

4-2021

The Militia: A Definition and Litmus Test

Marcus Armstrong

Follow this and additional works at: <https://commons.stmarytx.edu/thestmaryslawjournal>



Part of the [Constitutional Law Commons](#), [Courts Commons](#), [Law and Society Commons](#), [Legal Remedies Commons](#), [Military, War, and Peace Commons](#), [Second Amendment Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Marcus Armstrong, *The Militia: A Definition and Litmus Test*, 52 ST. MARY'S L.J. 1 (2021).
Available at: <https://commons.stmarytx.edu/thestmaryslawjournal/vol52/iss1/2>

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in St. Mary's Law Journal by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact egoode@stmarytx.edu, sfowler@stmarytx.edu.

ARTICLE

THE MILITIA: A DEFINITION AND LITMUS TEST

MARCUS ARMSTRONG*

I.	Introduction.....	2
II.	The Supreme Court's Inability to Define the Militia.....	6
	A. Why the Court's Definition in <i>Perpich</i> Is Incorrect.....	9
	B. The Militia's Commander in Chief.....	28
III.	The Militia Defined.....	43
	A. The Militia Is a Military Force	44
	B. The Militia Cannot Deploy Overseas	49
	C. The Militia Is Under the Command of a State's or Territory's Governor	50
IV.	Conclusion	51

* Founding partner at Texas Strategies. The author would like to thank David Armstrong, Andrea Ereman, Adan Arriaga, Saulo Arriaga, and Jenny Welch for their immeasurable help. The views expressed in this Article are solely the author's and do not necessarily reflect the views of Texas Strategies, its other partners, or its clients.

I. INTRODUCTION

In the prefatory clause of the Second Amendment, the early American leaders did not call a well-regulated militia a right.¹ They called it a necessity.² Scholars remind us that during the eighteenth century such prefatory clauses were not simple philosophical musings but rather stipulations that carried the weight of law.³ If that is the case, a natural question to ask is why did the early American leaders consider a well-regulated militia so necessary that they legally mandated one? To answer that question, one must answer another question—one that has confounded the Supreme Court since the early republic: “What is the militia?” This is the primary question I hope to answer in this Article; however, the present political climate makes this a difficult task.

Presently, the question is surrounded by an interminable, often shrill, political fight over whether the Second Amendment protects individual gun ownership or only collective defense. Because of this fight, arbitrary premises largely determine how one understands the militia.⁴ If one accepts

1. U.S. CONST. amend II.

2. *Id.*

3. MICHAEL WALDMAN, *THE SECOND AMENDMENT: A BIOGRAPHY* 61 (2014). Waldman quotes John Jay: “A preamble cannot annul enacting clauses; but when it evinces the intention of the legislature and the design of the act, it enables us, in cases of two constructions, to adopt the one most consonant to their intention and design.” *Id.* Waldman writes that clauses such as those described by Jay “were to be read as limiting what came after.” *Id.* Unfortunately, Waldman reaches further than his evidence allows with this interpretation, in that John Jay did not use any construction of the word “limit” nor any synonym. *See generally id.* Rather, Jay wrote that when a preamble evinces—or displays clearly—the intention of the legislature, it allows judges and justices to adopt an interpretation most consonant to—or in harmony with—that intention. *Id.* Thus, nothing in Jay’s quotation can be considered a synonym of “limiting.” *See generally id.* It is also worth noting the particular preamble Jay referred to was almost two hundred words long as opposed to only twenty-seven words in the Second Amendment’s prefatory clause. *Compare* THE VIRGINIA ASSEMBLY, BILL FOR SEQUESTERING BRITISH PROPERTY (1778), *reprinted in* 2 THE PAPERS OF THOMAS JEFFERSON 168 (Julian P. Boyd et al, eds. 1950), <https://founders.archives.gov/documents/Jefferson/01-02-02-0046> [<https://perma.cc/3J7S-SQBS>] (providing the 181 word preamble John Jay referenced), *with* U.S. CONST. amend II (“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.”).

4. *See* ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 8 (Univ. of Notre Dame Press 2d ed. 1984) (1981) (“It is precisely because there is in our society no established way of deciding between these claims that moral argument appears to be necessarily interminable.”). These premises are similar to the moral premises that MacIntyre discusses. The similarity is especially striking because the debate over the Second Amendment routinely takes the shape of a moral debate. MacIntyre identifies that arbitrarily accepted premises contribute to the interminable and bitter moral arguments that define our time. Thus, MacIntyre writes: “[W]hen we do arrive at our premises[.]

the premise that the Second Amendment protects individual gun ownership, there is a tendency to understand the militia to mean every individual capable of bearing arms, even if the individual is not a member of an organized military force like the National Guard.⁵ However, if one accepts the premise that the Second Amendment protects only collective defense, there is a tendency to understand the militia to mean only an organized military force, such as the National Guard.⁶ As a result, discussing the militia is difficult, because the premise a person accepts regarding the political fight over the Second Amendment dictates how that person understands the militia. Thus, any worthwhile discussion of the militia first must penetrate these two premises. That is not an easy thing to do in the best of times, and these are not the best of times. Nonetheless, the question—“what is the militia?”—has important implications not only for constitutional law but also for domestic policy. The question also significantly impacts considerations regarding federalism. Accordingly, one should not be daunted by the extraneous political fight over the Second Amendment’s meaning; one should instead attempt to negotiate around the coarse political fight and try to clarify calmly what has become a sclerotic impasse.

Understanding the militia according to arbitrary premises is not a recent practice but rather one that stretches back into the early republic. Early Supreme Court opinions dealing with the militia rested ultimately on assertions derived from arbitrary premises rooted in assumptions about human nature that were prevalent in the early republic and embraced by the early American leaders.⁷ During the period immediately after the Revolutionary War, the early American leaders possessed an almost naïve view of human nature as well as humanity’s ability to engage disinterestedly in politics.⁸ However, the early American leaders quickly became

argument ceases and the invocation of one premise against another becomes a matter of pure assertion and counter-assertion.” *Id.* As a result, the bickering continues endlessly.

