

GOVERNOR, DON'T FIRE UNTIL YOU SEE THE WHITES OF THEIR ONES AND ZEROS: STATE AUTHORITY TO WAGE WAR AGAINST CYBER ATTACKS

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ABSTRACT

This article considers whether states have authority to respond to certain cyber attacks as an “invasion” under Article I, Section 10 of the U.S. Constitution. Over the past decade, the U.S. government has shifted its primary national security focus from terrorism to strategic competition with other nation states. And cyber operations occupy a large part of that strategic competition. Although the federal government plays the leading role here, it does not have a monopoly in responding to cyber attacks. If a cyber operation crosses the threshold of an act of war, states have authority to respond with force under Article I, Section 10.

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1. INTRODUCTION

If a foreign adversary conducts a cyber operation against the United States that is comparable in “scale and effects” to an armed attack, the U.S. government has the legal authority to respond with military force.¹ The right of self-defense does not hinge on an enemy’s choice of weapon—a computer, as opposed to a missile.² The Department of Defense (DoD) recognizes five

¹ See TALLINN MANUAL 2.0 ON INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS 330 r.69 (Michael N. Schmitt & Liis Vihul eds., 2d ed. 2017) [hereinafter TALLINN MANUAL 2.0]. The Tallinn Manual was written to serve as “an objective restatement” of the law governing cyber operations. *Id.* at 3. It is the product of a group of international law experts gathered by the North Atlantic Treaty Organization’s (NATO) Cooperative Cyber Defense Center of Excellence, located in Tallinn, Estonia. *See id.* at 1–2. Its “primary audience” consists of “legal advisers charged with providing international law advice to governmental decision makers, both civilian and military.” *Id.* at 2; *see also* Eric Talbot Jensen, *The Tallinn Manual 2.0: Highlights and Insights*, 48 GEO. J. INT’L L. 735, 737–38 (2017).

² TALLINN MANUAL 2.0, *supra* note 1, at 340 r.71.

domains of war: land, sea, air, space, and cyberspace.³ If attacked in cyberspace, the United States can exercise its right of self-defense across all of these domains.⁴ The question is not can the United States respond with military force, but should it.⁵ Attributing the source of a cyber operation to a particular nation or group can be challenging.⁶ And the military option is just one of many on the table.⁷ But it is generally assumed that the federal government has a monopoly on this decision.⁸

This Article challenges that assumption. The Constitution expressly recognizes that states have the authority to wage war when they have been invaded or are in imminent danger of an invasion. Article I, § 10 provides: “No State shall, without the consent of Congress . . . engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.”⁹ The plain text, constitutional structure, ratification history, and subsequent governmental practice suggest that states may respond to cyber attacks with military force. The original understanding of “invasion” was not limited to ground operations by uniformed armies. And for the first hundred years of our history, states repeatedly used their own military forces to repel enemy attacks. State militias not only supplemented federal forces but also acted when the federal government was unwilling and unable to do so. Regardless of the domain of an enemy attack, states and the federal government have concurrent authority to act in self-defense.

³ JOINT CHIEFS OF STAFF, JOINT PUBLICATION 1, VOL. 1: JOINT WARFIGHTING, at GL-2 (2023) [hereinafter J.P. 1].

⁴ See TALLINN MANUAL 2.0, *supra* note 1, at 349 r.72.

⁵ See, e.g., *The CCP Cyber Threat to the American Homeland and National Security: Hearing Before the H. Select Comm. on the Strategic Competition Between the U.S. and the Chinese Communist Party*, 118th Cong. 37–38 (Jan. 31, 2024) (testimony of Gen. Paul Nakasone) (noting the United States could “respond decisively” to a cyber attack that crossed “the threshold of war” or could also “impos[e] costs in a much broader fashion”).

⁶ See, e.g., Delbert Tran, Note, *The Law of Attribution: Rules for Attributing the Source of a Cyber-Attack*, 20 YALE J.L. & TECH. 376, 383–84 (2018).

⁷ See, e.g., J.P. 1, *supra* note 3, at I-3 (“The United States leverages its diplomatic, informational, military, and economic instruments of national power to pursue its national interests.”).

⁸ See, e.g., Kristen E. Eichensehr, *Public-Private Cybersecurity*, 95 TEX. L. REV. 467, 475–76 (2017).

⁹ U.S. CONST. art. I, § 10, cl. 3.

2. BACKGROUND

2.1. Federalism in the Armed Forces

The federal government's constitutional authority over active-duty armed forces is plenary.¹⁰ Despite the Founding generation's concern over standing armies,¹¹ the Constitution gives Congress the power to "raise and support Armies"¹² and "provide for and maintain a Navy."¹³ Congress also has authority to make rules governing "the land and naval Forces."¹⁴ And the President serves as "the Commander in Chief" of active-duty forces and state militias "when called into the actual Service of the United States."¹⁵ The only express limit on federal power is that no appropriations shall be for a term longer than two years.¹⁶ The idea was to ensure Congress periodically debates "whether to continue funding a standing army."¹⁷

In contrast to active-duty forces, the Constitution reserves some authority over the militia to state governments. Congress has responsibility over "organizing, arming, and disciplining" state militias and "for governing" them when "employed in the Service of the United States."¹⁸ It also has authority to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."¹⁹ But states appoint officers and must train the militia according to standards prescribed by Congress.²⁰ And when not in federal service, a state's militia "is available for all appropriate uses to which [it] may be put."²¹

¹⁰ See, e.g., *Arver v. United States*, 245 U.S. 366, 382–83 (1918) (noting that in contrast to the militia, the federal government has "complete authority" over the Army).

¹¹ See Robert Leider, *Federalism and the Military Power of the United States*, 73 VAND. L. REV. 989, 995–1005 (2020) (describing that the Founding generation opposed having a standing army for philosophical and historical reasons).

¹² U.S. CONST. art. I, § 8, cl. 12.

¹³ *Id.* art. I, § 8, cl. 13.

¹⁴ *Id.* art. I, § 8, cl. 14.

¹⁵ *Id.* art. II, § 2, cl. 1.

¹⁶ *Id.* art. I, § 8, cl. 12.

¹⁷ Leider, *supra* note 11, at 1000.

¹⁸ U.S. CONST. art. I, § 8, cl. 16.

¹⁹ *Id.* art. I, § 8, cl. 15.

²⁰ *Id.* art. I, § 8, cl. 16.

²¹ Leider, *supra* note 11, at 1005; see also *infra* Section 3.3.

Following ratification, the federal government left state militias largely unregulated for over a century.²² The “first real exercise of the long dormant Congressional power to organize the militia” occurred in 1903.²³ Congress created “the organized militia, to be known as the National Guard.”²⁴ The intent was for the National Guard to “conform to the Regular Army organization, be equipped through federal funds, and be trained by Regular Army instructors.”²⁵ Several years later, the U.S. Attorney General issued an opinion that the militia could not be sent “into a foreign country in time of peace and when no invasion is made or threatened.”²⁶ In response, “Congress decided to ‘federalize’ the National Guard.”²⁷ The National Defense Act of 1916 “required every guardsman to take a dual oath—to support the Nation as well as the States and to obey the President as well as the Governor—and authorized the President to draft members of the Guard into federal service.”²⁸ Members of the National Guard “must keep three hats in their closets—a civilian hat, a state militia hat, and an army hat—only one of which is worn at any particular time.”²⁹

During the Cold War, the National Guard served as a “strategic reserve” in case there was “a major war with the Soviet Union.”³⁰ But with the transition to “an all-volunteer force” after Vietnam, the National Guard became an “operational reserve . . . almost by default.”³¹ For example, over 250,000 National Guardsmen deployed to Iraq from 2003 to 2011.³² In 2020,

²² Frederick Bernays Weiner, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181, 195 (1940).

²³ *Id.*

²⁴ Act of Jan. 21, 1903 (The Dick Act), ch. 196, sec. 1, 32 Stat. 775, 775 (codified as amended at 10 U.S.C. § 246).

²⁵ Weiner, *supra* note 22, at 195.

²⁶ Authority of President to Send Militia into a Foreign Country, 29 Op. Att’y Gen. 322, 324 (1912).

²⁷ *Perpich v. Dep’t of Def.*, 496 U.S. 334, 343 (1990).

²⁸ *Id.*

²⁹ *Id.* at 348.

³⁰ COMM’N ON THE NAT’L GUARD AND RESERVE, TRANSFORMING THE NATIONAL GUARD AND RESERVES INTO A 21ST-CENTURY OPERATIONAL FORCE 6 (2008).

³¹ *Id.*

³² John Orrell, *The National Guard’s Contribution: 300,000-Plus Iraq Deployments*, NAT’L GUARD: NEWS (Jan. 4, 2012), <https://perma.cc/3Z32-JGL6>.

the National Guard had around 3,900 cyber personnel, of which 2,200 regularly rotated for tours of service on the DoD Cyber Mission Force.³³ And until called into federal service, state governors command this force.³⁴

2.2. Military Operations in Cyberspace

Current DoD doctrine recognizes three types of operations in cyberspace: DoD Information Network operations, Defensive Cyber Operations, and Offensive Cyber Operations.³⁵ Defensive Cyber Operations (DCO), the relevant category for this Article,³⁶ involve defense of “blue cyberspace from imminent or active threats . . . that have bypassed, breached, or are threatening to breach security measures.”³⁷ If these operations “occur within the defended network or portion of cyberspace,” then they are referred to as Defensive Cyberspace Operations-Internal Defense Measures (DCO-IDM).³⁸ But when they “are taken external to the defended network or portion of cyberspace without the permission of the owner of the affected system,” they are referred to as Defensive Cyberspace Operations-Response Actions (DCO-RA).³⁹

When considering a state’s authority to respond to cyber attacks under Article I, § 10, the focus should be on DCO-RA. In other words, whether state cyber assets can operate in—and cause damage to—external networks.

³³ JAMES R. AYERS ET AL., USING NATIONAL GUARD CYBER FORCES TO SUPPORT HOMELAND CYBER DEFENSE ACTIVITIES IN NON-DOD-OWNED CYBERSPACE, at vii (2022), <https://perma.cc/795H-TT2F>. By comparison, the total number of the DoD Cyber Mission Force was 6,000. *Id.*

³⁴ See, e.g., *Abbott v. Biden*, 70 F.4th 817, 822 (5th Cir. 2023).

³⁵ JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-12, CYBERSPACE OPERATIONS, at II-2 to II-5 (2022).

³⁶ DoD Information Network (DODIN) operations involve addressing vulnerabilities in DoD networks to prevent attacks and “preserve the confidentiality, availability, and integrity of the DODIN.” *Id.* at II-2. Offensive Cyber Operations (OCO) “project power in and through” a neutral or adversary’s cyberspace, but not in response to imminent threats. *Id.* at II-5.

³⁷ *Id.* at II-3 to II-4. Blue cyberspace refers to “US cyberspace (i.e., areas in cyberspace owned or controlled by the United States Government [USG] or a US person) and other areas of cyberspace DOD is ordered to protect.” *Id.* at I-5.

³⁸ *Id.* at II-4.

