, Man, and Arm them (Dec. 10, 1811), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 308–11 (setting out the number of troops at each harbor); Report of the Secretary of War on the State of the Fortifications for the Defence of the Ports and Harbors of the United States (Dec. 19, 1809), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 245–47 (reporting on the condition of fortifications and expenditures of \$639,954 from appropriations in 1809); Report of a Committee on the Expediency of Making Further Appropriations for Fortifications (May 5, 1800), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 152 (recommending additional appropriation of \$100,000 to complete fortifications); Report of a Committee, to make further provisions for fortifications (June 10, 1797), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 117, 118 (estimating an additional \$200,000 to complete fortifications in six states); Report of a Committee, Showing the Measures Pursued for Procuring Proper Sites for Fortifications, Replenishing Magazine with Military Stores, and the Expenditures Necessary therefor (May 9, 1796), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 115–16 (reporting that \$132,234 to date was expended on fortifications); Description and Progress of Certain Fortifications (Jan. 16, 1796), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 110–11 (recording a report from the Secretary of War to the Senate on the progress of fortifications).

land, the cooperation of state government was essential.⁵⁹⁵ Typically, the state legislature ceded a tract of land to the national government or issued a resolution allowing the national government to use the land to construct fortifications.⁵⁹⁶ At times, the Secretary of War provided funds to the governor to purchase private land for constructing the fort.⁵⁹⁷ Governors often played active roles in determining the size and location of forts. For instance, in May 1794, the Governor of Rhode Island

visited the harbor and the ports . . . to be taken possession of. The security of the harbor and island, which consists in the defending the entrance of the harbor, and securing, by all means, a free and open

595. The fortification at New London, Connecticut, illustrates the intensive nature of the program: It consists, on the New London side of the harbor, of a citadel in stone masonry, bomb proof, covering a powder magazine, and will serve for the garrison to live in in time of peace. The citadel is surrounded with batteries and glacis, to cover it from the direct fire of ships of war, and to scour the entrance of the harbor and the neighborhood of the citadel with cannon and musketry.

The artillery consists of six eighteen and twenty-four pounders, on coast carriages

There is also a reverberatory furnace for heating balls. . . .

. . . .

On the Groton side of the harbor, the fortifications consist of a fort, made of earth and sods, containing a citadel, of brick masonry, covering a powder magazine, bomb proof, and serving for the garrisons to live in; and a battery near the harbor, under the protection of the fort, with a covered way, communicating from one to the other. The battery is also to be defended by a guard house, of brick masonry, with a powder magazine, bomb proof, under it. The garrison on the New London side will consist, in time of peace, of twenty-two men.

In time of war, fifty men.

The fort and citadel may afford a cover, in case of an attack, to one thousand men. The garrison of the fort and battery, on the Groton side of the harbor, in time of peace, twenty-two men.

On account of the battery and guard house, in time of war, eighty men. In case of an attack by an enemy, eight hundred men. [T]he object of the fortifications on the two sides of the harbor of New London is, the defence of the entrance of the harbor, by a cross fire of heavy cannon, with red hot balls, on shipping attempting to force their way through, and the protection of the trade in the harbor. Those batteries are well secured against a surprise, or any sudden attack. In order to take possession of them, or to operate their destruction, the enemy must undertake a regular attack: in that case, the whole force of the country ought to be brought against him.

A General Return of the Situation of the Fortifications of the Seaport Towns in the States of New England (Oct. 26, 1794), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 74.

596. See, e.g., Laws of North Carolina, An Act to cede to the United States certain lands (July 7, 1794), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 71 (ceding land at Cape Fear and Cape Hatteras for the erection of forts and lighthouses); Resolution of Maryland (Dec. 25, 1793), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 71 (authorizing the United States Government to erect a fort at Whitestone Point).

597. See, e.g., Letter from the Secretary of the Treasury to the Secretary of War (Dec. 17, 1794), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 106 (reporting on authorization to the Governor of Virginia to purchase land at Norfolk for \$1,000).

communication with the interior parts of the State, for the militia to come to the assistance of Newport in case of an attack. The Governor was pleased to approve the system of defense, which has since been partly executed.⁵⁹⁸

In addition to providing the initial funding to secure ports and harbors, Congress provided for ongoing upkeep of the fortifications.⁵⁹⁹ Congress also paid for the establishment and upkeep of lighthouses, beacons, buoys, and piers.⁶⁰⁰

Of particular concern to the federal government was securing New York City's harbor. In 1794, government engineer Charles Vincent recommended an immediate appropriation of \$182,000 to secure the city's vulnerable harbor.⁶⁰¹ Following a series of aggressions by British ships in the early 1800s, New Yorkers demanded that Congress do more to protect their

598. A General Return of the Situation of the Fortifications of the Seaport Towns in the States of New England (Oct. 26, 1794), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 74.

599. See, e.g., Message Transmitting the Names and Description of Fortifications, with a Statement of the Sums Expended and Estimates of the Expenditures Still Required on Each (Feb. 18, 1806), in 1 AMERICAN STATE PAPERS, *supra* note 157, at 192–97 (reporting on sums expended for upkeep).

600. See, e.g., Act of May 19, 1794, ch. 31, 1 Stat. 368 (proposing to erect “a Lighthouse on the Island of Seguin in the district of Maine, and for erecting a beacon and placing three buoys at the entrance of Saint Mary’s River, in the state of Georgia”); Act of Mar. 2, 1793, ch. 27, 1 Stat. 339 (supplementing an “act for the establishment and support of lighthouses, beacons, buoys, and public piers,” and continuing financial support until July 1, 1794); Act of Apr. 12, 1792, § 2, ch. 17, 1 Stat. 251, 251 (supplementing “the act for the establishment and support of lighthouses, beacons, buoys, public piers,” and floating beacon and buoys at Charleston Harbor); Act of Mar. 28, 1792, ch. 15, 1 Stat. 246 (appropriating \$4000 “for finishing the Lighthouse on Baldhead at the mouth of Cape Fear river in the State of North Carolina”); Act of Mar. 3, 1791, ch. 24, § 3, 1 Stat. 218, 218 (“continu[ing] in force the act therein mentioned, and to make further provision for the payment of Pensions to Invalids, and for the support of lighthouses, beacons, buoys, and public piers,” and continuing funding through July 1, 1792); Act of July 22, 1790, ch. 32, 1 Stat. 137 (“amend[ing] the act for the establishment and support of Lighthouses, beacons, buoys and public piers,” and continuing funding through July 1, 1791); Act of Aug. 7, 1789, ch. 9, 1 Stat. 53, 53–54 (making available federal funds for the upkeep of “Lighthouses, Beacons, Buoys, and Public piers”).