5. See *United States v. Emerson* 270 F.3d 203, 264 (5th Cir. 2001) (holding the Second Amendment protects a right to individual gun ownership and thus applies to every individual regardless of whether or not the individual is a member of an organized militia).

6. See *United States v. Wright* 117 F.3d 1265, 1274 (11th Cir. 1997) (holding the Second Amendment is a collective right exercised by a state, so membership in an unorganized militia does not bestow Second Amendment privileges on an individual precisely because the militia is unorganized rather than organized).

7. See *infra* notes 8–9 and accompanying text.

8. See, e.g., Gordon Wood, *Interests and Disinterestedness in the Making of the Constitution*, in *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL*

disillusioned with what the government created under the Articles of Confederation, to the point that George Washington wrote to John Jay: "We have probably had too good an opinion of human nature in forming our confederation."⁹

Although the Constitution was a product of this disillusionment, the early congressional acts and the early Supreme Court opinions still contained an almost blind trust in the President.¹⁰ This trust was the residue of that initial optimistic view of human nature, if not in the citizenry as a whole, then at least in the country's first citizen.¹¹ As such, the early congresses passed questionable laws concerning the militia, and the early Supreme Court opinions upheld those laws based on assertions derived from an arbitrary premise regarding the President's elevated human nature.¹² For example, the early congresses essentially gave the President the congressional power to call the militia into federal service in the case of an invasion.¹³ When the Supreme Court was informed this legislation allowed the President to abuse the militia system and call the militia into federal service at will and without oversight, the Court asserted arbitrarily that the chances of such abuse "must be remote" in part because of "the high qualities which the Executive must be presumed to possess, of public virtue, and honest devotion to the public interests, . . ."¹⁴

One finds, then, questionable legislation upheld by baseless assertions and circular reasoning: the President cannot abuse the militia system because the President possesses high qualities, and the President possesses these high qualities because the President is the President. Assertions of this sort are unconvincing, and they form a poor foundation for subsequent opinions. In fact, these assertions have led only to confusion about what the militia is and have sowed only uncertainty about who can command it. Throughout this Article, I hope to provide a reasoned explanation of what

IDENTITY 69–70 (Richard R. Beeman et al. eds., 1987) ("There is not upon the face of the earth a body of people more happy or rising into consequence with more rapid stride, than the Inhabitants of the United States of America.").

9. Letter from George Washington to John Jay (Aug. 1, 1786), in 11 THE WRITINGS OF GEORGE WASHINGTON 53, 53 (Worthington Chauncey Ford ed., 1891).

10. See *infra* note 13–14 and accompanying text.

11. *Id.*

12. *Id.*

13. Militia Act of 1795, ch. 36, § 1, 1 Stat. 424 (1795) (repealed in part 1861, current version at 10 U.S.C. § 252); Calling Forth Act of 1792, ch. 28, § 1, 1 Stat. 264, 264 (1792) (repealed 1795).

14. *Martin v. Mott*, 25 U.S. 19, 32 (1827).

the militia is, so there may finally be a solid understanding of the militia on which courts can base future opinions.

In doing this, I will consider several smaller but associated questions. Part II focuses on the Supreme Court's inability to define the militia. In the first section of Part II, I look at the Court's decision in *Perpich v. Department of Defense*¹⁵ and explore whether the current National Guard system is the militia.¹⁶ I conclude that the current National Guard system is not the militia but rather a federal army. In the second section of Part II, I document the Supreme Court's historical inability to define who can command the militia. Focusing primarily on the cases *Houston v. Moore*¹⁷ and *Martin v. Mott*,¹⁸ I show that the Supreme Court failed to apply federalist principles to the militia. We shall see that, as a militia's Commander in Chief, a governor maintains command of a state's militia until the governor releases all or part of the state's militia into federal service.

Part III offers a new definition of the militia and outlines the four necessary characteristics that define the militia. The militia is a military force: (1) that consists of all persons in a state or territory who are of arms-bearing age; (2) that cannot be deployed overseas; (3) and is under the command of the state's or territory's governor. This definition creates four necessary characteristics that define the militia. The first necessary characteristic is that the militia is a military force.¹⁹ As such, the force must be able to equip itself as a military force. The second necessary characteristic is that the militia consists of all persons in a state or territory who are of arms-bearing age. As a result, the militia is inherently a non-professional force. The third necessary characteristic is that the militia is a domestic military force.²⁰ If the federal government can deploy a military force overseas, that force is not the militia.²¹ The fourth necessary characteristic is the militia is a state force.²² If the federal government can call all or part of a military force into federal service without the explicit consent of a state's

15. *Perpich v. Dep't of Def.*, 496 U.S. 334 (1990).

16. *Id.*

17. *Houston v. Moore*, 18 U.S. 1 (1820).

18. *Martin v. Mott*, 25 U.S. 19 (1827).

19. *See id.* at 30 (1827) ("The [militia] service is a military service, and the command of a military nature; . . .").

20. *See Dunne v. Illinois*, 94 Ill. 120, 138 (1879) ("The [active] State militia is simply a domestic force, . . .").

21. *Id.*

22. *Id.*

or territory's governor, that force is not the militia.²³ These necessary characteristics create a litmus test that will help courts define the militia in future decisions. Finally, throughout the Article, we shall discuss when the federal government can call the militia into federal service. Current doctrine allows the President to call the militia into federal service for any legitimate military reason, from overseas training to overseas hostilities. This doctrine is unconstitutional. We shall see the federal government can call the militia into federal service only during those situations enumerated in the Constitution: invasion, insurrection, or enforcing the country's laws.²⁴ Calling the militia into federal service in any other situation is an abuse of the militia system.

II. THE SUPREME COURT'S INABILITY TO DEFINE THE MILITIA

In 1986, Congress passed the Montgomery Amendment.²⁵ Prior to that Amendment, beginning in 1952, the federal government could not call members of a state's National Guard into federal service without the governor's consent, unless there was an emergency.²⁶ However, the Montgomery Amendment limited a governor's authority to withhold this consent.²⁷ In response, Minnesota Governor Rudy Perpich filed suit in

23. *Id.*

24. U.S. CONST. art. I § 8, cl. 15.

25. 10 U.S.C. § 12301(f).