³⁹ *Id.*

These “missions may rise to the level of use of force, with physical damage or destruction of enemy systems, depending on broader operational context, such as the existence or imminence of open hostilities, the degree of certainty in attribution of the threat, the damage the threat has caused or is expected to cause, and national policy considerations.”⁴⁰ The DoD does not appear to have taken a public stance or issued guidance on the question.⁴¹

2.3. The U.S. Government’s Legal Authority to Respond to Armed Attacks

2.3.1. International Law Framework

The U.N. Charter recognizes that nations have an “inherent right of individual or collective self-defense” in the event of “an armed attack.”⁴² Cyber operations trigger the right of self-defense when they are comparable in “scale and effects” to armed attacks.⁴³ Although the precise contours of the law remain unsettled, “a cyber operation that seriously injures or kills a number of persons or that causes significant damage to, or destruction of, property would satisfy the scale and effects requirement” of an armed attack.⁴⁴ If “a series of cyber incidents that individually fall below the threshold of an armed attack” originate from the same source, a nation may treat “the incidents as a composite armed attack.”⁴⁵ Cyber attacks from both state and nonstate actors, “such as terrorist or rebel groups,” can trigger the right of

⁴⁰ *Id.*

⁴¹ See generally DEP’T OF DEFENSE, LAW OF WAR MANUAL § 16, at 1024–39 (2023) [hereinafter *DoD LAW OF WAR*] (addressing cyber operations under the law of war, but not appearing to take a public position on whether states may independently conduct DCO-RA). In the context of cyber operations, the National Guard Bureau has written, “States cannot engage in international warfare, i.e., a State cannot attack a foreign country by cyber or kinetic means. Any DCO-RA or OCO [Offensive Cyber Operations] activities must be carefully reviewed and should receive a written opinion from the State Attorney General in order to set parameters of activities.” NAT’L GUARD BUREAU, 2024 DOMESTIC OPERATIONS AND POLICY 149 (3d ed. 2024).

⁴² U.N. Charter art. 51.

⁴³ TALLINN MANUAL 2.0, *supra* note 1, at 339 r.71.

⁴⁴ *Id.* at 341.

⁴⁵ *Id.* at 342.

self-defense.⁴⁶ And there is “no requirement that the defensive force be of the same nature as that constituting the armed attack.”⁴⁷ That means states can respond to cyber operations with “a kinetic armed attack.”⁴⁸

The U.S. government has recognized this international consensus for over a decade.⁴⁹ In 2012, the Legal Adviser for the Department of State explained that “if the physical consequences of a cyber attack work the kind of physical damage that dropping a bomb or firing a missile would, that cyber attack should equally be considered a use of force.”⁵⁰ For example, cyber operations that cause a nuclear plant meltdown, open a dam above a populated area, or disable air traffic control trigger the right of self-defense.⁵¹ And the DoD takes the position that “cyber operations that cripple a military’s logistics systems, and thus its ability to conduct and sustain military operations, might also be considered a use of force under” international law.⁵²

2.3.2. Constitutional Framework

In addition to raising armies, the Constitution gives Congress the power to “declare War.”⁵³ And the President, as stated, is the Commander-in-Chief of the armed forces.⁵⁴ Legal scholars have spilled much ink debating whether the President can unilaterally initiate hostilities without congressional authorization.⁵⁵ But it is largely settled that the President can respond to armed attacks without congressional authorization.⁵⁶ The original draft of

⁴⁶ *Id.* at 345.

⁴⁷ *Id.* at 349.

⁴⁸ *Id.*

⁴⁹ See Harold Hongju Koh, Legal Adviser, U.S. Dep’t of State, International Law in Cyberspace: Remarks as Prepared for Delivery to the USCYBERCOM Inter-Agency Legal Conference (Sep. 18, 2012), in 54 HARV. INT’L L.J. ONLINE, 3–4 (2012).

⁵⁰ *Id.* at 4.

⁵¹ *Id.*

⁵² DoD LAW OF WAR, *supra* note 41, § 16.3.1.

⁵³ U.S. CONST. art. I, § 8, cl. 11.

⁵⁴ *Id.* art. II, § 2.

⁵⁵ See, e.g., Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1543–45 (2002); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of the War Powers*, 84 CALIF. L. REV. 167, 204 (1996).

⁵⁶ But see Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by “Declare War”*, 93 CORNELL L. REV. 45, 118 (2007) (“[I]n response to hostilities

the Constitution gave Congress the power to “make war.”⁵⁷ At the request of James Madison and Elbridge Gerry, the Convention changed the language to “declare” war, “leaving to the Executive the power to repel sudden attacks.”⁵⁸ Another delegate explained that the President should “be able to repel and not to commence war.”⁵⁹ Justice Story would concur in his *Commentaries* that the “command and application of the public force . . . to resist foreign invasion” was “obviously of an executive nature” within the President’s prerogative.⁶⁰

The Supreme Court later adopted that view during the Civil War.⁶¹ In *The Prize Cases*, the Court held that if “a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority.”⁶² Determining whether a situation calls for a military response “is a question to be decided by *him* [the President].”⁶³ Courts “must be governed by the decisions and acts of the political department . . . to which this power was entrusted.”⁶⁴

3. ORIGINAL UNDERSTANDING OF ARTICLE I, SECTION 10

“The first and most important rule in constitutional interpretation is to heed the text—that is, the actual words of the Constitution—and to interpret the text according to its ordinary meaning as originally understood.”⁶⁵ Founding-era dictionaries and other texts are a helpful starting point.⁶⁶ The

initiated by another nation, the President is limited to a lethal but calibrated defensive response, reserving to Congress the decision whether to wage an offensive war.”).

⁵⁷ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318 (Max Farrand ed., 1911) [hereinafter FARRAND’S RECORDS].

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 340, § 1485 (Boston, Hilliard, Gray, & Co. 1833).

⁶¹ *See The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862).

⁶² *Id.*

⁶³ *Id.* at 670.

⁶⁴ *Id.*

⁶⁵ *United States v. Rahimi*, 602 U.S. 680, 715 (2024) (Kavanaugh, J., concurring).

⁶⁶ *See, e.g., Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass’n of Am.*, 601 U.S. 416, 427 (2024).

structure of the Constitution can also reveal principles that inform the meaning of constitutional text.⁶⁷ And where the text is vague, reference to “the stated intentions and understandings of the Framers and Ratifiers of the Constitution” is appropriate.⁶⁸ Although not necessarily dispositive, these understandings “may be strong evidence of meaning.”⁶⁹

Post-ratification history and practice play a role too.⁷⁰ Historic practice is particularly compelling in the context of national security and foreign affairs, where judicial precedent is sparse.⁷¹ Without such precedent, we often “rely on the practical statesmanship of the political branches”⁷² to “determine the constitutional allocation of war-making powers between them.”⁷³ Indeed, the “actual art of governing” under the Constitution “cannot conform to judicial definitions” of governmental power “torn from context.”⁷⁴ The Constitution “contemplates that practice will integrate the dispersed powers into a workable government.”⁷⁵

With this interpretive framework in mind, we can consider whether states may respond to cyber attacks with military force.

3.1. Plain Meaning of “Invasion”

In *Federalist No. 43*, Madison recognized the “latitude” of the phrase “protection against invasion.”⁷⁶ He explained that a “protection against invasion is due from every society to the parts composing it.”⁷⁷ The phrase “seems to secure each state not only against foreign hostility, but against ambitious

⁶⁷ See, e.g., *Printz v. United States*, 521 U.S. 898, 918 (1997).

⁶⁸ *Rahimi*, 602 U.S. at 719 (Kavanaugh, J., concurring).

⁶⁹ *Id.*

⁷⁰ See *id.* at 723–29.

⁷¹ See, e.g., *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 23 (2015); April 2018 Air-strikes Against Syrian Chemical-Weapons Facilities, 42 Op. O.L.C. 39, 43 (2018).

⁷² Whether Uruguay Round Agreements Required Ratification as a Treaty, 18 Op. O.L.C. 232, 234 (1994).

⁷³ The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them, 25 Op. O.L.C. 188, 202 (2001).

⁷⁴ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

⁷⁵ *Id.*

⁷⁶ THE FEDERALIST NO. 43, at 292 (James Madison) (Jacob E. Cooke ed., 1961).

⁷⁷ *Id.*

or vindictive enterprises of its more powerful neighbors.”⁷⁸ The broad purpose of protecting states from hostility provides context to the term “invasion” in Article I, § 10. A cyber operation that “seriously injures or kills a number of persons” or causes significant property damage⁷⁹ fits the original understanding of the term. The leading dictionaries and political discourse of the era did not limit invasions to ground operations by uniformed militaries.⁸⁰

In 1785, Samuel Johnson’s dictionary defined “invasion” as a “[h]ostile entrance upon the rights or possessions of another; hostile encroachment.”⁸¹ To “invade” meant:

1. To attack a country; to make an hostile entrance. . . .
2. To attack; to assail; to assault. . . .[or]
3. To violate by the first act of hostility; to attack, not defend.⁸²

Johnson defined “Invader” as “One who enters with hostility into the possessions of another,” “An assailant,” or “Encroacher; intruder.”⁸³ And “hostile” meant “adverse; opposite; suitable to an enemy.”⁸⁴ Other dictionaries from the Founding era have similar definitions.⁸⁵ The essence of an invasion was an enemy attack.⁸⁶ The attack need not be mounted on the ground, or designed to seize and hold territory.⁸⁷

⁷⁸ *Id.* at 292–93.

⁷⁹ See TALLINN MANUAL 2.0, *supra* note 1, at 341.

⁸⁰ See Robert G. Natelson & Andrew T. Hyman, *The Constitution, Invasion, Immigration, and the War Powers of States*, 13 BRIT. J. AM. LEGAL STUDS. 19–27 (2024).

⁸¹ 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ See Natelson & Hyman, *supra* note 80, at 21 n.125. Of the thirteen dictionaries examined in their study, only one defined invasion in terms of ground forces. *Id.* at 20. That dictionary defined “invade” as “to come violently, illegally, unfairly, or unjustly, into the lands, possessions, or country of another; and is commonly understood of the army of one nation coming suddenly and unprovoked into another’s kingdom [sic] or country, and keeping possession of all or part thereof by violence, or driving away the cattle, making prisoners of the people, or doing other acts of hostility.” *Id.* at 20 n.124 (quoting THOMAS DYCHE & WILLIAM PARDON, A NEW GENERAL ENGLISH DICTIONARY (16th ed. 1777)).

⁸⁶ See 1 JOHNSON, *supra* note 81.

⁸⁷ See *id.*

The political discourse of the era also reveals that invasions could come through what now is described as another domain of war: the sea.⁸⁸ In *Federalist No. 41*, Madison observed that a navy was necessary to protect coastal towns from “daring and sudden invaders” with “the predatory spirit of licentious adventurers.”⁸⁹ Other political commentators feared “invasions of a maritime enemy”⁹⁰ or being “invaded by a maritime force.”⁹¹ Their language aligns with that of Hugo Grotius, who considered pirates to be “[i]nvaders.”⁹² In 1786, Congress even warned of “an invasion . . . by a marine power.”⁹³ The plain text of Article I, § 10 therefore suggests that state authority to wage war extends to cyber operations with scale and effects equivalent to armed attacks.