601. Charles Vincent, Approximation of Expenses Necessary for the Defence of the Harbor and the City of New York (1794), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 81. Vincent reported that

when we reflect on the risks one of the finest harbors in the world is exposed to; one that nature, and the social institutions of the inhabitants it enriches, leads by long strides to become the greatest and most flourishing emporium of the two worlds; we cannot forbear a sentiment mixed of dread and regret, when we see that nothing has been done yet towards the safety of a point of such importance, and we feel a pressing desire to see its defence established, towards which has proved more generous than we generally observe it to be.

Charles Vincent, General Observations on the Defence of the Harbor and City of New York (1794), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 79.

harbor.⁶⁰² When Congress made only modest allocations in the 1807 budget for harbor protection,⁶⁰³ the New York state legislature issued a resolution exhorting the national government to meet its constitutional obligations to protect the city.⁶⁰⁴ Shortly thereafter, a committee of the House charged with evaluating the need for additional defenses pressed the

necessity of placing our ports and harbors, as speedily as possible, in a situation to protect from insult and injury the persons and property of our citizens living in our seaport towns, or sailing in our own waters, and to preserve therein the respect due to the constituted authorities of the nation.⁶⁰⁵

According to the committee, "the protection desired can be best and most expeditiously afforded by means of land batteries and gun boats; . . . by a judicious combination and use of these two powers, effectual protection can be given, even to our most important seaport towns, against ships of any size unaccompanied by an army."⁶⁰⁶ In addition to New York, the committee cited fourteen seaports requiring additional fortification.⁶⁰⁷ Jefferson also urged Congress to give proper and "special consideration" to the needs of New York City.⁶⁰⁸ Congress responded with an additional appropriation of \$1 million in 1808 to complete fortifications.⁶⁰⁹ The next year, Congress allocated a further \$1.2 million, of which \$235,609 was spent on fortifying the New York harbor.⁶¹⁰

602. See Report of a committee on the memorial of the merchants of New York (Jan. 28, 1806), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 191 (discussing the unique vulnerabilities of New York City and the need for increased funding to fortify the harbor).

603. See Act of Mar. 3, 1807, ch. 29, 2 Stat. 432, 435 ("making appropriations for the support of Government during one thousand eight hundred and seven," and appropriating \$1200 in the general budget for erecting beacons); Act of Mar. 3, 1807, ch. 37, 2 Stat. 443 ("making further appropriations for fortifying the ports and harbors of the United States," and directing an additional special appropriation of \$150,000 for all of the nation's harbors).

604. Resolutions of the Legislature of the State of New York, Relative to the Defence of the City and Harbor of New York (Mar. 20, 1807), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 215 (stating that "every consideration of policy and duty requires, that adequate measures should be adopted by the National Government, for the protection of the port of New York," and that "the Congress of the United States are bound by their constitutional duties, as guardians of the common defence and general welfare, to satisfy this proper and reasonable expectation").

605. Committee Report on aggressions committed within our ports and waters by armed vessels (Nov. 24, 1807), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 217, 217.

606. *Id.* at 217-18.

607. *Id.* at 218.

608. Thomas Jefferson, Message to Congress (Jan. 6, 1809), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 236.

609. Act of Jan. 8, 1808, ch. 7, 2 Stat. 453 ("An act supplementary to an act, intituled 'An act for fortifying the ports and harbors of the United States, and for building Gun Boats.'").

610. Act of Feb. 10, 1809, ch. 15, 2 Stat. 516 (making an appropriation of \$450,000 to complete the fortification of the seaport towns and harbors of the United States); Act of June 14, 1809,

G. Summary

In fortifying coastal towns, securing the frontiers, and responding to invasions and insurrections, the national government quickly began meeting its protection responsibilities under Article IV. In the early decades of the Republic, Congress and the Executive depended heavily on militiamen to perform security work—and paid for these services. At times, states complained that the national government was not doing enough to protect them, and there were occasional disputes as to which militia costs Congress should cover. Yet it was understood universally that protection ultimately was the national government's obligation. The next part turns to some implications for homeland security in the War on Terrorism.

IV. HOMELAND SECURITY IN THE WAR ON TERRORISM

The rediscovery of the national government's constitutional mandate to protect the states, and the mechanisms available to fulfill that mandate, has important implications for the War on Terrorism—the topic of this part. Securing the homeland is not a new problem: The nation's earliest security needs presented similar difficulties of coordination and similar federalism concerns as those that have arisen in the War on Terrorism. The history, traced in this Article, of how the Protection Clause governed early conceptions of national security, and the early implementation of security efforts, informs and resolves analogous problems of homeland security today. The discussion begins with the most obvious implication: The Protection Clause requires the national government to protect states and their cities from terrorism either by putting in place the necessary security measures or by paying for security programs implemented locally. Next, it suggests that in the War on Terrorism the national government is entitled to enlist police and other state and local security personnel to carry out counterterrorism programs so long as Congress pays for their services—the Supreme Court's anticommandeering doctrine based on the Tenth Amendment should not limit enlistment of this nature. The discussion then turns to whether states properly may refuse to comply with federal requests to carry out security programs. Finally, it considers the justiciability of state claims that the national government has failed to

ch. 2, 2 Stat. 547 (making an appropriation of \$750,000); Report of the Secretary of War on the state of the fortifications for the defence of the harbors of the United States, in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 157, at 245, 247 (reporting on \$235,609 spent in New York from appropriations in 1809).

ensure the state's security or to compensate it for its security expenses in accordance with the requirements of the Protection Clause.