26. *Id.* §§ 12301(b)–(d). These subsections provide, in relevant part:

(b) At any time, an authority designated by the Secretary concerned may, without the consent of the persons affected, order any unit, and any member not assigned to a unit organized to serve as a unit, in an active status in a reserve component under the jurisdiction of that Secretary to active duty for not more than 15 days a year. However, units and members of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor of the State (or, in the case of the District of Columbia National Guard, the commanding general of the District of Columbia National Guard).

....

(d) At any time, an authority designated by the Secretary concerned may order a member of a reserve component under his jurisdiction to active duty, or retain him on active duty, with the consent of that member. However, a member of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor or other appropriate authority of the State concerned.

27. *Id.* at § 12301(f):

1987 “asking for an injunction barring enforcement of the statute.”²⁸ Governor Perpich argued the Montgomery Amendment violated the Militia Clauses,²⁹ but in 1990, the Supreme Court ruled unanimously against Governor Perpich.³⁰ In its decision, the Court relied upon a definition of the militia from an Illinois Supreme Court decision delivered in 1879.³¹ As quoted in the *Perpich* decision, the militia is defined, in part, as “a body of armed citizens trained to military duty, who may be called out in certain cases, but may not be kept on service like standing armies, in times of peace.”³² Based on this definition, the Court ruled the National Guard qualified as an active militia.³³ However, the Court did not quote the original definition in its entirety. The original definition continues:

Such an organization [i.e., the active militia], no matter by what name it may be designated, comes within no definition of “troops,” as that word is used in the [C]onstitution. The word “troops” conveys to the mind the idea of an armed body of soldiers, whose sole occupation is war or service, answering to the regular army. The organization of the active militia of the State bears no likeness to such a body of men.³⁴

This latter part of the definition is relevant because, in *Perpich*, the United States Supreme Court ruled members of the active militia are “troops” as

(f) The consent of a Governor described in subsections (b) and (d) may not be withheld (in whole or in part) with regard to active duty outside the United States, its territories, and its possessions, because of any objection to the location, purpose, type, or schedule of such active duty.

28. Case Note, Andrew M. Curtis, *Perpich v. U.S. Dep’t of Def. (D. Minn. 1987)*, 2 LA RAZA L.J. 87, 88 (1988).

29. *Perpich v. Dep’t of Def.*, 496 U.S. 334, 337 (1990); *see also* U.S. CONST. art. I § 8, cl. 16 (“[R]eserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.”).

30. *Perpich*, 496 U.S. at 354–55.

31. *Id.* at 348.

32. *Id.* (quoting *Dunne v. Illinois*, 94 Ill. 120, 138 (1879)). The remainder of the quote reads:

That is the case as to the active militia of this State. The men comprising it come from the body of the militia, and when not engaged at stated periods in drilling and other exercises, they return to their usual avocations, as is usual with militia, and are subject to call when the public exigencies demand it.

Id.

33. *Id.*

34. *Dunne*, 94 Ill. at 138. The remainder of the original definition continues: “It is simply a domestic force as distinguished from regular ‘troops,’ and is only liable to be called into service when the exigencies of the State make it necessary.”

that word is used in Constitution.³⁵ As a result, the Court ruled Article 1 Section 10 of the Constitution gave Congress supreme authority over the militia.³⁶ This means the Supreme Court's understanding of what the militia is, as expressed in *Perpich*, contradicts the definition of the militia the Court used to support its understanding. The Court's interpretation also contradicts a long-standing distinction between the terms "militia" and "troops."³⁷

Thus, one glimpses the confusion and uncertainty that surrounds efforts to understand the militia. According to the definition of the militia that the

35. See *Perpich*, 496 U.S. at 351 n.22 (reasoning the supremacy of the Constitution determines the definition of troops). The Constitution does not mention the militia in that section and only applies to the National Guard if members of the National Guard are "troops" as that word is used in the Constitution. The Court ruled Congress's authority to raise armies is supreme and the militia is subordinate to that supreme authority. See *id.* at 354 n.29 (explaining war powers are given to the federal government in the Constitution, but even if they were not, the power would still vest in the federal government) (citing *Selective Draft Law Cases*, 245 U.S. 366 (1918)). However, the *Selective Draft Law Cases* do not support the Court's ruling. In *Perpich*, the Court ruled Congress's authority to raise armies gives it the authority to call the militia—as the militia—into federal service during peacetime and deploy the militia overseas for military training. *Id.* But the *Selective Draft Law Cases* concerned Congress's authority to draft individuals during wartime. See 245 U.S. at 390 (describing the cases' area of concern as "the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation as the result of a war declared by the great representative body of the people . . ."); see also *id.* at 372 ("The Draft Act does not call the National Guard in its organized form, but operates upon the individuals, for reorganization in national units."). Thus, the *Selective Draft Law Cases* did not concern Congress's authority to call the militia—as the militia—into federal service during peacetime for military training. *Id.* Rather, the *Selective Draft Law Cases* concerned Congress's authority to draft individuals into a federal army to wage a declared war. *Id.*

Indeed, the Court's reasoning in *Perpich* leads to an uncomfortable conclusion. If Congress's authority to raise armies gives it the authority to: (1) call the militia—as the militia—into federal service during peacetime, and (2) send the militia overseas for military training (because Congress's authority to raise armies is supreme and the militia is subject to Congress's supreme authority), then Congress has the authority to: (a) call *any* individual subject to congressional authority into federal service during peacetime, and (b) deploy that individual overseas for military training, regardless of whether that individual is a member of the National Guard or not—because that individual is subject to Congress's supreme authority to raise armies even if the individual is not a member of the National Guard. See *generally Perpich*, 496 U.S. 334. As a result, the Court's reasoning in *Perpich* in this regard is unconvincing. *Id.*; see also 32 U.S.C. § 109(a) (including the National Guard within "troops").

36. *Perpich*, 496 U.S. at 354–55; see U.S. CONST. art. I, § 10, cl. 3 ("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.").

37. See, e.g., *United States v. Miller*, 307 U.S. 174, 178–79 (1939) ("The Militia which the States were expected to maintain and train is set in contrast with Troops which they were forbidden to keep without the consent of Congress."); see *infra* text accompanying notes 77–81.