3.2. Constitutional Structure

When interpreting “the meaning of a word in the Constitution, there is no better dictionary than . . . the Constitution itself.”⁹⁴ The Supreme Court has long “employed this structural method of interpretation to read the Constitution in the manner it was drafted and ratified—as a unified, coherent whole.”⁹⁵ The other “invasion clause” can therefore inform the scope of state war-making power.⁹⁶ Article IV, § 4 provides, “The United States shall guarantee to every State in this Union a Republican Form of Government, and

⁸⁸ See Natelson & Hyman, *supra* note 80, at 23.

⁸⁹ THE FEDERALIST NO. 41, *supra* note 76, at 275 (James Madison).

⁹⁰ Phila. Freeman’s J. (Jan. 2, 1788), *reprinted in* 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 230 (John P. Kaminski, Gaspare J. Saladino & Richard Leffler eds., 1984).

⁹¹ “Civis,” to the Citizens of South Carolina, Charleston Columbian Herald (Feb. 4, 1788), *reprinted in* 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 21, 24 (John P. Kaminski, Gaspare J. Saladino & Richard Leffler eds., 1986).

⁹² 2 HUGO GROTIIUS, THE RIGHTS OF WAR AND PEACE 735 (Richard Tuck ed., John Morrice trans., Liberty Fund 2005) (1625).

⁹³ 30 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 447 (John C. Fitzpatrick ed., 1934) (1786).

⁹⁴ *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 829 (2015) (Roberts, C.J., dissenting).

⁹⁵ *Id.*

⁹⁶ See U.S. CONST. art. IV, § 4.

shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”⁹⁷ As already noted, it is largely settled that if there is an “invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority.”⁹⁸

The state’s authority under Article I, § 10 should therefore mirror the President’s executive power to “resist foreign invasion.”⁹⁹ In fact, the Constitution is even “more explicit in authorizing the States to ‘engage in War’ than it is with the President.”¹⁰⁰ After all, “the President’s power to engage in war in response to invasion is implied, not explicit.”¹⁰¹ The Constitution recognizes dual sovereignty here “not . . . for the benefit of the States or state governments as abstract political entities,” but rather “for the protection of individuals.”¹⁰² The “structural protections” ensure “a healthy balance of power between the States and the Federal Government [to] reduce the risk of tyranny and abuse from either front.”¹⁰³ Article I, § 10 guarantees that the people are not entirely dependent on the federal government’s decision making for protection against attacks.

3.3. Convention and Ratification History

When settling on the power of states to wage war under the new Constitution, the framers were not writing on a blank slate. The Articles of Confederation provided:

No State shall engage in any war without the consent of the United States, in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians

⁹⁷ *Id.*

⁹⁸ *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862).

⁹⁹ 3 STORY, *supra* note 60, at 340, § 1485.

¹⁰⁰ *United States v. Abbott*, 110 F.4th 700, 730 (5th Cir. 2024) (Ho, J., concurring).

¹⁰¹ *Id.*

¹⁰² *New York v. United States*, 505 U.S. 144, 181 (1992).

¹⁰³ *Printz v. United States*, 521 U.S. 898, 921 (1997) (citation omitted) (internal quotation marks omitted).

to invade such State, and the danger is so imminent as not to admit of a delay, till the United States, in Congress assembled, can be consulted¹⁰⁴

Compared to other issues, this one did not generate as much attention from the Framers or ratifiers.¹⁰⁵ But the record they left behind suggests that Article I, § 10 “says what it means and means what it says.”¹⁰⁶

Early on at the Convention, Charles Pinckney proposed a draft prohibiting states from engaging in war “except in self-defense, when actually invaded, or the danger of invasion is so great as not to admit of a delay until the government of the United States can be informed thereof.”¹⁰⁷ And during debates over the militia, Roger Sherman “took notice that the States might want their Militia for defence [against] invasions and insurrections, and for enforcing obedience to their laws. They will not give up this point.”¹⁰⁸ The draft constitution produced by the Committee of Detail provided that no state shall “engage in any war, unless it shall be actually invaded by enemies, or the danger of invasion be so imminent, as not to admit of a delay, until the Legislature of the United States can be consulted.”¹⁰⁹ A few days before adjourning, the Framers removed the requirement to consult Congress and the reference to “enemies.”¹¹⁰ The Convention records provide no insight on the change.¹¹¹

The provision received considerable attention at the Virginia Ratifying Convention. John Marshall, then a delegate to the convention, responded to claims that states would lack authority to defend themselves without the consent of Congress.¹¹² He explained that “state legislatures had power to

¹⁰⁴ ARTICLES OF CONFEDERATION of 1781, art. VI, para. 5.

¹⁰⁵ See George K. Walker, *United States National Security Law and United Nations Peacekeeping or Peacemaking Operations*, 29 WAKE FOREST L. REV. 435, 477 n.288 (1994) (noting the issue “excited little debate in the Constitutional Convention or afterward”).

¹⁰⁶ *United States v. Rahimi*, 602 U.S. 680, 715 (2024) (Kavanaugh, J., concurring).

¹⁰⁷ 1 THE DEBATES IN THE SEVERAL STATES CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION 149 (J. Elliot ed., 2d ed. 1836) [hereinafter ELLIOT’S DEBATES].

¹⁰⁸ 2 FARRAND’S RECORDS, *supra* note 57, at 332.

¹⁰⁹ *Id.* at 187; *accord id.* at 577.

¹¹⁰ *Id.* at 626.

¹¹¹ See *id.*

¹¹² 3 ELLIOT’S DEBATES, *supra* note 107, at 419.

command and govern their militia before, and have it still, undeniably, unless there be something in this Constitution that takes it away.”¹¹³ Despite the affirmative grant to Congress to “suppress insurrections and repel invasions . . . the power given to the states by the people is not taken away.”¹¹⁴ It was therefore “unquestionable” that states could call out the militia “in the same manner as they could have done before [the Constitution’s] adoption.”¹¹⁵ Not only that, the Constitution expressly reserves the power to wage war when invaded or under imminent danger.¹¹⁶ According to Marshall, “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.”¹¹⁷

Other delegates echoed those arguments. Madison agreed that states “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.”¹¹⁸ If “not in the actual service of the United States,” then “state governments might do what they thought proper with the militia.”¹¹⁹ Madison believed the affirmative grant to Congress did not “bar the states from calling forth their own militia,” but rather provided “a supplementary security to suppress insurrections and domestic violence.”¹²⁰ States are only “restrained from making war, unless invaded, or *in imminent danger*. When in such danger, they are not restrained.”¹²¹ Because the federal government also has a duty to repel invasions, there is “a concurrence of the power.”¹²² Another delegate agreed, noting that the provision restricts “only offensive hostility, as they are at liberty to engage in war when invaded, or in imminent danger.”¹²³

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 420.

¹¹⁸ *Id.* at 383.

¹¹⁹ *Id.* at 416.

¹²⁰ *Id.* at 425.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 427.

Even opponents of ratification appeared to concede the point. Patrick Henry feared that Virginia would be unable to suppress local insurrections because the Constitution did not expressly reserve that power to states.¹²⁴ Unlike Marshall, he refused to rely “on constructive rights and argumentative implication.”¹²⁵ To prove his claim, Henry pointed to Article I, § 10, which expressly reserves state authority not to “domestic insurrections, but war.”¹²⁶ Henry worried that if “the country be invaded, a state may go to war, but cannot suppress insurrections.”¹²⁷

3.4. Governmental Practice

There are only a handful of examples in American history where states have independently waged war under Article I, § 10. For good reason. The United States is surrounded by oceans and relatively peaceful neighbors. But in the War of 1812 and the Civil War, states used their own military forces to supplement federal armies. And on two other occasions, states acted in self-defense when the federal government was unwilling or unable to protect them. These examples support independent state military action under Article I, § 10.

3.4.1. The Creek War with Georgia, 1786–1796

Following the American Revolution, the Creek Indians waged a war against the State of Georgia that lasted over a decade. For purposes of this Article, that story is best told in two chapters. Chapter one precedes ratification of the Constitution, when the Articles of Confederation governed the federal-state relationship. Because the relevant Articles are “similar to the language in the U.S. Constitution, the history of how people understood” them “can inform” our analysis.¹²⁸ The Confederation Congress expressed

¹²⁴ *Id.* at 423.

¹²⁵ *Id.* at 422.

¹²⁶ *Id.* at 423.

¹²⁷ *Id.*

¹²⁸ *United States v. Rahimi*, 602 U.S. 680, 719 (2024) (Kavanaugh, J., concurring); *see also* Natelson & Hyman, *supra* note 80, at 17 (noting that the Constitution resulted in “a balance between federal and state prerogative roughly similar to that under the Articles of Confederation”).

concerns about the war's underlying causes and the state's authority to execute treaties.¹²⁹ But there does not appear to be any contemporaneous dispute over the state's legal authority to use military force.¹³⁰

Chapter two follows ratification. And here, federal authorities agreed that because Georgia was invaded, it could wage war as it deemed fit.¹³¹ The Secretary of War even conceded that in some cases the state militia could lead a counterattack on enemy territory.¹³² But federal authorities parted ways with the state once it appeared that the invasion had ended. The President refused to authorize a federal expedition into Creek country because he thought a declaration of war was necessary.¹³³ Nevertheless, the state continued to wage its limited war against the Creeks.¹³⁴ Its problem was a lack of resources, not legal authority. That would be a recurring theme in other conflicts.

3.4.1.1. Pre-Ratification

The Creeks fought alongside the British during the Revolutionary War.¹³⁵ After the British surrendered, some Creek leaders signed treaties with Georgia to establish the border.¹³⁶ But other Creeks “rejected the treaties, arguing that the treaty signers did not represent Creeks as a whole.”¹³⁷ The Creek resistance leaders believed that the Confederation Congress would not allow settlement on lands ceded to the state under these treaties.¹³⁸ And they received weapons, ammunition, and encouragement from their Spanish allies in Louisiana and West Florida.¹³⁹

¹²⁹ See *infra* notes 148–149.

¹³⁰ However, Madison remarked near the end of his life that under the Articles of Confederation, federal authority “was violated by Treaties & wars with Indians, as by Geo[rgia].” 3 FARRAND’S RECORDS, *supra* note 57, at 548.

¹³¹ See *infra* Section 3.4.1.2.

¹³² See *infra* notes 208–209, 223.

¹³³ See *infra* notes 220–222.

¹³⁴ See *infra* notes 229–239.

¹³⁵ JOSHUA S. HAYNES, PATROLLING THE BORDER: THEFT AND VIOLENCE ON THE CREEK-GEORGIA FRONTIER, 1770–1796, at 72–83 (2018).

¹³⁶ *Id.* at 88–89, 102, 125.

¹³⁷ *Id.* at 86.

¹³⁸ *Id.* at 117.

¹³⁹ *Id.* at 117–18.