A. Protection and Terrorism

The 2004 report of the 9/11 Commission concludes that the United States was ill-prepared to defend itself against the terrorist attacks of September 11, 2001.⁶¹¹ The Constitution did not leave such preparations to chance. Created in an age of war and instability by a people fresh from revolution, the Constitution at its core is about security. The ratifying generation thus put in place constitutional arrangements that, rather than act as a blueprint for governments free from threats, were designed for governing when threats abound. Today, like Americans of the late eighteenth century, we fear internal strikes launched by forces already within our borders. We worry about the secret aspirations of "aliens" among us, and we fear their connections to "enemies" abroad. We want the government to protect us, but we worry too about enhancing governmental authority in ways that might affect our own freedoms. To be sure, there are some important differences between the past and the present. The musket-wielding mobs and gunships off the coastline that concerned eighteenth-century Americans are different threats than the fuel-laden jets flown into skyscrapers or the lethal pathogens released in the subway that we worry about today. Moreover, few people nowadays imagine that the nation's very existence is in peril, a concern that was very real to Americans in the years immediately after the Revolutionary War. Yet in an important sense, the threat of terrorism opens a window into the late eighteenth century and the world of the generation that created the Constitution. In particular, the Americans who included in their Constitution (as plain as words could make it) the requirement that the United States government protect each of the states from attack, would surely recognize the terrible destruction of September 11 as the national government's failure and responsibility.

Rediscovering the Protection Clause, and how it resolved the nation's earliest security problems, leaves no room to doubt that the duty to secure states and their cities from acts of terrorism falls on the national

611. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT: EXECUTIVE SUMMARY 9 (2004) [hereinafter 9/11 COMMISSION REPORT] ("[W]e can say with confidence . . . that none of the measures adopted by the U.S. government from 1998 to 2001 disturbed or even delayed the progress of the al Qaeda plot. Across the government, there were failures of imagination, policy, capabilities, and management.").

government. The Protection Clause *requires* Congress to provide the means of defending each of the states and for the Executive to carry out the mandate. The national government can meet its protection obligations by putting in place the necessary counterterrorism measures itself, or by reimbursing the states for the costs of their security programs. As a practical matter, the best approach likely will be some combination of the two—an approach that brings together the specialized strengths of federal agencies and their ability to coordinate national responses with the particularized knowledge and experience of state actors within localized communities.⁶¹²

The Protection Clause requires Congress to pay for the security needs of the states. In the War on Terrorism, Congress has treated homeland

612. See generally Arnold M. Howitt & Robyn L. Pangi, *Intergovernmental Challenges of Combating Terrorism*, in COUNTERING TERRORISM: DIMENSIONS OF PREPAREDNESS 37, 37–55 (Arnold M. Howitt & Robin L. Pangi eds., 2003) (discussing the need for a strong federal role in setting the agenda for state and local government action, providing fiscal and technical assistance, and supplying specialized capabilities, combined with customized state and local measures on the ground). A great deal of current efforts to prevent future terrorist attacks involves cooperation and coordination among federal, state, and local (and sometimes international) governments. The Department of Homeland Security has as one of its guiding principles, “engag[ing] partners and stakeholders from federal, state, local, tribal and international governments . . . [to] work together to identify needs, provide service, share information and promote best practices.” DEP’T OF HOMELAND SEC., SECURING OUR HOMELAND: U.S. DEPARTMENT OF HOMELAND SECURITY STRATEGIC PLAN 6 (2004). In addition to administering grant programs, the Department provides information, training, and technical assistance to state and local personnel, especially through the Office for Domestic Preparedness. See generally Homeland Security, Office for Domestic Preparedness, <http://www.ojp.usdoj.gov/odp> (last visited Dec. 17, 2004). States and cities also have in place various kinds of coordination. See, e.g., *Bruno Testimony*, *supra* note 11, at 2–3 (describing how the New York City Office of Emergency Management has developed the Citywide Incident Management System and integrated with the Department of Homeland Security’s Incident Management System and the New York State Incident Management System); *Kelly Testimony*, *supra* note 6, at 3–6, 8 (describing how New York City has posted 250 officers full time to the Joint Terrorism Task Force with the F.B.I.; posted a New York City detective to Washington to serve as the liaison to the Department of Homeland Security; implemented an Incident Command System consistent with federal standards; developed a security alert plan based on the federal Homeland Security Advisory System; and engaged in cooperation with foreign law enforcement); *Eleventh Public Hearing of the National Comm’n on Terrorist Attacks Upon the United States* 1–2, 5, 7, 17, 25, 27–28 (May 18–19, 2004) (statement of Nicholas Scoppetta, Commissioner, Fire Department of New York), available at http://www.9-11commission.gov/hearings/hearing11/scoppetta_statement.pdf (describing how the New York City Fire Department has developed counterterrorism training in partnership with the U.S. Military Academy’s Combating Terrorism Center; undertaken training of officers at the Naval Post Graduate School and the National Fire Academy, developed incident management teams with the U.S. Forestry Service, developed mutual assistance agreements with upstate counties and Nassau County, and begun discussions for mutual assistance with New Jersey; developed an Exercise Design Team to work with other city agencies and the Department of Homeland Security; implemented intelligence sharing with the New York State Office of Public Security, other state agencies, and the JTTF; and undertaken health monitoring funded by a grant from the Centers for Disease Control).

security funding programs as a form of general revenue spending rather than as fulfilling a constitutional obligation.⁶¹³ Funds therefore have been spread around rather than concentrated where they are needed. Although Congress has adopted many of the other recommendations of the 9/11 Commission,⁶¹⁴ it has not followed the Commission's strong recommendation to allocate homeland security funds solely on the basis of the security needs of individual states and cities.⁶¹⁵ With funds distributed not on the basis of actual security needs but in a way that ensures each state receives a share, Congress has reimbursed high-risk states and cities for only a portion of the costs of their counterterrorism programs.⁶¹⁶ Taking the Protection Clause seriously requires a new approach, one in which members of Congress understand homeland security as their duty to the states, and work to ensure that states receive assistance relative to the level of protection they require. Of course, there is room to debate what the needs of any particular state are, and this debate surely will be part of the process.⁶¹⁷ However, identifying and meeting a state's needs requires recognizing first that homeland security, in contrast to virtually every other national governmental program, entails the performance of a constitutional obligation.