Supreme Court endorsed in *Perpich*, a body of people that qualifies as “troops”—as that word is used in the Constitution—cannot also be a militia.³⁸ However, the Supreme Court contradicted this definition and ruled that members of the militia are also “troops” in the constitutional sense.³⁹ It is difficult to see how the Court concluded that militia members are also “troops” in the constitutional sense if the Court based its decision on the Illinois Supreme Court’s 1879 definition of the militia. In the original definition, “troops” in the constitutional sense are “soldiers, whose sole occupation is war or service.”⁴⁰ In addition, the Supreme Court ruled in *Perpich* that the militia’s defining characteristic is a “part-time, nonprofessional fighting force.” The Supreme Court also ruled the current National Guard system fits this description.⁴¹ The Court stated a member of the National Guard essentially wears three hats or has three occupations: a civilian, a militia member, and a federal soldier.⁴² Because a member of the National Guard serves as an active duty federal soldier only periodically, one cannot say that the member’s sole occupation is war or service. Likewise, because a member of the National Guard is a militia member only part-time, one still cannot say the member’s sole occupation is war or service. And because a member of the National Guard is a civilian the majority of the time, one cannot say the member’s sole occupation is state or federal military service. Given the Court’s endorsement of a definition which states “troops” in the constitutional sense are full-time soldiers, as well as the Court’s stated position that a militia must be part-time and nonprofessional, it is not immediately clear how the Court arrived at the decision that militia members are also “troops” in the constitutional sense.

A. *Why the Court’s Definition in Perpich Is Incorrect*

One may say candidly and categorically that the current National Guard system is not the militia. It is a federal army. This conclusion may perplex many readers, perhaps even most. In fact, this conclusion may seem quite reckless to some since the Militia Act of 1903 reads, “the organized militia [is] to be known as the National Guard of the State, Territory, or District of

38. See *Perpich*, 496 U.S. at 348 (reasoning the definition adopted by the Court prevents militias from being used as “standing armies” which is what “troops” are).

39. *Id.* at 354–55.

40. *Dunne v. Illinois*, 94 Ill. 120, 138 (1879).

41. *Perpich*, 496 U.S. at 348.

42. *Id.*

Columbia”⁴³ In addition, the current law reads, “the organized militia . . . consists of the National Guard and the Naval Militia.”⁴⁴ Nonetheless, it remains true that the current National Guard system is not a militia, but rather a federal army. The National Guard system established in the Militia Act of 1903 is not the same system as the current National Guard system. In 1916, Congress allowed the President to draft the National Guard into the regular army.⁴⁵ When Congress passed this 1916 Act, the organized militia created by the Militia Act of 1903 ceased to exist.⁴⁶ In 1917, the President drafted the National Guard into the regular army for the First World War.⁴⁷ As a result, the National Guard established by the 1916 Act also ceased to exist.⁴⁸ Congress created the current

43. Militia Act of 1903, Pub. L. No. 57-33, 32 Stat. 775 (1903).

44. 10 U.S.C. § 246(b)(1).

45. Compare National Defense Act of 1916, Pub. L. No. 64-85, 39 Stat. 166 (repealed 1956) (stating the President shall have the power to draft the National Guard into the regular army if necessary), with Selective Service Act of 1917, Pub. L. No. 65-12, 40 Stat. 76 (referencing section 111 of the National Defense Act of 1916 as authorization allowing the president to draft members of the National Guard into the regular army).

46. See, 2 U.S. WAR DEP'T, OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY 1918, at 35 (1998) [hereinafter 1918 OPINIONS OF THE JUDGE ADVOCATE] (“[T]he Organized Militia . . . as a military institution, has ceased to exist, having been superseded by the new National Guard created by the national defense act of June 3, 1916. . . . [The organized militia cannot] function with the National Guard because they have never been authorized to become a part of the National Guard.”).

47. Proclamation of July 3, 1917, 40 Stat. 1681 (1917).

48. As Chief of Staff of the Army, General Peyton March oversaw the reduction and reorganization of the United States Army after the First World War. In testimony given before Congress in 1919, March addressed the status of the National Guard, stating:

[T]he National Guard has gone out of existence, except in eight States. We have had a great deal of correspondence with the governors of the various States as to what was going to be done. The great mass of the men who were in the National Guard are now in the Army in France, and a great many of the men who have come into the Army have by that process lost their National Guard enlistment, and when they are discharged from the United States Army they become civilians; so what the National Guard will have to do will be to build up again from the ground up.

Army Reorganization: Hearing on H.R. 14560 Before the Comm. on Mil. Affs., 65th Cong. 58 (1919) (statement of General Peyton March, Chief of Staff, United States Army) [hereinafter *Army Reorganization*].

Indeed, when two states—Illinois and Maine—specifically inquired about the status of their National Guard, the Judge Advocate General of the Army issued boilerplate language in both instances stating both states’ National Guards ceased to exist after entering federal service on August 5, 1917. See 1918 OPINIONS OF THE JUDGE ADVOCATE, *supra* note 46, at 543 (“[B]y the express provisions of the proclamation of the President of July 3, 1917 (40 Stat. 1681), the National Guard of Illinois, including all members and all enlisted men of the National Guard Reserve, was drafted into the military

National Guard system when it reorganized the National Guard in 1920,⁴⁹ and then established the National Guard of the United States and the “dual enlistment” doctrine in 1933.⁵⁰ When a person enlists into the current National Guard system, that person signs a “dual enlistment”—meaning the person joins the National Guard of the United States concurrently when they enlist with their state’s National Guard.⁵¹ The National Guard of the United States is a federal organization, comprising the Army National Guard of the United States and the Air National Guard of the United States.⁵² These are reserve components of the U.S. Army and Air Force, respectively.⁵³ Both organizations are permanent parts of the Army and Air Force, distinct from the states’ National Guards.⁵⁴ Although the U.S. Army National Guard and the U.S. Air National Guard are distinct from the states’ National Guards, they comprise all of the members of the states’ National

service of the United States as of the 5th of August, 1917. It was there further provided that all such persons so drafted should stand discharged from the militia of the State of Illinois on and from the 5th day of August, 1917. Obviously, since the 5th day of August the National Guard of the State of Illinois ceased to exist as a military unit or organization.”); *see also id.* at 626 (“It is also further provided in [the proclamation of the President of July 3, 1917] that all such persons so drafted should stand discharged from the militia of the State of Maine on and from the fifth day of August, 1917. Obviously since the fifth of August, 1917, the National Guard of Maine has ceased to exist as either a military unit or an organization”); *Report of the Chief of the Militia Bureau*, in 1 WAR DEPARTMENT: ANNUAL REPORTS, 1920, 1301 (1921) (“Inasmuch as the act of June 3, 1916, prescribed that on being drafted into United States service members of the National Guard should ‘stand discharged from the Militia,’ the National Guard ceased to exist as a State force on August 5, 1917. Since the date of the armistice the Militia Bureau has been assiduously engaged in organizing a new National Guard.”).