Beginning in the 1770's, the Creeks employed "a foreign policy centered on limited border raiding to harass colonists and force them to observe established boundaries."¹⁴⁰ After the Treaty of Shoulderbone Creek in November 1786, border raiding "sky-rocketed to a thirty-year peak."¹⁴¹ In May 1787, the federal Indian agent in the state warned that a 6,000 man Creek army was about to launch "an immediate invasion."¹⁴² That warning was prescient. By November 1787, Creeks had killed thirty-one settlers, taken four hostages, and burned a county courthouse to the ground.¹⁴³ Although the Georgia militia responded to these attacks, its "basic difficulty was a financial one."¹⁴⁴ The governor complained that "we are engaged in a war, without the means requisite to prosecute it."¹⁴⁵

As "the Creeks ravaged with impunity the Georgia frontier,"¹⁴⁶ the state's congressional delegation requested federal help. They sought a resolution to "draw forth a sufficient number of the forces of the Union to punish any nation or tribe of Indians that shall attempt to make war on either of the United States, by attacking or killing any of their citizens."¹⁴⁷ But a congressional committee resisted that effort, believing that land hungry settlers were "the principal source of difficulties with the Indians."¹⁴⁸ The committee also thought the state lacked authority under the Articles of Confederation to enter into treaties with Indian tribes.¹⁴⁹ Although Congress felt "bound by the

¹⁴⁰ *Id.* at 22.

¹⁴¹ *Id.* at 128.

¹⁴² Letter from James White to Henry Knox, Sec'y of War (May 24, 1787), in 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS 20, 21 (Walter Lowrie & Matthew St. Clair Clarke eds., Washington, Gales & Seaton 1832) [hereinafter ASPIA].

¹⁴³ Randolph C. Downes, *Creek-American Relations, 1782-1790*, 21 GA. HIST. Q. 142, 163 (1937) [hereinafter Downes I]; Letter from George Matthews, Governor of Ga., to Henry Knox, Sec'y of War (Nov. 15, 1787), in 1 ASPIA, *supra* note 142, at 23.

¹⁴⁴ Downes I, *supra* note 143, at 161.

¹⁴⁵ *Id.* at 162.

¹⁴⁶ *Id.*

¹⁴⁷ 33 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 455-56 (Roscoe R. Hill ed., 1936).

¹⁴⁸ *Id.* at 457.

¹⁴⁹ *Id.* at 457-58; see also ARTICLES OF CONFEDERATION of 1781, art. IX, para. 4 ("The United States in Congress assembled shall also have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated.").

federal compact to protect every part of the nation," it would "never employ the forces of the union in any cause, of the justice of which they are not fully informed and convinced of."¹⁵⁰ Despite representations that Georgia was "in danger of an invasion," Congress only sent pistols, swords, and some artillery pieces to the state.¹⁵¹

Without meaningful federal support, Georgia was left to fight a war on its own.¹⁵² Although there was "scarcely any money in the treasury to supply the militia," the state regularly responded to Creek attacks.¹⁵³ When a small militia patrol was ambushed in September 1787, General Elijah Clarke marched fifty miles into Creek country with 160 militia.¹⁵⁴ A three-hour firefight ensued at the Battle of Jacks Creek.¹⁵⁵ Despite having six men killed and eleven wounded, General Clarke reported that his force "totally defeated" the Creek warriors.¹⁵⁶ The militia only withdrew because it was short on provisions.¹⁵⁷

With "war" against the Creeks "raging," the Georgia legislature also took action.¹⁵⁸ In October 1787, it passed a law to raise an army of 1,500 soldiers "to serve until peace is established with the Indians."¹⁵⁹ The law also allowed the governor to raise two regiments of volunteers, totaling another 1,500 men.¹⁶⁰ The legislature further believed that "the support of the Union" should be "demanded" by its congressional delegation.¹⁶¹ The governor was

¹⁵⁰ 33 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 147, at 461–62.

¹⁵¹ *Id.* at 530–31.

¹⁵² *See* Downes I, *supra* note 143, at 161–63.

¹⁵³ *Id.* at 162.

¹⁵⁴ HAYNES, *supra* note 135, at 144; Downes I, *supra* note 143, at 163.

¹⁵⁵ Downes I, *supra* note 143, at 163.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Report of the General Assembly of Georgia (Oct. 23, 1787) [hereinafter Georgia Assembly Report], in 1 ASPIA, *supra* note 142, at 24.

¹⁵⁹ An Act for Suppressing the Violences of the Indians (Oct. 31, 1787), in A DIGEST OF THE LAWS OF THE STATE OF GEORGIA 365, 366 (Robert Watkins & George Watkins eds., Philadelphia, R. Aitken 1800).

¹⁶⁰ *Id.*

¹⁶¹ Georgia Assembly Report, in 1 ASPIA, *supra* note 142, at 24.

more diplomatic in correspondence with Secretary of War Henry Knox, noting that “arming and equipping these troops [would] be attended with such expense, that the aid of the Union [would] be required.”¹⁶²

As the state waited for federal help, Creek attacks continued in 1788. There was not only “repeated action” along the border, but the governor also ordered state troops to protect coastal counties.¹⁶³ Fifteen settlers were killed in one week in March alone.¹⁶⁴ By the beginning of May, the death toll for the year exceeded forty.¹⁶⁵ The settlements in four inland counties were almost entirely destroyed.¹⁶⁶ Congress finally authorized a treaty commission to initiate talks with the Creeks.¹⁶⁷ And in July, it passed a resolution notifying the Creeks “that should they persist in refusing to enter into a Treaty upon reasonable terms, the Arms of the United States shall be called forth for the protection of the frontier.”¹⁶⁸ Creek leaders subsequently agreed to treaty negotiations, and the governor declared a truce.¹⁶⁹ The parties would delay talks until the Spring of 1789, to allow officials elected under the newly ratified Constitution to take office.¹⁷⁰

Although there was hope for a peaceful resolution, Secretary Knox prepared for war.¹⁷¹ In its July 1788 resolution, Congress directed Knox to prepare military plans against the Creeks.¹⁷² At the time, the regular army only had around 700 soldiers, most of whom were protecting the Northwest

¹⁶² Letter from George Matthews, Governor of Ga., to Henry Knox, Sec’y of War (Nov. 15, 1787), in 1 ASPIA, *supra* note 142, at 23.

¹⁶³ HAYNES, *supra* note 135, at 148.

¹⁶⁴ Downes I, *supra* note 143, at 170; *see* HAYNES, *supra* note 135, at 148–49.

¹⁶⁵ Downes I, *supra* note 143, at 170.

¹⁶⁶ *Id.*

¹⁶⁷ HAYNES, *supra* note 135, at 150.

¹⁶⁸ 34 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 326 (Roscoe R. Hill, ed., 1937).

¹⁶⁹ HAYNES, *supra* note 135, at 150; Downes I, *supra* note 143, at 171.

¹⁷⁰ HAYNES, *supra* note 135, at 151.

¹⁷¹ Report of Henry Knox, Sec’y of War (July 26, 1788), in 1 ASPIA, *supra* note 142, at 25.

¹⁷² 34 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 168, at 327.

Territory.¹⁷³ There were no federal troops in Georgia.¹⁷⁴ And the Creeks had more men, were more united, and were better led than the northern tribes.¹⁷⁵ Rather than relying on militia, Knox recommended raising an army of 2,800 regulars.¹⁷⁶ He believed “the only effectual mode” of dealing with the Creeks “in case they should persist in their hostilities” would be “an invasion of their country with a powerful body of well regulated troops” that could “destroy their towns and provisions.”¹⁷⁷

3.4.1.2. Post-Ratification

After being sworn in, President Washington received the grim report from Secretary Knox that the “State of Georgia is engaged in a serious war with the Creeks.”¹⁷⁸ And should treaty negotiations break down, the President had to decide whether to use military force “for the protection of that frontier.”¹⁷⁹ Peace talks broke down in September 1789.¹⁸⁰ Although the truce endured,¹⁸¹ President Washington warned Congress that Creek “assurances” were “too uncertain” to be relied upon.¹⁸² The federal government must be in a position “to punish all unprovoked aggressions.”¹⁸³ Washington asked Congress to raise an army that could “march into their country, and

¹⁷³ 33 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 147, at 602–03; 27 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 538 (Gaillard Hunt ed., 1928); *see also* William Hall & Saikrishna Bangalore Prakash, *The Constitution's First Declared War: The Northwestern Confederacy War of 1790–95*, 107 VA. L. REV. 119, 133 (2021).

¹⁷⁴ *See* Report of Henry Knox, Sec'y of War (July 26, 1788), in 1 ASPIA, *supra* note 142, at 25.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ Report of Henry Knox, Sec'y of War, to George Washington, President of the U.S. (July 6, 1789), in 1 ASPIA, *supra* note 142, at 15.

¹⁷⁹ *Id.* at 16.

¹⁸⁰ HAYNES, *supra* note 135, at 153; Downes I, *supra* note 143, at 179; Letter from Benjamin Lincoln, Cyrus Griffin & David Humphreys to Henry Knox, Sec'y of War (Nov. 20, 1789), in 1 ASPIA, *supra* note 142, at 79.

¹⁸¹ Downes I, *supra* note 143, at 179.

¹⁸² Letter from Henry Knox, Sec'y of War, to George Washington, President of the U.S. (Jan. 4, 1790) (submitted to United States Congress by President Washington on January 12, 1790), in 1 ASPIA, *supra* note 142, at 59.

¹⁸³ *Id.*

destroy their towns, unless they submit to an equitable peace.”¹⁸⁴ The size of the Army at the time was “utterly inadequate” to do that.¹⁸⁵

Congress took action in the Spring of 1790. It passed legislation increasing the size of the Regular Army to around 1,200.¹⁸⁶ The law also authorized the President to call out the militia “as he may judge necessary” to aid the Army in “protecting the inhabitants of the frontiers of the United States.”¹⁸⁷ The President deployed federal troops to three outposts along Georgia’s frontier.¹⁸⁸ And after an army colonel sent an ultimatum “threatening to destroy Creeks,” the primary Creek resistance leader agreed to resume peace talks.¹⁸⁹ In August 1790, the Creeks agreed to terms with the federal government in the Treaty of New York.¹⁹⁰

The treaty brought peace to the Georgia frontier for the rest of 1790 and 1791.¹⁹¹ During that time, the federal government focused its attention on the Indian conflict in the Northwest Territory. President Washington authorized offensive expeditions against the northern tribes, but the army suffered two humiliating defeats in November 1790 and November 1791.¹⁹² And those failures planted the seeds of future conflict between the state and federal government. Victorious northern tribes came south and convinced the Creeks to join their war against American expansion.¹⁹³ When war returned, Georgia would wonder “why the United States chose to throw all the

¹⁸⁴ *Id.* at 60.

¹⁸⁵ *Id.*

¹⁸⁶ Act of Apr. 30, 1790, ch. 10, § 1, 1 Stat. 119, 119 (repealed 1795).

¹⁸⁷ *Id.* § 16, 1 Stat. at 121.

¹⁸⁸ HAYNES, *supra* note 135, at 154.

¹⁸⁹ *Id.* Another historian suggests that the letter contained a bribe to the Creek resistance leader. See Downes I, *supra* note 143, at 182.

¹⁹⁰ Treaty of New York (Aug. 7, 1790), in 1 ASPIA, *supra* note 142, at 81; see HAYNES, *supra* note 135, at 156–57; Randolph C. Downes, *Creek-American Relations, 1790–1795*, 8 J. S. HIST. 350, 354 (1942) [hereinafter Downes II].