B. The Commandeerer in Chief

The U.S. Supreme Court has ruled that under the Tenth Amendment, the federal government may not commandeer state legislatures or

613. See 9/11 COMMISSION REPORT, *supra* note 611, 395–96.

614. The Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 18 Stat. 3638, adopted many of the other recommendations of the Commission.

615. 9/11 COMMISSION REPORT, *supra* note 611, at 396:

Recommendation: Homeland security assistance should be based strictly on an assessment of risks and vulnerabilities . . . We understand the contention that every state and city needs to have some minimum infrastructure for emergency response. But federal homeland security assistance should not remain a program for general revenue sharing. It should supplement state and local resources based on the risks or vulnerabilities that merit additional support. Congress should not use this money as a pork barrel.

See Bill Nichols & John Diamond, *Roadblocks lifted for 9/11 intel-reform bill*, USA TODAY, Dec. 7, 2004, at 8A (discussing the failure to adopt the recommendation as part of the Intelligence Reform and Terrorism Prevention Act of 2004).

616. See *supra* notes 8–11.

617. See 9/11 COMMISSION REPORT, *supra* note 611, at 396 (recommending that a panel of security experts develop benchmarks for determining community needs and that funds be distributed in accordance with those benchmarks with any departure only upon a showing of national interest).

executive personnel.⁶¹⁸ Justice Stevens, writing (in dissent) in 1997, questioned the wisdom of the Court's broad ruling:

[W]e must consider its implications in times of national emergency. Matters such as . . . the threat of an international terrorist, may require a national response before federal personnel can be made available to respond. If the Constitution empowers Congress and the President to make an appropriate response, is there anything in the Tenth Amendment . . . that forbids the enlistment of state officers to make that response effective?⁶¹⁹

In other words, a blanket rule against commandeering seems inconsistent with the national government's responsibility to respond to certain kinds of emergencies like terrorism.

While the Court has not recognized it, there is a compelling response to Justice Stevens's concern: The Constitution specifically authorizes the national government, in meeting its protection obligations, to commandeer state personnel, allowing militia to be called forth into federal service under the President's command for security purposes. Nothing about the Tenth Amendment suggests that it altered this power of the national government to call forth the militia to provide security. As much of this Article has demonstrated, the national government regularly exercised that authority after 1791. Even with the Tenth Amendment otherwise preventing commandeering, in the War on Terrorism, the federal government may commandeer state personnel for security work under the authority of the Commander in Chief.

Today, the states' security personnel are not militiamen, but principally are the members of local law enforcement—and the bulk of counterterrorism work will fall to them.⁶²⁰ Modern police forces are not equivalent to early

618. See *Printz v. United States*, 521 U.S. 898 (1997) (invalidating provisions of the Brady Handgun Violence Prevention Act because the Constitution prohibits Congress from commandeering state executive officials to enforce federal law); *New York v. United States*, 505 U.S. 144 (1992) (invalidating provisions of the federal Low-Level Radioactive Waste Policy Amendments Act because the Constitution prohibits Congress from commandeering state legislatures).

619. *Printz*, 521 U.S. at 940 (Stevens, J., dissenting).

620. In 2000 (the most recent year for which firm data are available), there were 565,915 full-time local police in 12,666 departments in the United States, and 87,028 full-time state police in 49 state departments (Hawaii has no state police). See DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 39 tbl.1.24 (2002). In addition to state and local police, there were 3070 sheriffs' offices with 293,823 full-time officers, and 1376 "special jurisdiction" departments with 69,650 employees responsible for policing airports, public housing, colleges, and the like. *Id.* In New York State, for example, there were 393 local police departments with nearly 75,000 officers; the state police has just 4948 employees. *Id.* at 41 tbl. 1.26, 43 tbl.1.28. By way of comparison, in 2002, there were 90,168 federal officers authorized to carry firearms and make arrests. Of these, 19,101 (or 21 percent) were immigration agents and 14,305 (15.9 percent) were

militia units.⁶²¹ Yet the problems we face today of providing homeland security are analogous to those that were once resolved by federal deployment of state militiamen. If the Protection Clause is to resolve successfully the difficulties of coordinating security in the modern era, the national government should be entitled to deploy the states' modern security personnel for security purposes. In applying the Protection Clause, it makes sense to permit the federal government to delegate police officers to operate checkpoints at bridges and tunnels, patrol wharves and harbors, inspect

assigned to the Bureau of Prisons; just 11,248 worked for the FBI. *Id.* at 64 tbl.1.66. The tradition of protection also bears out Justice Stevens's pragmatic observation that national security often requires localized mobilization before the national government is able to act.

621. Notably, police departments are staffed by full-time employees whereas the militia was the entire adult male community, responding as needs arose. On the other hand, like the militia, local law enforcement operates under state law but is organized within a single community—the members of police departments are, like militiamen, typically drawn from and live within the communities in which they work.