In addition, *see* Frederick Bernays Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181, 205 (1940) (“One item needs still to be added: when the National Guardsmen were mustered out of federal service after [the First World War], there was no provision for restoring them to that militia status from which their draft had discharged them. Consequently, there was no more National Guard”). The National Defense Act of 1920 addressed this problem by amending section 111 of the National Defense Act of 1916 so that National Guard members drafted into federal service returned to their National Guard units once discharged from federal service. *See* National Defense Act of 1920, Pub. L. No. 66-242, § 111, 41 Stat. 759, 784–85 (1920) (explaining, upon the termination of the national emergency, all National Guard members will return to their National Guard enlistment and continue until their enlistment expires).

49. *See* National Defense Act of 1920, Pub. L. No. 66-242, § 111, 41 Stat. 759 (1920). Representative Rollin Sanford of New York referred to a possible reorganization of the National Guard as a “reestablishment and reorganization of the National Guard in the several States.” *Army Reorganization*, *supra* note 48, at 61.

50. National Defense Act of 1920, Pub. L. No. 66-242, § 111, 41 Stat. 759 (1920).

51. For clarity’s and simplicity’s sake, I refer only to state National Guards in much of this Article, even though the same applies to territories as well.

52. *Perpich v. Dep’t of Def.*, 496 U.S. 334, 338 (1990).

53. 10 U.S.C. §§ 101(c)(3, 5).

54. *Id.* §§ 7062, 9062.

Guards.⁵⁵ This is a critical distinction that one must understand going forward: the dual enlistment doctrine does not mean a person joins a state's National Guard that may call someone into federal service. Rather, the person joins two separate organizations: the state's National Guard and a distinct federal organization that is a permanent component of the United States Armed Forces. The person is a member of this federal organization for the entire time in which that person is a member of a state's National Guard.

Thus, the entire memberships of every state's National Guard are members in a permanent and standing component of the United States Armed Forces.⁵⁶ This means the entire membership of every state's National Guard (i.e., the organized—or active—militia) is ultimately under the command of the U.S. Army or Air Force.⁵⁷ As a result, every member of a state's National Guard is a federal soldier. This state of affairs contradicts the definition of the militia adopted by the Supreme Court in *Perpich*, which reads that a state's active militia does not answer to the regular army.⁵⁸

One may respond by stating the current National Guard system does not contradict the Supreme Court's definition of militia because the states' National Guards do not take orders from the United States Army or the United States Air Force. Still, one must ask: what are the states' National

55. *Id.*

56. See *Perpich*, 496 U.S. at 347 (“[E]very member of the Minnesota National Guard voluntarily enlisted, or accepted a commission as an officer, in the National Guard of the United States and thereby become a member of the Reserve Corps of the Army.”); see also *Gilligan v. Morgan*, 413 U.S. 1, 7 (1973) (“The [National] Guard is an essential reserve component of the Armed Forces of the United States, . . .”).

57. 32 U.S.C. section 101(5) states: “‘Army National Guard of the United States’ means the reserve component of the Army all of whose members are members of the Army National Guard.” Section 101(4) states: “‘Army National Guard’ means that part of the organized militia of the several States and Territories, Puerto Rico, and the District of Columbia, active and inactive]” As such, members of the organized militia of the several states are members in a reserve component of the Army that answers ultimately to the United States Army.

Likewise, section 101(7) states: “‘Air National Guard of the United States’ means the reserve component of the Air Force all of whose members are members of the Air National Guard.” Section 101(6) states: “‘Air National Guard’ means that part of the organized militia of the several States and Territories, Puerto Rico, and the District of Columbia, active and inactive” As such, members of the air component of the organized militia of the several states are members in a reserve component of the Air Force that answers ultimately to the United States Air Force.

58. See *Dunne v. Illinois*, 94 Ill. 120, 138 (1879) (“The word ‘troops’ conveys to the mind the idea of an armed body of soldiers, whose sole occupation is war or service, answering to the regular army. The organization of the active militia of the State bears no likeness to such a body of men.”).

Guards without their memberships or units? If a state diverts its Guard members or units to a federal organization, does the state's National Guard still exist in any meaningful sense?⁵⁹ That is the predicament confronting the states' National Guards. The states do not have their own militia members or their own units—on the contrary, the states have federal soldiers on loan to them from the federal government. The states have access to these troops only with the continued permission of Congress,⁶⁰ and the governor may command the units only so long as the National Guard Bureau decides to let the states have access to the units.⁶¹ Thus, the

59. The Supreme Court implied that, except for war or a similar emergency, Congress could not call up so many members of a state's National Guard that the state National Guard would be unable to perform its duty. A governor would be able to veto any such plan. See *Perpich*, 496 U.S. at 351 (describing the power of the governor to veto the power of Congress when calling members of the National Guard). However, it is unclear how that could be the case. The Supreme Court confirmed that congressional power over the members of the National Guard of the United States is “plenary and exclusive.” See *id.* at 339–40 (referencing the court of appeals en banc affirmance of the district court's judgment). If, then, the members of the states' Guards do not belong to the states, but rather to the National Guard of the United States, and if the states have access to these soldiers only because Congress permits the states to have access, and if the congressional power over these soldiers is plenary and exclusive, how can a governor stop Congress from calling up as many members of the National Guard of the United States as Congress deems necessary? How can a governor veto a congressional decision to withdraw the congressional consent that allows a state or governor to have access to soldiers over whom Congress exercises plenary and exclusive authority? It is unclear how any governor could veto a congressional decision to call the entire membership of a state's National Guard into federal service for any reason and effectively disband it. Any such veto would challenge Congress's ability to raise and support armies, or Congress's authority over those armies, or Congress's ability to withdraw its own consent. It is difficult to see how a governor can veto any of the above.