¹⁹¹ John K. Mahon, *Military Relations Between Georgia and the United States, 1789–1794*, 43 GA. HIST. Q. 138, 138 (1959) [hereinafter Mahon I].

¹⁹² See, e.g., JOHN K. MAHON, *HISTORY OF THE MILITIA AND THE NATIONAL GUARD* 50–51 (1983) [hereinafter MAHON II]; Hall & Prakash, *supra* note 173, at 137–49; Mahon I, *supra* note 191, at 138.

¹⁹³ HAYNES, *supra* note 135, at 167, 171; Downes II, *supra* note 190, at 361–62.

armed might of the [Army] at the Northwest Indians, and at the same time insisted that [its] people turn the other cheek to their Indian enemies.”¹⁹⁴

The peace ended in March 1793. A war party of thirty Creeks attacked a general store, brutally killing two settlers.¹⁹⁵ The Creeks also looted the store and burned it to the ground.¹⁹⁶ It was the first of several attacks on the Georgia frontier.¹⁹⁷ In one incident, Creeks killed a father, his two children, and a female slave.¹⁹⁸ The mother survived, but she had been scalped, shot, and tomahawked.¹⁹⁹ Andrew Pickens, a federal treaty commissioner and Revolutionary War hero, warned that “the whole of the Creek nation, except [one band], had declared war against the United States.”²⁰⁰ He believed a party of “five hundred warriors” had set out to join a group of Seminole Indians to attack “all along the frontiers of Georgia.”²⁰¹

For the Governor of Georgia, “retaliation by open war” was “the only resort.”²⁰² In early April 1793, he asked the President to order the militia into federal service.²⁰³ The governor reported that “[t]he militia remaining subject to the call of the commandant of the Federal troops, and not being drawn into service, upon pressing occasions, has abated the confidence of the people in Government.”²⁰⁴ Without federal assistance, “impressing” the militia into state service would become necessary.²⁰⁵ And by May, the governor had “drawn into service” militia units and ordered construction of

¹⁹⁴ Mahon I, *supra* note 191, at 144.

¹⁹⁵ HAYNES, *supra* note 135, at 167; Downes II, *supra* note 190, at 362.

¹⁹⁶ HAYNES, *supra* note 135, at 167.

¹⁹⁷ *Id.* at 167–70.

¹⁹⁸ *Id.* at 170.

¹⁹⁹ *Id.*

²⁰⁰ Letter from Andrew Pickens to Gen. Elijah Clarke (Apr. 28, 1793), in 1 ASPIA, *supra* note 142, at 369.

²⁰¹ *Id.* The federal Indian agent in the state held a similar view. See Downes II, *supra* note 183, at 363.

²⁰² Letter from Edward Telfair, Governor of Ga., to Henry Knox, Sec’y of War (May 8, 1793), in 1 ASPIA, *supra* note 142, at 369.

²⁰³ Letter from Edward Telfair, Governor of Ga., to Henry Knox, Sec’y of War (Apr. 3, 1793), in 1 ASPIA, *supra* note 142, at 368.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

“block-house[.]” garrisons along the frontier.²⁰⁶ He informed Secretary Knox that “the people must be protected, and a failure, in this juncture, will affect the operations of Government in a serious degree.”²⁰⁷

Secretary Knox responded that because the state had been “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 exigencies.”²⁰⁸ But Knox cautioned that “considerations of policy” regarding “foreign Powers, and the pending treaty with the Northern Indians” made it “advisable to avoid, for the present, offensive expeditions into the Creek country.”²⁰⁹ No federal troops serving in the Northwest Territory could be spared for a war against the Creeks.²¹⁰ Nevertheless, the President authorized the governor to identify two hundred state militia for federal service lasting one year.²¹¹ The men were to serve under the Regular Army officer commanding the federal garrison in Georgia.²¹²

The governor never sent those men to serve under federal command.²¹³ Instead, he ordered a militia general to lead 700 volunteers on an offensive expedition into Creek country.²¹⁴ But the general could not hold his force together. Forty miles into Creek country, he and his men turned

²⁰⁶ Letter from Edward Telfair, Governor of Ga., to Henry Knox, Sec’y of War (Apr. 29, 1793), in 1 ASPIA, *supra* note 142, at 368; Letter from Edward Telfair, Governor of Ga., to Henry Knox, Sec’y of War (May 8, 1793), in 1 ASPIA, *supra* note 142, at 368.

²⁰⁷ *Id.* at 369.

²⁰⁸ Letter from Henry Knox, Sec’y of War, to Edward Telfair, Governor of Ga. (June 10, 1793), in 1 ASPIA, *supra* note 142, at 364.

²⁰⁹ Letter from Henry Knox, Sec’y of War, to Edward Telfair, Governor of Ga. (May 30, 1793), in 1 ASPIA, *supra* note 142, at 364.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ Report of Henry Knox, Sec’y of War, to the Senate (Dec. 16, 1793), in 1 ASPIA, *supra* note 142, at 361–62; Letter from Major Henry Gaither to Edward Telfair, Governor of Ga. (Sep. 7, 1793), in 1 ASPIA, *supra* note 142, at 424; Letter from Constant Freeman to Henry Knox, Sec’y of War (Sep. 4, 1793), in 1 ASPIA, *supra* note 142, at 425.

²¹⁴ Report of Henry Knox, Sec’y of War, to the Senate (Dec. 16, 1793), in 1 ASPIA, *supra* note 142, at 361–62; Letter from Edward Telfair, Governor of Ga., to Henry Knox, Sec’y of War (June 12, 1793), in 1 ASPIA, *supra* note 142, at 369; Mahon I, *supra* note 191, at 150.

around.²¹⁵ They were short on provisions, approaching a large Creek force, and many had only agreed to serve fifteen days.²¹⁶ The governor would later convene a council of militia officers to propose a plan of action for the President. Their plan resembled Secretary Knox's recommendation in 1787.²¹⁷ The governor wanted to raise a force of 5,000 men, link up with federal troops in the state, and lead "on the part of the United States, an expedition against the hostile towns of the Creek nation."²¹⁸ Of course, the federal government would need to fund the operation.²¹⁹

President Washington "utterly disapprove[d]" the plan in early September 1793.²²⁰ According to Knox, the President believed the "expedition [was] unauthorized by law."²²¹ Because only Congress could declare war, "all offensive expeditions against their towns [would] be unlawful, and the expenses thereof [could not] be paid by the [federal] Government."²²² Knox conceded that "cases may exist" to pursue "Indians who have been invading the frontiers, into their own country, without any formal declaration of war."²²³ But he did not believe "that any late invasion of Georgia ha[d] taken place, excepting by small predatory parties" which ended in "May or June."²²⁴ Not only that, but Creek leaders had notified federal authorities that they were "disposed for peace."²²⁵ And putting aside the legal concerns, an invasion could disrupt ongoing diplomatic efforts with Spain²²⁶ or prompt

²¹⁵ Report of Henry Knox, Sec'y of War, to Congress (Dec. 16, 1793), in 1 ASPIA, *supra* note 142, at 361–62.

²¹⁶ *Id.*; Mahon I, *supra* note 191, at 150.

²¹⁷ Report of Henry Knox, Sec'y of War (July 26, 1788), in 1 ASPIA, *supra* note 142, at 25.

²¹⁸ Letter from Edward Telfair, Governor of Ga., to Henry Knox, Sec'y of War (Aug. 8, 1793), in 1 ASPIA, *supra* note 142, at 370–71.

²¹⁹ *Id.* at 371.

²²⁰ Letter from Henry Knox, Sec'y of War, to Edward Telfair, Governor of Ga. (Sep. 5, 1793), in 1 ASPIA, *supra* note 142, at 365.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ Spain would ultimately cede its claim to most lands in the Southeastern United States in the Treaty of San Lorenzo. See HAYNES, *supra* note 135, at 189.

the Cherokees to form an alliance with the Creeks.²²⁷ The government's "unsuccessful attempts to make peace with the Northern Indians ought to render us cautious of extending the war."²²⁸

Despite the President's refusal to approve the ambitious plan, the state militia continued to wage war against the Creeks. In late September, a militia unit crossed the border, killed six Creek warriors, and set their town ablaze.²²⁹ Federal officials complained that militia raids into Creek country hampered their efforts to restore peace.²³⁰ The federal agent in the area found it "truly unaccountable" that the governor would authorize such raids after the President's "express order to the contrary."²³¹

The friction nearly boiled over in May 1794. Creeks ambushed a militia unit, killed three men, and mutilated their bodies.²³² The commanding officer's genitals were apparently severed.²³³ In response, a militia officer gathered 150 men and attacked a group of Creeks suspected of being involved in the ambush.²³⁴ The problem was that the Creeks were camped just outside the walls of Fort Fidius, a federal garrison.²³⁵ Federal troops were protecting them while their chiefs traveled to meet with the new governor.²³⁶ Some of the Creeks ran inside the fort, and the militia demanded that they be turned over.²³⁷ The federal troops "stood to the rifle-slots in the stockade,

²²⁷ Letter from Henry Knox, Sec'y of War, to Edward Telfair, Governor of Ga. (Sep. 5, 1793), in 1 ASPIA, *supra* note 142, at 365.

²²⁸ *Id.*

²²⁹ Report of Henry Knox, Sec'y of War, to the Senate (Dec. 16, 1793), in 1 ASPIA, *supra* note 142, at 361–62; Letter from James Seagrove to Edward Telfair, Governor of Ga. (Oct. 3, 1793), in 1 ASPIA, *supra* note 142, at 412; Letter from Colonel Melton to Edward Telfair, Governor of Ga. (Sep. 26, 1793), in 1 ASPIA, *supra* note 142, at 373; Downes II, *supra* note 190, at 368.

²³⁰ Letter from James Seagrove to Edward Telfair, Governor of Ga. (Oct. 15, 1793), in 1 ASPIA, *supra* note 142, at 417; Letter from James Seagrove to Edward Telfair, Governor of Ga. (Oct. 3, 1793), in 1 ASPIA, *supra* note 142, at 412–13.

²³¹ Letter from James Seagrove to Edward Telfair, Governor of Ga. (Oct. 21, 1793), in 1 ASPIA, *supra* note 142, at 417.

²³² HAYNES, *supra* note 135, at 181.

²³³ *Id.*

²³⁴ Downes II, *supra* note 190, at 370.

²³⁵ HAYNES, *supra* note 135, at 182.

²³⁶ Letter from James Seagrove to Henry Knox, Sec'y of War (May 16, 1794), in 1 ASPIA, *supra* note 142, at 486; Downes II, *supra* note 190, at 370.