In thinking about modern translations and applications of the Constitution, one error must be avoided: equating the National Guard with the old militia. The National Guard claims to be the direct descendant of the militia. See National Guard Website, History, <http://www.arng.army.mil/history> (last visited July 27, 2004). In fact, the National Guard originated in the early twentieth century as a part of the national military. See Act of Jan. 21, 1903 (the Dick Act), ch. 196, 32 Stat. 775 (promoting the efficiency of the militia, and for other purposes and forming the Organized Militia as the "State National Guard," in accordance with the organization of the Army, and with federal funds and army instructors); Act of June 3, 1916 (National Defense Act), ch. 134, 39 Stat. 166 (making the National Guard part of the Army). Moreover, the National Guard is nothing like the old militia. The cornerstone of the Constitution's militia was universal service (by adult white men), whereas the National Guard is an entirely voluntary corps. The militia originated as a local institution under the authority of the states, but the National Guard is, by law, part of the national military, run by, paid for, and mobilized by the national government. See UVILLER & MERKEL, *supra* note 425, at 142–43. Indeed, "[t]he militia . . . was designed and supported as an alternative to the professional standing army of the central government. The modern National Guard, then, is not just different from the militia referred to in the Constitution, it is in many ways, its antithesis." *Id.* at 153–54 (concluding that there is today no functionally equivalent entity of the old militia). The militia was not only separate from the national army, it was meant to outnumber and overpower it. (Recall Madison's claim about what a half million militiamen could do to twenty-five or thirty thousand regulars. See *supra* text accompanying note 177.) Today, though, more than 1.4 million troops belong to the regular United States military establishment—the Army National Guard has about 360,000 members. UVILLER & MERKEL, *supra* note 425, at 143. The distinction between the old militia as an alternative to a standing army and the National Guard as the army itself is symbolized by a further difference: who takes care of the weapons. Militiamen kept their guns at home because they might need them at any moment to rise up in arms against oppression. Weapons for use by National Guardsmen are kept under lock and key in federal armories. Further, the only armed fighting Guardsmen do is at the direction of the government itself. See *id.* at 143–44. (Without pressing the point too far, police officers today keep and maintain their own weapons; it is also a fair assumption that to the average citizen, seeing a police officer, gun in holster, patrolling a street, is less startling than seeing a Guardsman in fatigues with an M16.) For all of these reasons, it is wrong to read the Constitution's militia provisions as referring today to the National Guard. At the same time, the federal government can, of course, deploy the National Guard—as part of the national military—for homeland security purposes.

cargo in trucks, test for noxious agents in subways, guard buildings and monuments, secure public events, and carry out all of the other tasks involved in securing the homeland from terrorism. Just as, notwithstanding the Tenth Amendment, the federal government regularly called forth the states' militiamen to provide security against invasions and insurrections, it should be allowed to enlist the states' police officers to prevent and respond to terrorism.⁶²²

Beyond the application of the Constitution's Protection Clause, there are additional reasons to think differently about commandeering for security purposes. In the anticommandeering cases, the Supreme Court has identified several federalism-related reasons for the doctrine. These include the burden to states and localities of having to carry out federal programs, and the interest citizens have in being able to identify—to hold accountable—the government actors behind a law or program.⁶²³ These concerns are less pressing in the context of the federal government commandeering local law enforcement for security purposes. With local law enforcement, several safeguards exist that are not necessarily present with respect to the general problem of commandeering the states. First, if commandeering is limited to local law enforcement for security purposes, the rest of the governmental apparatus of the states is free to pursue its own programs. Thus the states retain much of their capacity of "vertical competition."⁶²⁴ Second, the requirement that Congress fund the national government's use of local law enforcement ensures that the national government will reflect upon and take proper account of the associated costs, and that the states and cities will not be stuck with the tab. Third, commandeering the part of the state apparatus made up of local law enforcement units contains some natural, built-in checks. Armed locals put under the command of the national

622. If I am wrong to conclude that applying the Protection Clause today permits federal commandeering of law enforcement, my broader claims still remain. Even without the tool of commandeering, the national government is constitutionally obligated to protect the states. It can do so by deploying federal personnel. The national government can also meet its protection mandate by paying for the costs of security implemented locally, thereby coordinating with state and local security personnel rather than commandeering them.

623. See *Printz*, 521 U.S. at 930 ("By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes."); *New York*, 505 U.S. at 168 ("[W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished.").

624. See Akhil Reed Amar, *Five Views of Federalism: "Converse-1983" in Context*, 47 VAND. L. REV. 1229, 1239 (1994) (discussing federalism as producing a check on the national government for the benefit of citizens); Vikram David Amar, *Converse § 1983 Suits in Which States Police Federal Agents: An Idea Whose Time Has Arrived*, 69 BROOK. L. REV. 1369 (2004) (discussing vertical competition in the context of the War on Terror).

government likely are better organized and better equipped to resist federal overreaching than are, say, state bureaucrats laboring on a federal waste management program from an office in Albany (the issue in *New York v. United States*). Security, therefore, highlights both a particular kind of dependence on local government, and the ways local government may uniquely safeguard the values of federalism.

If the federal government chooses to rely on state and local personnel to do this security work, it must pay for their services. It is wrong, indeed constitutionally impermissible, for the national government to ask or expect police (and other employees of state and local government) to provide security against terrorism without covering the costs of their undertakings. There is room for negotiation and debate about how much those costs really are. The Protection Clause does not require Congress to write blank checks to the states—it would be unreasonable to expect payment without evidence supporting a state's claims. But these are details that can be worked out between the national government and the states. In the early years of the Republic, Congress and the War Department rapidly developed mechanisms to monitor expenses: advancing funds and pre-authorizing spending, reviewing states' actual expenditures along the way, issuing warnings when they were excessive, requiring states seeking reimbursement to submit detailed evidence in support of their final costs, and conducting audits. Similar mechanisms are clearly within the competency of modern government. The starting point, though, must be understood. The security tab belongs to Congress. In providing states with homeland security funding, including paying for the work of local law enforcement, Congress is not doing the states any favors. It is fulfilling its constitutional obligation.

In practice, various arrangements between the national government and the states are imaginable. One option is for Congress simply to reimburse the states for all reasonable security costs, leaving it to the states to figure out what kind of protection they need. A second option is a formal agreement setting out the specific security tasks state and local government will perform on behalf of the national government and the precise payment for those services. For example, the Joint Terrorism Task Forces (JTTF) in place today between some state and local law enforcement departments and the FBI and other federal agencies,⁶²⁵ typically are governed by a written

625. According to the FBI website, there exist sixty-six task forces involving more than 2300 personnel. See FBI, <http://www.fbi.gov/terrorinfo/counterrorism/partnership.htm> (last visited Dec. 15, 2004).

agreement.⁶²⁶ The approach could be expanded to set out the rules for other kinds of security arrangements.⁶²⁷ A third option is for the national executive branch to direct the security work of state employees, giving them detailed instructions on a daily basis.⁶²⁸ Other options and combinations of these options are conceivable. Further, to ensure that state personnel are prepared for security purposes, Congress may and likely should provide for “arming” them (for example, with guns, radiation suits, bomb detectors, and other devices), “organizing” them (such as by figuring out the size of police