60. See *id.*, 496 U.S. at 351 n.22 (referencing the Constitution's delineation of states' authority to have and control troops).

61. The National Guard Bureau is a joint effort between the U.S. Army and Air Force. It oversees the Army and Air National Guards of the United States. Though a scenario in which a state loses its National Guard seems far-fetched, it nearly happened to Ohio during the late 1980s. As punishment for Ohio Governor Richard Celeste objecting to an overseas training deployment of Ohio National Guard units, General Herbert Temple, then Chief of the National Guard Bureau, developed a plan in which “the Ohio National Guard [w]ould be made to disappear over a period of a very few months except for only the 73rd Infantry Brigade.” See James Burgess et al., *THE NATIONAL GUARD, THE MONTGOMERY AMENDMENT AND ITS IMPLICATIONS*, at *106 (1990) (unpublished Group Study Project, U.S. Army War College, AD-A237 993) (on file with the Fletcher School of Law and Diplomacy, U.S. Army War College). According to General Temple, the National Guard Bureau instructed the United States Property and Resource Officer for Ohio “to develop a plan that would take the National Guard out of Ohio in two years . . . [This] included the Air National Guard.” *Id.* at *107. Thus, General Temple said the “entire plan [was] [t]he drawdown of the Ohio National Guard, including all the jobs, the training dollars and the equipment.” *Id.* In the end, Governor Celeste allowed the overseas training deployment because not doing so would “destroy the Ohio National Guard.” *Id.* at *108; see also Bob Haskell, *Change Agent*, NAT'L GUARD, Sept. 2014, at 32, 35 (describing the retired Lieutenant General Herbert R. Temple's response to Governor Celeste's opposition).

states possess neither militia members nor militia units. Rather, the units and their memberships belong ultimately to the U.S. Army or Air Force and can be diverted to another organization without the state's or governor's consent.⁶² The members of the National Guard of the United States, then, are members of the United States Armed Forces because the National Guard of the United States is a federal armed force—in other words, an army; and that army is “comprised of state national guard units and their members.”⁶³ And since only Congress can raise and support armies,⁶⁴ any army raised in the United States must be a federal organization. As a result, all of the people, equipment, and units which that army comprises must be answerable to federal authority. Since the U.S. National Guard is an army, and the state National Guard units and their members make up that army, the state National Guard units and their members must be answerable to federal authority. Since the Army National Guard of the United States—the land component of the federal army that Congress has designated the National Guard of the United States—is a permanent part of “the Army,” along with the Regular Army and the Army Reserve, the members, equipment, and units of the Army National Guard of the United States belong to the United States Army.⁶⁵ Likewise, since the Air National Guard of the United States is a permanent part of “the Air Force,” along with the Regular Air Force and the Air Force Reserve,⁶⁶ the members, equipment, and units of the Air National Guard of the United States belong to the United States Air Force. It is disingenuous, then, to suggest the current National Guard system does not contradict the Supreme Court's definition of the militia when the National Guard system's members and its units belong to the United States Army and the United States Air Force.

Consequently, National Guard members are federal soldiers and National Guard units are federal units. The Supreme Court ruled the overwhelming federal nature of the current National Guard system—specifically, that the federal government provides almost all of the National Guard system's

62. See 32 U.S.C. § 325(a) (requiring relief from the state's National Guard for any member who is called to active duty for the Army National Guard of the United States or the Air National Guard of the United States).

63. See *Perpich*, 496 U.S. at 338 (quoting *Perpich v. Dep't. of Def.*, 666 F. Supp. 1319, 1320 (D. Minn. 1987)).

64. U.S. CONST. art. I, § 8, cl. 12.

65. 10 U.S.C. § 7062(c)(1).

66. *Id.* § 9062(d)(1).

funding and equipment—qualifies National Guard members as “troops.”⁶⁷ This may seem like a fair position, but Congress did not include only the federally-funded National Guard system in its definition of “troops” as that word is used in the Constitution. Congress also included state defense forces in its definition of “troops.”⁶⁸ A state defense force is a military force raised and maintained by an individual state.⁶⁹ The force does not receive federal funding and is “exempt from being drafted into the Armed Forces of the United States.”⁷⁰

The Supreme Court recognized a state defense force belongs exclusively to the state that raised the force.⁷¹ The Supreme Court also noted that a state defense force is a militia.⁷² Nonetheless, current law defines members of a state defense force as “other troops.”⁷³ The law allows the states to raise and maintain such defense forces only so long as Congress authorizes the states to do so.⁷⁴ Thus, even if one concedes that federal funding of the National Guard system qualifies its members as “troops” in the constitutional sense, it is difficult to understand how state defense forces also qualify as “troops.” State defense forces do not receive federal funding, they are not federalized, and they are not even available to be federalized. Thus, it seems the distinction between constitutionally defined “troops” and militia does not exist anymore. Rather, Congress, with the help of the Supreme Court, has expanded the term “troops”—as used in the Constitution—to include all militia members, regardless of whether or not the militia unit receives federal funding or equipment.⁷⁵ In addition, Congress—again with the help of the Supreme Court—has legislated that

67. See *Perpich*, 496 U.S. at 351 (stating the support, funding, materials, and leadership of the National Guard comes from the federal government); see also Burgess, *supra* note 61, at ch. 6 (supporting the conclusion that the National Guard is almost fully funded by the federal government).

68. See 32 U.S.C. § 109 (“In time of peace, a State, the Commonwealth of Puerto Rico, the District of Columbia, Guam, or the Virgin Islands may maintain no troops other than those of its National Guard and defense forces authorized by subsection (c).”).

69. *Id.*

70. *Perpich*, 496 U.S. at 352–53 n.25.