²³⁷ Mahon I, *supra* note 191, at 152.

and Georgia militiamen cocked their flintlocks.”²³⁸ Fortunately, a federal official helped the Creeks escape, while also convincing everyone to lay down their arms.²³⁹

Following the near disaster, relations between the state and federal governments began to cool.²⁴⁰ The new governor designated the 200 militia to serve under the federal commander in the state.²⁴¹ The state also agreed to enforce the Treaty of New York, meaning it would expel settlers who crossed into Creek country.²⁴² In return, the federal government funded the state's defensive block houses along the frontier.²⁴³ In June 1796, the Creeks signed the Treaty of Colerain with the United States, which brought relative peace and stability to the Georgia frontier.²⁴⁴

3.4.2. The War of 1812

The United States entered the War of 1812 with less than 7,000 active-duty soldiers, making reliance on state militias inevitable.²⁴⁵ The Militia Act of 1795 authorized the President “to call forth such number of the militia . . . as he may judge necessary” if the country was “invaded” or in “imminent danger of invasion.”²⁴⁶ And with war looming in April 1812, Congress passed legislation requiring state governors to “hold in readiness” up to 100,000 militia “to march at a moment's warning.”²⁴⁷ The same law authorized the President “to call into actual service any part of . . . said detachment”

²³⁸ *Id.*

²³⁹ *Id.* at 152–53; Downes II, *supra* note 190, at 370; Letter from Constant Freeman to Henry Knox, Sec'y of War (May 10, 1794), in 1 ASPIA, *supra* note 142, at 483–84.

²⁴⁰ Mahon I, *supra* note 191, at 153.

²⁴¹ *Id.*

²⁴² *Id.* at 153–54. After the Treaty of New York was signed, the Georgia legislature would send an official protest to Congress. See Protest of the Legislature of the State of Georgia Against the Treaty of New York (Nov. 26, 1790), in II ASPIA, *supra* note 142, at 790–91. One historian remarked that few treaties signed by the United States have been as favorable to an Indian tribe. See Downes II, *supra* note 190, at 354.

²⁴³ Mahon I, *supra* note 191, at 153.

²⁴⁴ HAYNES, *supra* note 135, at 195.

²⁴⁵ C. EDWARD SKEEN, CITIZEN SOLDIERS IN THE WAR OF 1812, at 12 (1999).

²⁴⁶ Act of Feb. 28, 1795 (Militia Act of 1795), ch. 36, § 1, 1 Stat. 424, 424.

²⁴⁷ Act of April 10, 1812, ch. 55, § 1, 2 Stat. 705, 705.

of 100,000 militia.²⁴⁸ By regulation, a federal call to service required a specific request for a certain number of militia from a Regular Army officer to a governor.²⁴⁹ Congress officially declared war against Great Britain in June 1812.²⁵⁰

Despite the federal government's broad authority, states occasionally "had to respond promptly to invasion by the enemy before the federal government authorized them."²⁵¹ For example, the Governor of Maryland called out the state's militia when the British marched on Washington, D.C.²⁵² The Army officer charged with defending the capital noted that "this force" was "called out by the authority of the State laws, and is not under my command. But they do and will co-operate toward the general defence."²⁵³ In addition to responding to emergencies, governors also ordered their militias into state service to supplement federal armies. After the President called 3,000 New York militia into federal service to defend the northern border, the Governor of New York ordered "into State service" an additional regiment to defend "the same frontier."²⁵⁴

²⁴⁸ *Id.* § 4, 2 Stat. at 707.

²⁴⁹ MARVIN A. KREIDBERG & MERTON G. HENRY, HISTORY OF MILITARY MOBILIZATION IN THE UNITED STATES ARMY, 1775–1945, at 51 (1955); *see also* Rules and Regulations of the Army for 1813, in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS 433 (Walter Lowrie & Matthew St. Clair Clarke eds., Washington, Gales & Seaton 1832) [hereinafter ASPMA] (requiring "[a]ll militia detachments for the service of the United States" to be made "under the requisition of some officer of the United States . . . on the Executive authority of the State").

²⁵⁰ Act of June 18, 1812, ch. 102, 2 Stat. 755 (declaring war on the United Kingdom of Great Britain and Ireland).

²⁵¹ SKEEN, *supra* note 245, at 143–44; *see also id.* at 126–27, 144 (describing Maryland preparing for British invasion and asking federal government for funds to defray expenses); 26 ANNALS OF CONG. 135–36, 815–16 (1813) (considering claims of reimbursement from the states).

²⁵² SKEEN, *supra* note 245, at 133.

²⁵³ Letter from William Winder, Brigadier Gen., to John Armstrong, Sec'y of War (July 27, 1814), in 1 ASPMA, *supra* note 249, at 546.

²⁵⁴ 1 PUBLIC PAPERS OF DANIEL D. TOMPKINS, GOVERNOR OF NEW YORK 1807–1817, at 494–95, 497 (New York, Wynkoop Hallenbeck Crawford Co. 1898).

Secretary of War James Monroe later articulated his understanding of the shared constitutional authority between states and the federal government.²⁵⁵ In August 1812, the Governor of Massachusetts refused to honor a request to put the state's militia into federal service.²⁵⁶ Armed with an advisory opinion from the highest court in Massachusetts,²⁵⁷ the governor argued that only states can determine whether an emergency warrants calling out the militia.²⁵⁸ And he did not think there was reason to fear an invasion.²⁵⁹ The governor further questioned whether anyone but the President himself could take command when the state's militia was called into federal service.²⁶⁰ Two years later, the governor called the militia into state service because the federal government moved troops from Massachusetts to the western frontier.²⁶¹ He asked the Secretary of War whether the federal government would reimburse the cost of mobilizing the state's militia.²⁶²

Secretary Monroe thought the governor's refusal to honor the federal request was "dangerous" and "repugnant" to the Constitution.²⁶³ The federal government's authority to call out the militia was "a complete power" that did not require the governor's consent.²⁶⁴ Once the militia is called into federal service, "all State authority over them ceases" and they "constitute a part of the national force."²⁶⁵ Writing just weeks after the British burned the

²⁵⁵ Letter from James Monroe, Sec'y of War, to Caleb Strong, Governor of Mass. (Sep. 17, 1814), in 1 ASPMA, *supra* note 249, at 614.

²⁵⁶ Letter from Caleb Strong, Governor of Mass., to William Eustis, Sec'y of War (Aug. 5, 1812), in 1 ASPMA, *supra* note 249, at 610–11.

²⁵⁷ See A Letter from the Governor of Mass., to the Justices of the Supreme Jud. Ct., with the Answer of the Justices, 8 Mass. 548–51 (1812) (answering Governor's question regarding state control over militia).

²⁵⁸ See *id.* at 549.

²⁵⁹ Letter from Caleb Strong, Governor of Mass., to William Eustis, Sec'y of War (Aug. 5, 1812), in 1 ASPMA, *supra* note 249, at 610.

²⁶⁰ See A Letter from the Governor, 8 Mass. at 549–50 (asking the Massachusetts Supreme Court for an advisory opinion).

²⁶¹ Letter from Caleb Strong, Governor of Mass., to James Monroe, Sec'y of War (Sep. 7, 1814), in 1 ASPMA, *supra* note 249, at 613–14.

²⁶² *Id.*

²⁶³ Letter from James Monroe, Sec'y of War, to William B. Giles, Chairman, Senate Comm. on Mil. Affs. (Feb. 11, 1815), in 1 ASPMA, *supra* note 249, at 605.

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 606.

Capitol, Monroe remarked that if “a close union of the States, and a harmonious co-operation between them and the [Federal] Government” was ever “necessary for the preservation of their independence, and of those inestimable liberties which were achieved by the valor and blood of our ancestors, that period may be considered as having arrived.”²⁶⁶

Yet Monroe never claimed that the state lacked authority to use its militia independently of the federal government. To the contrary, he explained that any 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. The expenses attending them are chargeable to the State, and not to the United States.”²⁶⁷ Because the Massachusetts militia was “called into service by the authority of the State, independently of Major General Dearborn, [U.S. Army]” and “not placed under him, as commander of the district,” the state was “chargeable with the expense.”²⁶⁸ In other words, the state was free to use its militia independently. But it had to pay the bill. And if called into federal service, the state’s authority over the militia ended.

3.4.3. The Civil War

During the Civil War, the North primarily looked to federal military power—both the Regular Army and militias called into federal service—to preserve the Union. But northern governors also called their militias into state service to respond to actual and threatened invasions.²⁶⁹ These examples further demonstrate that despite an unequal distribution of material resources, states share legal authority with the federal government to repel enemy attacks—at least until their militias are called into federal service.

3.4.3.1. Ohio State Militia Secures West Virginia

After exceeding its initial quota of militia designated for federal service in April 1861, Ohio decided to retain 10,000 militia “in the service of

²⁶⁶ Letter from James Monroe, Sec’y of War, to Caleb Strong, Governor of Mass. (Sep. 17, 1814), in ASPMA, *supra* note 249, at 614.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ See *infra* Sections 3.4.3.1–.3.

the State, to defend her against invasion should it be threatened by the rebels."²⁷⁰ The state Adjutant General concluded "that the Ohio River was not a proper line of defense as against hostile action on the part of Virginia."²⁷¹ And when Confederates began operating in what is now West Virginia, the governor was "satisfied" that "Ohio is in danger of invasion."²⁷² He called nine regiments into service "for the defense of the State against invasion."²⁷³ The only issue was whether they had to wait until Confederates crossed the Ohio River before they could attack. Some of the governor's advisors apparently questioned whether they could enter another state.²⁷⁴

The governor decided that "the best way to defend the State against invasion, was to keep the invaders at a distance."²⁷⁵ Rather than letting a "theory prevent the defense of Ohio," he would "defend Ohio beyond rather than on her border."²⁷⁶ To be sure, the governor did not unilaterally order state troops to West Virginia. But he urged federal military authorities to occupy the area.²⁷⁷ And the commanding Union general, George McClellan, believed the Ohio state regiments were best positioned to respond.²⁷⁸ McClellan asked the governor "for leave to use them," and the governor ordered "all the State troops under General McClellan's command."²⁷⁹ Despite never

²⁷⁰ C. P. BUCKINGHAM, ANNUAL REPORT OF THE ADJUTANT GENERAL TO THE GOVERNOR OF THE STATE OF OHIO FOR THE YEAR 1861 [hereinafter ADJUTANT GENERAL REPORT], in ANNUAL REPORTS MADE TO THE GOVERNOR OF OHIO FOR THE YEAR 1861, pt. 2, at 154 (Columbus, Richard Nevins 1862) [hereinafter OHIO ANNUAL REPORT – 1861].

²⁷¹ 1 WHITELAW REID, OHIO IN THE WAR: HER STATESMEN, HER GENERALS, AND SOLDIERS 46 (New York, Moore, Wiltach & Baldwin 1868).

²⁷² Letter from William Dennison, Governor of Ohio, to R. W. Traxler, State Auditor (May 1, 1861), in OHIO ANNUAL REPORT – 1861, *supra* note 270, at 32; *see also* Matthew Oyos, *The Mobilization of the Ohio Militia in the Civil War*, 98 OHIO HIST. J. 147, 167 (1989) (noting that Confederates had just "cut the strategically important Baltimore and Ohio Railroad in western Virginia").

²⁷³ *See* Letter from William Dennison, Governor of Ohio, to R. W. Traxler, State Auditor, in OHIO ANNUAL REPORT – 1861, *supra* note 270, at 32 (quoting an Ohio statute passed shortly after the attack on Fort Sumter).