626. See, e.g., Boston Joint Terrorism Task Force, Memorandum of Agreement (Dec. 19 2002) (on file with author); Reimbursement Agreement Between the Federal Bureau of Investigation and Boston Police Department (June 29, 2003) (on file with author); Memorandum of Understanding Between the Federal Bureau of Investigation and the Phoenix Police Department (Apr. 24, 2002) (on file with author); Reimbursement Agreement Between the Federal Bureau of Investigation and the Phoenix Police Department (Jan. 15, 2003) (on file with author); Memorandum of Understanding, Intergovernmental Agreement Between the Federal Bureau of Investigation and the Portland Police Bureau (Nov. 19, 2003) (on file with author); Reimbursement Agreement Between the Federal Bureau of Investigation and the Dearborn Police Department (Apr. 9, 2002) (on file with author); San Francisco Joint Terrorism Task Force, Memorandum of Agreement (Dec. 5, 2002) (on file with author). The FBI has a template memorandum. FBI, Joint Terrorism Task Force, Memorandum of Understanding (MOU) (on file with author). JTTF agreements are of course not the only formal agreements between federal and state/local officials in the War on Terror. See, e.g., Judith Miller, *City and F.B.I. Reach Agreement on Bioterror Investigations*, N.Y. TIMES, Nov. 21, 2004, at 39 (reporting on the six-page protocol between the New York City Police Department and the FBI setting out rules that govern investigations of suspected biological attacks).

627. The JTTF agreements contain various provisions. The Boston JTTF Agreement, for example, announces that it “establishes and delineates the mission and structure of the Boston Joint Terrorism Task Force . . . in addressing the complex problems of terrorism affecting the New England States of Massachusetts, Maine, New Hampshire, and Rhode Island” and that its purpose is “to set out a common understanding of the policies and procedures the Boston Police Department and the FBI will follow in providing law enforcement service to the citizens of Massachusetts and the United States of America.” Boston Joint Terrorism Task Force, *supra* note 627, at art. 1. Under the Agreement, the JTTF consists of personnel of the Boston Police Department, the Bureau of Alcohol, Tobacco and Firearms, the U.S. Customs Service, the (former) Immigration and Naturalization Service, the Internal Revenue Service, the Lowell, Massachusetts Police Department, the U.S. Marshals Service, the Massachusetts State Police, the Massachusetts Bay Transportation Authority Police Department, the U.S. Postal Inspection Service, the Secret Service, and the FBI. *Id.* art. 3(A). Supervision of matters assigned to the JTTF is the responsibility of a designated FBI agent and the Boston Police Department’s supervisory personnel. *Id.* art. 3(D). The FBI agrees to assign ten special agents and a supervising agent to the JTTF while the Boston Police Department agrees to assign two detectives. *Id.* art. 3(F). The FBI provides the JTTF with office space and provides Boston Police Department members with vehicles. *Id.* arts. 3(E) & 4. Salaries of JTTF members are to be paid by their respective agencies, but the FBI agrees to reimburse overtime incurred in the performance of JTTF duties. *Id.* art. 8; see also Reimbursement Agreement Between the Federal Bureau of Investigation and Boston Police Department, *supra* note 626 (specifying procedures for reimbursement and limiting overtime payments to \$881.13 per officer per month).

628. The state employees might remain on the payroll of the state, with the state reimbursed for the time its employees are in federal service. Alternatively, the employees might temporarily don federal uniforms, receive paychecks and other benefits directly from the national government, and thus look and feel very much like federal employees.

units to be used for specific tasks), “disciplining” them (setting out the necessary training before undertaking these tasks), and “governing” state personnel called into federal service (for example, setting rules about leave and overtime).⁶²⁹ Again, there are various ways in which Congress might exercise these powers.⁶³⁰

C. State Resistance

Suppose that the national government wants to employ local law enforcement officers (or other state and local personnel) to carry out a security measure, but they refuse to assist. The scenario is not unimaginable. Local police might be too busy with other duties. They might think the work asked of them is too dangerous. Perhaps prior episodes in federal employ have been unpleasant or poorly compensated. Maybe local police disagree with or oppose what the federal government is seeking to accomplish or the means of going about it. Even if individuals are willing to comply with the federal government’s request, the state or locality might refuse to have its employees used in a certain way (perhaps needing them at home or opposing a federal program).⁶³¹

Are such refusals proper? By placing so much emphasis on the role of the militia as a safeguard to liberties, the 1788 Constitution seems to take for granted that militiamen will, at some point when liberties are threatened, refuse to be called forth or refuse to do things asked of them, or that the states might refuse to lend their militia services. One conclusion is that this is exactly how it should be: Refusals of this nature serve to keep an overreaching national government in check, just as the Constitution intended, and the national government always has the alternative of sending in its own personnel (a factor that a reluctant militia or state will weigh in its own decision about whether to comply).

629. See U.S. CONST. art. I, § 8.

630. With all this talk of terrorism, it is worthwhile to note that there are other instances in which the national government might properly elect to call forth law enforcement and other state and local personnel for security purposes—to deal with civil disorder (at home or in other states), to patrol national borders, and to perform other tasks associated with preventing invasions and dealing with insurrections, as well as responding to opposition to the enforcement of federal laws. In each case, though, compensation is required.

631. See generally Susan N. Herman, *Introduction to Symposium, Our New Federalism? National Authority and Local Autonomy in the War on Terror*, 69 BROOK. L. REV. 1201, 1212–26 (2004) (discussing police chiefs’ refusals to participate in FBI interviews, local resistance to the Patriot Act, local enforcement of immigration laws, preemption of state law requiring the disclosure of inmates’ identities, preemption of local consent decrees, and other instances of federal and state conflict in the War on Terror).

At the same time, it seems faithful to the Constitution's text and underlying values to recognize that the power of the militia—and of local law enforcement and other security personnel today—to refuse federal service is very limited. The Constitution allocates power to Congress to provide for calling forth the militia and puts militiamen under the authority of the President as Commander in Chief.⁶³² There is no qualification, nothing requiring the states to agree with the deployment, no authorization for the states or their militia to decide whether and how Congress can exercise its calling-forth authority or to limit the President's command. Moreover, the militia's role in safeguarding liberties suggests only a limited right of refusal in the most serious of circumstances. Refusal is proper only when the request would entail oppression or abuse, the very things the militia units were meant to prevent.