71. See *id.* (discussing the constitutionality of a state to raise a defense force at its own expense).

72. See *id.* (positing that a militia is a type of defense force that a state is constitutionally entitled to).

73. See 32 U.S.C. § 109(a) (noting the difference between the National Guard and defense forces).

74. See *id.* § 109 (stating the allowance and jurisdiction of states to maintain defense forces).

75. See Burgess, *supra* note 61, at *106.

every militia falls under Article 1, Section 10 of the Constitution.⁷⁶ As a result, the states cannot possess a militia of any sort without congressional permission.

The language of “other troops” first appeared in the National Defense Act of 1916.⁷⁷ However, the language at that time prohibited states only from maintaining troops not authorized by the Act. The language exempted state National Guard members as well as “[s]tate police or constabulary” members from the term “troops.”⁷⁸ Congress amended the language regarding other troops in 1940. However, the language in this Act is murkier; it appears this Act did not define members of the National Guard as “troops,” though the Act did authorize the states to organize and maintain “such military forces other than National Guard as may be provided by” state laws.⁷⁹ However, a state could organize these military forces only “while any part of the National Guard of the State concerned is in active Federal service.”⁸⁰ The current language in which Congress

76. Act of Jan. 3, 1956, ch. 1041, 70 A Stat. 1 (1956) (codifying Title 10 and Title 32 of the United States Codes which are entitled “Armed Forces” and “National Guard,” respectively).

77. National Defense Act of 1916, ch. 134, 39 Stat. 198 (1916).

78. *Id.* One must remember by 1916, the Illinois Supreme Court, the New Jersey Supreme Court, the Minnesota Supreme Court, and the Federal Court of Claims had already ruled that members of state National Guard units were not “troops” as that word is used in the Constitution. As a result, it was impossible for states to maintain National Guard members as “troops” in the constitutional sense because National Guard members did not become “troops” until they entered the actual service of the federal government—at which point the states no longer were maintaining them. And once the National Guard members were discharged from federal service and the states resumed maintenance, the National Guard members were no longer “troops” as that word is used in the Constitution. *See Dunne v. Illinois*, 94 Ill. 120, 138 (1879) (distinguishing National Guard members from regular troops under the Constitution); *Smith v. Wanser*, 52 A. 309, 312 (N.J. 1902) (recognizing the constitutional difference between the regular Army and militia); *State v. Wagener*, 77 N.W. 424, 425 (Minn. 1898) (supporting the recognized conclusion that National Guard members are not considered troops); *Ala. Great S. R.R., Co. v. United States*, 49 Ct. Cl. 522, 535 (1914) (concluding that a distinct separation exists between troops and members of the National Guard).

79. Act of Oct. 21, 1940, ch. 904, 54 Stat. 1206 (amending Section 61 of the National Defense Act of 1916 by allowing states to organize their own military units without being a part of the National Guard). The New Jersey Supreme Court ruled in 1902 the term “military forces” does not imply “troops” in the constitutional sense. *See Smith*, 52 A. at 312–13 (interpreting that military forces and troops are not the same in a constitutional sense). And, indeed, legal scholars who were inclined to believe that the National Guard or other state forces were “troops” in the constitutional sense could not say for sure that the 1940 Act declared either the National Guard or state forces actually to be “troops” as that word is used in the Constitution. *See, e.g.,* George W. Bacon, *The Model State Guard Act*, 10 FORDHAM L. REV. 41, 46–48 (1941) (discussing the interpretation of legal scholars of the status of National Guard members as troops in the constitutional sense); *see also* Wiener, *supra* note 48, at 196–98 (discussing the effects of the Dick Act on the status of National Guard members as troops).

80. Act of Oct. 21, 1940, ch. 904, 54 Stat. 1206.

explicitly defines the National Guard and state defense forces as “troops”—as used in the Constitution—appeared in 1956 when Congress passed a complete revision and codification of Title 10 and Title 32 of the United States Code.⁸¹ However, neither Congress nor the Supreme Court provided any reasons for why the militia are now “troops” in the constitutional sense even though this new interpretation contradicts a long-standing distinction between the terms “militia” and “troops.” In 1898, the Supreme Court of Minnesota ruled the active militia and National Guard were not “troops” in the constitutional sense.⁸² The Federal Court of Claims reached the same decision in 1914.⁸³ And in 1917, General Enoch Crowder—then the Judge Advocate General of the Army—delivered an opinion in which he wrote: “The words ‘militia’ and ‘troops’ are contrasted much, as in the Constitution . . . the word ‘militia’ is contrasted with ‘Army’ and ‘forces.’”⁸⁴ Similarly to the Supreme Court in *Perpich*, General Crowder continued by stating the “distinguishing characteristics [of the militia are] the voluntary enrollment of all men of certain ages and the absence of technical training or habitual service.”⁸⁵ Finally, General Crowder contrasted the militia with “troops” as that word is used in the Constitution: “‘Armies,’ ‘forces,’ and ‘troops,’ . . . are words designating specialists, trained soldiers, continuously under military control and discipline, whose primary purpose is to fight and whose activities are continuously directed to military training and readiness.”⁸⁶ And so, it remains unclear on what

81. Act of Jan. 3, 1956, ch. 1041, 70 A Stat. 1 (1956) (codifying Title 10 and Title 32 of the United States Codes which are entitled “Armed Forces” and “National Guard” respectively).

82. See *Wagener*, 77 N.W. at 422–23 (“Under our Military Code, the active militia or national guard are organized and enrolled for discipline, and not for military service, except in times of insurrection, invasion, and riot. The men comprising it come from the body of the militia of the state, and, when not engaged, at stated periods, in drilling or training for military duty, they return to their usual avocations, subject to call when public exigencies require it, but may not be kept in service, like standing armies, in times of peace. While enrolled as soldiers of the state for the purposes aforesaid, they are neither ‘troops,’ within the meaning of [S]ection 10 of [A]rticle 1 of the federal [C]onstitution, nor a ‘standing army,’ within the meaning of section 14 of the bill of rights in the state constitution.” (citing *Dunne*, 94 Ill. 120)).