²⁷⁴ 1 REID, *supra* note 271, at 46.

²⁷⁵ ADJUTANT GENERAL REPORT, in OHIO ANNUAL REPORT – 1861, *supra* note 270, at 155.

²⁷⁶ 1 REID, *supra* note 271, at 46.

²⁷⁷ *Id.* at 47–49.

²⁷⁸ *Id.* at 49.

²⁷⁹ *Id.*

being “mustered into federal service,” the state militia crossed into West Virginia, reopened the railway, and “routed a small Confederate force at Philippi.”²⁸⁰ West Virginia became “an effective shield for” Ohio and a “corridor for threatening the Confederacy.”²⁸¹ McClellan received the credit, but the “initiative in planning” and “execution . . . was primarily by Ohio [state] troops.”²⁸²

3.4.3.2. Pennsylvania State Militia During the Gettysburg Campaign

As the Confederate Army marched north in June 1863, Pennsylvania “was practically without defenses of her own, for most men of military inclination were already with the Union armies in the field, and there was no longer even a state militia force with much more than a paper organization.”²⁸³ The federal government tried to create a local defense force “trained, equipped, and controlled by federal authorities” that “would be kept on a standby basis.”²⁸⁴ But its roll out made clear that volunteers would “not be entitled to a bounty, and cannot be paid until Congress makes an appropriation for that purpose.”²⁸⁵ When very few answered that call,²⁸⁶ a state official asked federal authorities to “authorize the Governor to call out the militia.”²⁸⁷ The Secretary of War replied that the governor has “the right under [the] State laws and constitution, to call out the militia of the State

²⁸⁰ Oyos, *supra* note 272, at 167.

²⁸¹ 1 ALLAN NEVINS, *THE WAR FOR THE UNION: THE IMPROVISED WAR 1861–1862*, at 144 (1959).

²⁸² HARRY L. COLES, *OHIO FORMS AN ARMY* 10 (1962).

²⁸³ Russell F. Weigley, *Emergency Troops in the Gettysburg Campaign*, 25 PA. HIST. 39, 40 (1958).

²⁸⁴ Edwin B. Coddington, *Pennsylvania Prepares for Invasion, 1863*, 31 PA. HIST. 157, 158 (1964).

²⁸⁵ Order of Edwin M. Stanton, Sec’y of War (June 9, 1863), in *THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES*, ser. 1, vol. 27, pt. 3, at 44 (D.C. 1889) [hereinafter *WAR OF THE REBELLION*].

²⁸⁶ See Coddington, *supra* note 284, at 158.

²⁸⁷ Telegram from Thomas A. Scott to Edwin M. Stanton, Sec’y of War (June 14, 1863), in *WAR OF THE REBELLION*, *supra* note 285, ser. 1, vol. 27, pt. 3, at 112.

whenever he deems it necessary to do so . . . This Department has no objection to his doing so.”²⁸⁸

The governor certainly knew that, but his state “lacked the money and the equipment to organize its own state forces.”²⁸⁹ At the governor’s request, President Lincoln authorized 50,000 militia from Pennsylvania to be called into federal service.²⁹⁰ Yet still, authorities “struggled” to recruit volunteers.²⁹¹ People feared “being placed in one of the national armies in the field by way of the back door.”²⁹² Federal and state authorities were therefore “forced to improvise.”²⁹³ The governor would call volunteers into state service, and the federal government “would assume the cost of maintaining them,” provided that the governor put them under the tactical control of the U.S. Army commander in the district.²⁹⁴ Within a few weeks, nearly 24,000 men²⁹⁵ volunteered to protect the state against a Confederate army that “had acquired a reputation for invincibility.”²⁹⁶ They defended critical infrastructure and harassed the Confederate advance in Pennsylvania before the main Union Army arrived at Gettysburg.²⁹⁷

3.4.3.3. Morgan’s Raid in Indiana and Ohio

As the dust settled at Gettysburg, a division of Confederate cavalry in Kentucky slipped past Union lines in a bold dash for the Ohio River.²⁹⁸ On

²⁸⁸ Telegram from Edwin M. Stanton, Sec’y of War, to Thomas A. Scott (June 14, 1863), in *WAR OF THE REBELLION*, *supra* note 285, ser. 1, vol. 27, pt. 3, at 112.

²⁸⁹ Coddington, *supra* note 284, at 161.

²⁹⁰ Proclamation of President Abraham Lincoln (June 15, 1863), in *WAR OF THE REBELLION*, *supra* note 285, ser. 1, vol. 27, pt. 3, at 136–37; Coddington, *supra* note 284, at 159.

²⁹¹ Telegram from Andrew G. Curtin, Governor of Pa., to Edwin M. Stanton, Sec’y of War (June 15, 1863), in *WAR OF THE REBELLION*, *supra* note 285, ser. 1, vol. 27, pt. 3, at 144.

²⁹² Coddington, *supra* note 284, at 161.

²⁹³ *Id.* at 160.

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 166.

²⁹⁶ Weigley, *supra* note 283, at 57.

²⁹⁷ *Id.* at 43–53.

²⁹⁸ 1 REID, *supra* note 271, at 135; 1 REPORT OF THE ADJUTANT GENERAL OF THE STATE OF INDIANA 165 (Indianapolis, Alexander H. Conner 1869) [hereinafter INDIANA ADJUTANT GENERAL REPORT].

July 8, 1863, General John Morgan led that division across the river into Indiana.²⁹⁹ The strategic objective was to alleviate pressure bearing down on Confederate forces in Tennessee.³⁰⁰ Morgan's plan was "to march through Southern Indiana and Ohio, avoiding large towns and large bodies of militia, spreading alarm through the country, making all the noise he could, and disappearing again across the upper fords of the Ohio before the organizations of militia could get such shape and consistency as to be able to make head against him."³⁰¹

With just a token federal presence in state,³⁰² the Governor of Indiana called state militia units into service.³⁰³ He also ordered all able-bodied men in southern counties to "form themselves into companies . . . and arm themselves with such arms as they may be able to procure."³⁰⁴ In three days, "thirty thousand men, fully armed and organized, had taken the field at various points to meet the enemy."³⁰⁵ They "were sure that it was their duty to gather in their own towns and keep Morgan off; and, in the main, he saved them the trouble by riding around."³⁰⁶

As Morgan caused panic in Indiana, the Governor of Ohio correctly assessed that his state was "in imminent danger of invasion by an armed force."³⁰⁷ He too called the state militia into active service.³⁰⁸ And nearly fifty thousand Ohio militia men answered the call.³⁰⁹ Some militia units were ordered to serve under Regular Army officers, while others served under state

²⁹⁹ 1 REID, *supra* note 271, at 136.

³⁰⁰ 1 INDIANA ADJUTANT GENERAL REPORT, *supra* note 298, at 209.

³⁰¹ 1 REID, *supra* note 271, at 137.

³⁰² 1 INDIANA ADJUTANT GENERAL REPORT, *supra* note 298, at 174.

³⁰³ Report of Major General John L. Mansfield (Dec. 27, 1864), in OPERATIONS OF THE INDIANA LEGION AND MINUTE MEN, 1863–4, at 3 (Indianapolis, W.R. Holloway 1865) [hereinafter OPERATIONS OF THE INDIANA LEGION].

³⁰⁴ Order of Governor O.P. Morton (July 9, 1863), in 1 INDIANA ADJUTANT GENERAL REPORT, *supra* note 298, Doc. 99.

³⁰⁵ Address of Governor Oliver P. Morton (July 15, 1863), in OPERATIONS OF THE INDIANA LEGION, *supra* note 303, at 8.

³⁰⁶ 1 REID, *supra* note 271, at 138.

³⁰⁷ *Id.* at 139.

³⁰⁸ *Id.*

³⁰⁹ *Id.* at 150.

command.³¹⁰ Federal cavalry ultimately captured Morgan on July 26, 1863, trying to cross into Pennsylvania.³¹¹

3.4.3.4. State Supreme Court Cases

State supreme courts also heard challenges to laws enacted pursuant to the state war-making power. For example, the Pennsylvania Supreme Court considered a law that allowed municipalities to issue bonds to pay volunteers for military service.³¹² Each volunteer reduced the municipality's quota under the federal draft.³¹³ The court rejected the claim that the state legislature had infringed upon an exclusive federal power. Although "protection against invasion" is a federal "duty," the court noted there is an "express exception" if the state is "actually invaded, or in imminent danger not admitting of delay."³¹⁴ To hold "that there is no power in the state to preserve her territory from irruption, and the lives and property of her people, is to outrage the first law of nature and of government, and to bring unmerited reproach upon the wisdom of the founders of our institutions."³¹⁵

The West Virginia Supreme Court also considered the legality of a wartime law enacting a "suitor's test oath."³¹⁶ The law acted as "*quasi* confiscation" in that it required plaintiffs to swear an oath of loyalty to the Union before they could access the court system.³¹⁷ The state supreme court noted that the federal government's power to "confiscate the property of the enemy" was "too firmly settled to be called in question."³¹⁸ And the state "under similar circumstances, has a like power to confiscate the property of her enemies."³¹⁹ The court reasoned that "the right to engage in war without the consent of Congress, is reserved to the States respectively, if actually invaded

³¹⁰ See *id.* at 139.

³¹¹ *Id.* at 148. Morgan escaped from the Ohio state penitentiary in November 1863. *Id.* at 149.

³¹² *Speer v. Sch. Dirs. of Blairsville*, 50 Pa. 150, 158 (1865).

³¹³ *Id.* at 158–59.

³¹⁴ *Id.* at 164–65.

³¹⁵ *Id.* at 165.

³¹⁶ *Beirne v. Brown*, 4 W. Va. 72, 72 (1870).

³¹⁷ *Id.* at 75.

³¹⁸ *Id.*

³¹⁹ *Id.* at 76.

or in such imminent danger as will not admit of delay.”³²⁰ The law was therefore a valid “exercise of one of the war powers of the State.”³²¹

3.4.4. The Texas Border War, 1874–1880

In 1859, a Mexican bandit led “an army of several hundred” across the Rio Grande River and captured Brownsville, Texas.³²² Understandably, the Governor of Texas ordered state troops to restore law and order to the city.³²³ They joined forces with the U.S. Army and routed the armed bandits.³²⁴ The Civil War would ironically bring peace to the area.³²⁵ But after the war, armed criminal groups returned and made a business of crossing into South Texas to steal cattle.³²⁶ They also killed anyone who got in their way.³²⁷ In a few short years, a land of “grassy plains” and “vast herds of cattle” had become “a perilous and dreary waste.”³²⁸ A congressional committee estimated that ranchers lost almost \$28 million in theft.³²⁹ And more importantly, the armed groups murdered 105 people between 1871 and 1875.³³⁰

By June 1874, a new governor had seen enough. Although the U.S. Army had defensive posts along the border, the governor believed they were “utterly inadequate” to stop the agile groups raiding the frontier.³³¹ To the contrary, the Army was only ready for an invasion by a large, conventional force.³³² The governor called several companies of state militia into service to patrol portions of South Texas.³³³ And if the militia was “in close pursuit

³²⁰ *Id.* at 79 (opinion of Brown, President).

³²¹ *Id.* at 75.