Put differently, state and local personnel likely can refuse to comply with a federal request that exceeds the power of the federal government under the Constitution in the first place. One such scenario is when the request goes beyond using state or local personnel for the Article I purposes of repelling invasions, suppressing domestic insurrections, and dealing with opposition to federal laws.⁶³³ As a trivial example, state personnel, even if promised compensation, should be free to refuse to go to Washington for the purpose of raking leaves on the grounds of the White House. But if the call is for a purpose within the proper scope of the Constitution's authorization, then the states should comply.⁶³⁴

A second scenario in which refusal seems proper is if the federal government asks the states and their personnel to do something that violates a protection of the Bill of Rights.⁶³⁵ If a federal program is unconstitutional on this basis, it surely makes sense that states can refuse a request to carry it

632. U.S. CONST. art. I, § 8; *id.* art. II, § 2.

633. *Id.* art. I, § 8.

634. This does not (necessarily) mean that there is also a possibility of disagreeing with the national government's determination that the conditions for a proper use of the militia exist. Recall how the New England states justified their refusals during the War of 1812 on the ground that, as a factual matter, there was no threat of invasion. However, Massachusetts later recognized the national government's exclusive authority to make that determination. See discussion *supra* Part III.

635. See Vikram David Amar, *supra* note 624, at 1371, 1378 (noting, in the context of advocating for the creation of state laws to remedy federal violations of constitutional rights, that "state governments may use the Constitution . . . to affirmatively shield the citizens from federal laws that trample . . . on individuals' rights" and that "states can affirmatively and offensively develop legal vehicles to redress and deter such transgressions").

out.⁶³⁶ In this regard, consider the role of local law enforcement in resisting federal overreaching in the War on Terrorism. Out of concern with protecting liberties, local law enforcement in some places refused, at least initially, to carry out requests by the FBI to investigate members of the local community.⁶³⁷ More than three hundred local (and some state) resolutions have also passed provisions opposing the Patriot Act and implementing local programs to protect individual rights.⁶³⁸ This seems to be precisely what the Constitution anticipates in the federalism-based security apparatus it creates. Indeed, the point illustrates a broader theme. Though some courts and commentators talk about federalism's division of power between the nation and the states as the mechanism to protect constitutional interests,⁶³⁹ the national government's *dependency* on local personnel to carry out programs on the ground may be the best safeguard.⁶⁴⁰

636. A further possible understanding, while beyond the scope of the present Article, at least bears flagging. The text of the Constitution itself might suggest some leeway for more draconian federal power and greater coercion of local personnel in times of war. Under Article I, Congress may provide for calling forth the Militia "to execute the Laws of the Union, suppress Insurrections and repel Invasions." U.S. CONST. art. I, § 8, cl. 15. Local personnel might refuse to do something that is unconstitutional on the ground that they would not be executing the *laws* of the United States (and that something violating the Constitution is not "the supreme Law of the Land," *id.* art. VI, cl. 2). But the text also suggests that "suppress[ing] Insurrections" and "repel[ling] Invasions" might be different. *Id.* art. I, § 8, cl. 15. Textually, these provisions are separated out from "execut[ing] the laws of the Union." *Id.* A possible inference is that dealing with invasions and insurrections falls outside of the scope of the Union's "laws," and, therefore, beyond the Constitution's normal constraints on federal power, including constraints on the federal government's use of state and local security personnel. *Id.*

637. See Fox Butterfield, *A Police Force Rebuffs F.B.I. on Querying Mideast Men*, N.Y. TIMES, Nov. 21, 2001, at B7 (describing refusal of Portland, Oregon police chief to question Arab and Muslim men on the ground that state law required probable cause); Fox Butterfield, *Some Police Chiefs Object to Interviews*, N.Y. TIMES, Nov. 22, 2001, at A4 (discussing refusal by Portland, Oregon police chief to cooperate with federal agents in interviewing Arab and Muslim men).

638. See Evelyn Nieves, *Local Officials Rise Up to Defy the Patriot Act*, WASH. POST, Apr. 21, 2003, at A1; Elaine Scarry, *Acts of Resistance*, HARPER'S MAG., May 2004, at 15–20. For a listing of these resolutions, see Bill of Rights Defense Committee, at <http://www.bordc.org> (last visited Oct. 15, 2004).

639. See, e.g., *New York v. United States*, 505 U.S. 144, 181 (1992) ("[T]he Constitution divides authority between federal and state governments for the protection of individuals."); *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (noting that federalism "makes government more responsive by putting the States in competition for a mobile citizenry"); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (discussing the role of the states in protecting individual rights); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. at 341 (arguing that federalism promotes participation in political processes).

640. See Ann Althouse, *The Vigor of Anti-Commandeering Doctrine in Times of Terror*, 69 BROOK. L. REV. 1231, 1274 (2004) (discussing how constitutional rights are protected when "[t]o carry out its programs, the national government . . . need[s] to inspire the confidence of the vast numbers of police and other personnel employed at the state, and, especially, local government level").

D. Justiciability

As every law student learns, complaints under the Guarantee Clause of Article IV, Section 4 are deemed nonjusticiable, to be resolved through political processes and not by the courts.⁶⁴¹ What about cases under the Protection Clause? May a state sue the national government if it fails to ensure the state's security? In a few cases, extending the reasoning of the Supreme Court's decisions under the Guarantee Clause, lower federal courts have held that lawsuits to enforce the Protection Clause similarly raise nonjusticiable political questions.⁶⁴² However, these decisions shed little light because they all involve circumstances—like the entry of undocumented aliens across borders—that are far removed from the core concerns of the Protection Clause.⁶⁴³

In some ways, a lawsuit under the Protection Clause is easier to sustain than a claim under the Guarantee Clause. Whereas the Guarantee Clause requires a judgment about what kind of government is “republican”—an inherently political question—the Protection Clause presents more typical “cases” and “controversies.”⁶⁴⁴ Here are three readily imaginable scenarios: (1) A state that finds its borders unguarded files a lawsuit seeking to compel the federal government to put troops in place or sues to recover the costs of sending state personnel to do the work. (2) After the Department of Homeland Security warns of attacks on bridges, San Francisco sues for reimbursement of the costs of posting police officers around the clock at the Golden Gate Bridge. (3) Nevada sues for the costs of sending helicopters to patrol the skies over Las Vegas. Each presents a clear claim, and if sustained, a clear remedy.

641. See, e.g., *City of Rome v. United States*, 446 U.S. 156, 182 n.17 (1980) (explaining that an alleged violation of the Guarantee Clause presents a nonjusticiable political question). The doctrine begins with *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), in which the Court refused to rule, under the Guarantee Clause, on the legitimacy of the charter government in Rhode Island. *Id.* at 38–40. In explaining the political question doctrine, Justice Brennan later wrote:

[S]everal factors were thought by the Court in *Luther* to make the question there “political”: the commitment to the other branches of the decision as to which is the lawful state government; the unambiguous action by the President, in recognizing the charter government as the lawful authority; the need for finality in the executive's decision; and the lack of criteria by which a court could determine which form of government was republican.

Baker v. Carr, 369 U.S. 186, 222 (1962).

642. See *California v. United States*, 104 F.3d 1086 (9th Cir. 1997); *New Jersey v. United States*, 91 F.3d 463 (3d Cir. 1996); *Padavan v. United States*, 82 F.3d 23 (2d Cir. 1996) (dismissing an Article IV, Section 4 claim by New York State senators against the federal government for reimbursement of health, education, and other expenses incurred by the “invasion” of unlawfully present aliens); *Chiles v. United States*, 69 F.3d 1094 (11th Cir. 1995); *Barber v. Hawaii*, 42 F.3d 1185 (9th Cir. 1994) (dismissing as nonjusticiable a claim that the federal government has allowed an “economic invasion” by Japan).

643. See *supra* note 642.

644. U.S. CONST. art. III, § 2, cl. 1.

To be sure, in a legal action, there are likely to be questions about the perceived threat (is there really a likelihood of foreign ships arriving in the harbor?) and about the scope of needed defenses (does the state really require eighty troops or will fifty suffice?). Resolving a Protection Clause dispute also raises issues regarding the level of deference to be accorded to the national government in evaluating and responding to security concerns. Further, it is not obvious whether, under the Protection Clause, tort doctrines of negligence or strict liability should apply to determine whether the national government has met its duty to the states, or whether some other standard is appropriate in assessing liability. There is also an issue as to whether the Protection Clause invites compensation for damages resulting from actual invasions or domestic violence (for example, is the national government required to provide compensation following the attacks of 9/11?) and the extent of any such damages. Nonetheless, these kinds of questions do not seem beyond the capacity of judges and juries to resolve with their existing tools for weighing evidence like expert testimony and determining what relief, if any, is appropriate.

On the other hand, the Protection Clause might be better left to processes outside the courts. State demands to Congress for security funding are not new. In 1836, for example, sixteen years after it became a state, Maine invoked the national government's constitutional duties—and the unique threats to the state—in pressing for additional security appropriations:

The circumstances which give to our State its greatest importance, viz: our extensive seaboard and frontiers, render our situation the most exposed, and places us most in need of government aid and protection. While liberal appropriations have been made by the general Government all along the Atlantic shore and the Gulf of Mexico, a mere trifle (less than ten thousand dollars) from 1791 to 1833 has been appropriated to Maine for fortifying our seaports and protecting all our great interests. . . . We deem ourselves . . . of all the States in the Union the most defenceless and exposed. . . . [T]hough in an emergency we should confidently rely upon the patriotism of our citizens for defence, still it would be at the hazard of great interests, our homes, our property, and our best blood. . . . [W]ith a national treasury literally overflowing, we ask a right guaranteed to us by the Constitution, that we no longer be forgotten in the "common defence" of the country. . . . [T]he time has arrived when the great interests of the State imperiously demand of the general government vastly more liberal interposition for its protection and defence.⁶⁴⁵

645. Application of the legislature of Maine for Liberal Appropriations by Congress for the Defences of the Country (Apr. 22, 1836), in 6 AMERICAN STATE PAPERS: MILITARY AFFAIRS,

The request recalls those being made by states and cities today for money and equipment for counterterrorism programs: a unique vulnerability, the risks to the whole nation from a local attack, the tireless efforts of state and local personnel, but also the need for federal help. That is, perhaps, how it should be. States *should* ask for what they need, presenting the details of their own circumstances to the national government, and arguing for more support when they require it. Congress and the Executive should consider requests from states carefully, evaluating the severity of the threat and the appropriate means of defending against it. If states understand their right to insist on protection, and if members of Congress and the Executive—sworn to uphold the Constitution—take seriously their *duty* to protect the states, there may be no need to turn to judicial remedies.

CONCLUSION

When it declared homeland security “too important for politics as usual to prevail,”⁶⁴⁶ the 9/11 Commission was expressing an old idea. The Americans who ratified the federal Constitution understood that, in the system of government they had created, usual politics would leave some states with less security than they needed, and that this would put the whole nation at risk. The Constitution’s Protection Clause therefore takes the provision of security out of the ordinary operations of politics and imposes on the national government a constitutional duty to secure the states and their cities.

Alexander Hamilton was a New Yorker, but he was also an American. He knew that leaving his state to “sustain the whole weight” of protecting itself would not be “equitable as it respected New York,” and in addition, that it would not be “safe as it respected the other States.”⁶⁴⁷ Hamilton would readily recognize today how a terrorist attack on Wall Street is also an attack on Main Street. Faced with a “danger [which] though in different degrees, is . . . common,” Hamilton admonished, “the means of guarding against it ought in like manner to be the objects of common councils and of a common treasury.”⁶⁴⁸ The Security Constitution requires nothing less.

supra note 157, at 404, 405. See U.S. SENATE JOURNAL, 24th Cong., 1st Sess. 302 (1835) (discussing the Maine application as “declarative of the obligation upon the United States to afford protection to that State”).

646. 9/11 COMMISSION REPORT, *supra* note 611, at 396.

647. THE FEDERALIST NO. 25, at 158 (Alexander Hamilton).

648. *Id.*