³²² J. FRED RIPPY, *THE UNITED STATES AND MEXICO* 182 (1926).

³²³ TEXAS FRONTIER TROUBLES, H.R. REP. NO. 44-343, at IV (1876) [hereinafter H.R. REP.].

³²⁴ RIPPY, *supra* note 322, at 183; H.R. REP., *supra* note 323, at IV.

³²⁵ H.R. REP., *supra* note 323, at V.

³²⁶ RIPPY, *supra* note 322, at 282.

³²⁷ H.R. REP., *supra* note 323, at XII.

³²⁸ RIPPY, *supra* note 322, at 286.

³²⁹ *Id.*

³³⁰ H.R. REP., *supra* note 323, at 168 (Report of Joint Select Committee of Texas State Legislature (March 1875)).

³³¹ *Id.* at 163 (Message of Governor Richard Coke to Texas State Legislature).

³³² *See id.*

³³³ *Id.* at 162, 165.

of thieves or marauders," the governor ordered them to "follow as far as possible, whether on this side of the Rio Grande or the other."³³⁴ But the governor also made clear that "no military expedition or enterprise [was] to be carried on" against the Mexican government or its people.³³⁵

The U.S. Attorney General initially questioned the legality of the order.³³⁶ The attorney general notified the governor that he might be "liable for prosecution" under federal law.³³⁷ After all, conducting a "military expedition or enterprise" against a friendly foreign government like Mexico was a "high misdemeanor" punishable by up to three years in prison.³³⁸ The attorney general promised to consider any response, should the governor "think proper to make one . . . before determining what further action" to take.³³⁹

The governor replied that the state "is fully authorized" under Article I, § 10 "to use the war powers which ordinarily reside in the United States Government."³⁴⁰ The border raids were not an "irregular occurrence" to be suppressed by "the efforts of an ordinarily vigilant and energetic government."³⁴¹ Rather, the state had been "forced to assume the unjust burden of defending herself against foreign aggression, and of repelling invasion of her territory."³⁴² For years, "armed bodies of men" from Mexico had carried on "a most destructive predatory war" against the citizens of South Texas.³⁴³ The area lost "hundreds of thousands of dollars annually," while criminal bands "butcher[ed] whole families" and set "fire [to] their houses."³⁴⁴ The Mexican government, "whether from want of power or of will," did not stop

³³⁴ *Id.* at 165.

³³⁵ *Id.* (internal quotation marks omitted).

³³⁶ *Id.* at 164.

³³⁷ *Id.*

³³⁸ Act of April 20, 1818, ch. 88, § 6, 3 Stat. 447, 449.

³³⁹ H.R. REP., *supra* note 323, at 164 (Letter from United States Attorney General George H. Williams to Governor Richard Coke).

³⁴⁰ H.R. REP., *supra* note 323, at 166 (Letter from Governor Richard Coke to United States Attorney General George H. Williams (Aug. 6, 1874)).

³⁴¹ *Id.* at 165.

³⁴² *Id.* at 166.

³⁴³ *Id.* at 165–66.

³⁴⁴ *Id.* at 165.

the raids.³⁴⁵ And “the inadequacy of the force posted on the Rio Grande by the United States” encouraged them to continue.³⁴⁶

The governor also noted that the federal government was constitutionally obligated to “defend the people of Texas against hostile invasion.”³⁴⁷ And within the past year, the U.S. Army had crossed the Rio Grande twice to inflict punishment “on Mexican soil.”³⁴⁸ The governor believed:

If the forces of the United States have a right to cross the national boundary and continue pursuit of marauders on Mexican soil, of which there can be no doubt, Texas forces, which are doing the duty which ought to be performed by the United States troops, and are doing it because United States troops are not there to do it, and it must be done, have the same right.³⁴⁹

Nevertheless, the governor acknowledged that the federal government could prevent the enforcement of his order.³⁵⁰ And if notified of such a decision from federal authorities, the governor promised to revoke it.³⁵¹

Despite that promise, the attorney general yielded to the governor’s legal opinion.³⁵² Although the state militia continued to patrol South Texas, the governor asked for federal troops to do more.³⁵³ General Sherman, then the most senior officer in the Army, believed that if the “marauders on the Texas frontier” were mere “horse-thieves,” then the state should handle them.³⁵⁴ But if they came “from Mexico in such force and numbers as to

³⁴⁵ *Id.* at 166.

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ *Id.* at 167.

³⁵¹ *Id.*

³⁵² *Id.* at XVI (“Attorney-General Williams acquiesced in these conclusions, and the orders remained in force.”).

³⁵³ *Id.* at 76–77 (Letter from Governor Richard Coke to President Ulysses S. Grant (May 29, 1875)); *id.* at 77 (Letter from Governor Richard Coke to General E.O.C. Ord (May 24, 1875)).

³⁵⁴ *Id.* at 75 (Letter from General William T. Sherman to Secretary of War William W. Belknap (May 6, 1875)).

amount to war and invasion,” then the federal government must intervene.³⁵⁵ Although Sherman thought they might just be horse thieves, he conceded that it could be “a mixed case, calling for investigation and prudent conduct on the part of the authorities, both State and national.”³⁵⁶

The federal government would adopt that approach in 1875. President Grant ordered naval vessels to the Rio Grande “to co-operate with and assist the United States and State troops by patrolling the river to the head of navigation, to prevent marauding bands from crossing from or recrossing to Mexico.”³⁵⁷ The U.S. Army and state militia also coordinated their defense of South Texas. For example, in November 1875, a regular army unit pursued bandits to the Rio Grande but did not cross for tactical reasons.³⁵⁸ The state militia arrived, crossed into Mexico, and engaged the enemy.³⁵⁹ When the enemy counterattacked, the regular army came to their defense in Mexico and covered their escape.³⁶⁰ At no point in the engagement was the state militia under the command and control of the U.S. Army.³⁶¹ Tensions along the border with Mexico would persist until 1880 when Mexico agreed to reciprocal crossing of the border to pursue armed bandits.³⁶²

4. CONCLUSION

The current national security posture makes it imperative to evaluate Article I, § 10 in the context of cyber warfare. Over the past decade, “the primary concern in U.S. national security” has shifted from terrorism to “[i]nter-state strategic competition.”³⁶³ According to one scholar, an “era of

³⁵⁵ *Id.*

³⁵⁶ *Id.* at 76.

³⁵⁷ *Id.* at 80 (Telegram from E.D. Townsend, Adjutant General, to Lieutenant General Philip H. Sheridan (June 16, 1875)).

³⁵⁸ *Id.* at 93 (Report of Captain James F. Randlett (Dec. 1, 1875)); RIPPY, *supra* note 322, at 290–91.

³⁵⁹ H.R. REP., *supra* note 323, at 94; RIPPY, *supra* note 322, at 290.

³⁶⁰ H.R. REP., *supra* note 323, at 94; RIPPY, *supra* note 322, at 291.

³⁶¹ H.R. REP., *supra* note 323, at 90 (Report of Major A.J. Alexander (Nov. 29, 1875)).

³⁶² RIPPY, *supra* note 322, at 310.

³⁶³ U.S. DEP'T OF DEF., SUMMARY OF THE 2018 NATIONAL DEFENSE STRATEGY 1 (“Inter-state strategic competition, not terrorism, is now the primary concern in U.S. national security.”).

limited war has ended” and an “age of comprehensive conflict has begun.”³⁶⁴ And for years, the federal government has warned that it cannot protect every critical vulnerability in cyberspace.³⁶⁵ Should we find ourselves in a “total war,”³⁶⁶ states may need to act before the federal government can give its blessing.³⁶⁷ At a minimum, states should be prepared to independently conduct defensive cyber operations that destroy enemy systems behind the attack.³⁶⁸ They have constitutional authority to do so under Article I, § 10.

The Constitution has a “fixed” meaning,³⁶⁹ but its text is not “trapped in amber.”³⁷⁰ The First Amendment applies to more than quills,³⁷¹ the Second Amendment to more than “muskets and sabers,”³⁷² and Article I, § 10 to more than redcoats. The purpose was to ensure states had legal authority to defend themselves against enemy attacks. Although the federal government was created for collective protection against such threats, states never gave it a monopoly over their self-defense. To the contrary, the Constitution expressly reserves authority to wage defensive wars independently of the federal government. If a cyber attack is of such magnitude that would justify a federal military response, state governments can do the same. Dual sovereignty is a feature of the American system, not a bug. It ensures that the public is not entirely dependent on the federal government for protection against attacks.

³⁶⁴ Mara Karlin, *The Return of Total War: Understanding—and Preparing for—a New Era of Comprehensive Conflict*, FOREIGN AFFS., Nov./Dec. 2024, at 8, 10.

³⁶⁵ See, e.g., *Worldwide Threats to the Homeland: Hearing Before the H. Comm. on Homeland Sec.*, 118th Cong. 7 (statement of FBI Dir. Christopher Wray) (“Significant cyber incidents—SolarWinds, Cyclops Blink, the Colonial pipeline incident—only emphasize what we have been saying for a long time: the Government cannot protect against cyber threats on its own. We need a whole-of-society approach that matches the scope of the danger.”).

³⁶⁶ See Karlin, *supra* note 364, at 10.

³⁶⁷ See James E. McGhee, *Liberating Cyber Offense*, 10 STRATEGIC STUDS. Q. 46, 48 (2016) (“The approval authority for any cyber operation that goes outside of a DOD network is very high. Corresponding approval authorities for kinetic operations is much lower.”).

³⁶⁸ See *supra* Section 2.2.

³⁶⁹ See *United States v. Rahimi*, 602 U.S. 680, 737 (2024) (Barrett, J., concurring).

³⁷⁰ *Id.* at 691 (majority opinion).

³⁷¹ See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008).

³⁷² *Rahimi*, 602 U.S. at 692.

This conclusion might be unsettling at first. But recognizing state authority here is not an invitation to chaos. Keep in mind, we are dealing with malicious attacks on the homeland. States and the federal government have a shared interest in defeating a common enemy. And even when policy objectives do not completely align, history suggests that states and the federal government have a moderating influence on each other. When they act within the same space, they are forced to cooperate. Rather than pushing each other to the fringe, the two sovereigns pull one another to the center. As Madison predicted in *Federalist No. 51*, the “different governments will controul each other; at the same time that each will be controuled by itself.”³⁷³ Even during the Creek War, the continued friction between the state and federal governments forced each sovereign to moderate its policy. Similarly, the state and federal governments coordinated their military efforts along the southern border in 1875. The “healthy balance of power” between state and federal governments in these cases reduced the risk of “abuse from either front.”³⁷⁴

To the extent states abuse their power, the federal government ultimately has the authority to put state forces under its control. Congress can “provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.”³⁷⁵ And the President commands the militia when it is called into federal service. Until then, Article I, § 10 empowers states to use military force in response to cyber operations comparable in scale and effects to an armed attack.

³⁷³ THE FEDERALIST NO. 51, *supra* note 76, at 351 (James Madison).

³⁷⁴ *Printz v. United States*, 521 U.S. 898, 921 (1997) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)) (internal quotation marks omitted).

³⁷⁵ U.S. CONST. art. I, § 8, cl. 15.