83. See *Ala. Great S. R.R. Co.*, 49 Ct. Cl. at 535 (noting a distinct separation exists between members of the National Guard and troops). Chief Justice Campbell ruled “[t]he Constitution therefore clearly distinguishes between the Army and Navy on the one hand and the militia upon the other.” *Id.* The Court of Claims also ruled the Constitution and military laws of Alabama and Mississippi do not define active militia or National Guard as troops even if they are technically soldiers of the State. *Id.* at 537–38.

84. 1918 OPINIONS OF THE JUDGE ADVOCATE, *supra* note 46, at 180.

85. *Id.*

86. *Id.*

constitutional grounds Congress and the Supreme Court revised the status of militia members so that they became “troops” in the constitutional sense.

The 1956 revision and codification of Title 10 and Title 32 of the United States Code occurred only a few years after Congress increased its statutory authorization over members of the National Guard. In 1952, Congress legislated that the National Guard could be called into federal service even if just for training purposes.⁸⁷ Prior to that Act, Congress called members of the National Guard into federal service only during periods of war or national emergency.⁸⁸ It is not clear on what constitutional grounds Congress rested this authority to call members of the National Guard into federal service only for training purposes. In its *Perpich* decision, the Supreme Court gave two possible answers. In the first answer, the Supreme Court acknowledged that the Constitution reserves to the states “the Authority of training the Militia.”⁸⁹ However, the Court ruled that Congress’s authority to discipline the militia limited the states’ authority to train the militia.⁹⁰ The Court went on to rule: “If the discipline required for effective service in the Armed Forces of a global power requires training in distant lands, or distant skies, Congress has the authority to provide it.”⁹¹

The Supreme Court’s position, then, appears to be that the states have the authority to train the militia until Congress decides *it* wants to train the militia. This is an odd position since Congress does not have the enumerated constitutional authority to train the militia. The Supreme Court’s interpretation appears to contend that the authority to train the militia resides in Congress’s authority to discipline the militia; however, the Court gives no reasons for why the congressional authority to discipline the militia includes the authority to train the militia.⁹² This omission is noteworthy, especially since the early American leaders gave the authority

87. See Armed Forces Reserve Act of 1952, ch. 60B, 66 Stat. 481, 490 (1952) (recognizing Congress may call up National Guard members for training alone); see also *Perpich v. Dep’t of Def.*, 496 U.S. 334, 346 (1990) (acknowledging Congress may call up members of the National Guard at will, even if just for training).

88. See *Perpich*, 496 U.S. at 346 (explaining the previous understanding of the situations that would allow Congress to call up members of the National Guard).

89. See U.S. CONST. art. I, § 8, cl. 16 (establishing the right of the states to train the militia).

90. See *Perpich*, 496 U.S. at 349–50 (discussing the relationship between Congress’s authority to discipline the militia and the states’ authority to train the militia).

91. *Id.* at 350.

92. *Id.*

to train the militia explicitly to the states.⁹³ Thus, the early American leaders understood how to assign explicitly the authority to train the militia. If the early American leaders intended for Congress to have the authority to train the militia, it is unclear why they did not explicitly give Congress that authority as they did the states. Why would the early American leaders cryptically put the authority to train the militia inside Congress's authority to discipline the militia? The Court did not answer this question in its *Perpich* decision.

The record of the 1787 convention further weakens the Supreme Court's interpretation. According to the convention record, the early American leaders did not understand "discipline" to include actively providing training to the militia.⁹⁴ Rather, the early American leaders understood "discipline" to mean establishing "the manual exercise evolutions."⁹⁵ This may be better said as establishing training standards and requiring, developing, or approving a training curriculum. Thus, the Supreme Court's interpretation is more constitutionally accurate if stated as: "If the discipline required for effective service in the Armed Forces of a global power requires training in distant lands, or distant skies, Congress has the authority to [require] it."⁹⁶ Though this language is more constitutionally accurate, it's still not in its *most* constitutionally accurate form. Specifically, it is not at all clear why a militia member requires overseas training since the militia cannot constitutionally be deployed overseas. It is also unclear why a member of a state Air National Guard unit necessarily must train in "distant skies" rather than the skies over United States territory. Additionally, it is unclear why a militia member necessarily must train in foreign lands when the United States has developed domestic training facilities that can simulate military operations in the different terrains and climates.⁹⁷

93. See *id.* at 347 (stating the early interpretation of the Constitution giving the authority to train the National Guard expressly to the states); U.S. CONST. art. 1 § 8 cl. 16.

94. See MAX FERRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 385 (vol. 2 Max Farrand ed., 1911) (asserting the early American leaders did not interpret the Constitution to include Congress' power to train the militia); see *infra* note 229.

95. *Id.*; see also *Arver v. United States*, 245 U.S. 366, 383 (1918) ("[The United States Constitution] diminished the occasion for the exertion by Congress of its military power beyond the strict necessities for its exercise by giving the power to Congress to direct the organization and training of the militia . . . although leaving the carrying out of such command to the states.").

96. See *Perpich*, 496 U.S. at 350 (altering the Supreme Court's original quote on the issue of Congress requiring the Armed Forces to be trained in distant lands).

97. The United States Army has training schools dedicated to simulating military operations in several different terrains and climates. For example: Mountain Warfare School (Jericho, VT), Desert

The Supreme Court's position, then, is most constitutionally accurate if stated thusly: "If the discipline required for effective service in the Armed Forces of a global power requires training [*so that a member of the militia can operate effectively*] in distant lands, or distant skies, Congress has the authority to [*require*] it." However, even in its most constitutionally accurate form, the Supreme Court's position is probably still unconstitutional since the militia cannot deploy overseas; as a result, it is unclear if Congress has the authority to require the militia to train for missions that exceed the militia's constitutional role. Still, even if Congress does have the authority to require the militia to train for missions that exceed the militia's constitutional role, Congress does not have the authority to *provide* training to the militia—only to *require* the training.

As this discussion illustrates, it is not necessary to call militia members into active duty federal service and send them overseas for them to receive effective training for overseas operations. As a result, the Supreme Court's first attempt to provide the constitutional grounds on which Congress can call the National Guard into active duty federal service solely for training purposes is not compelling.

The Supreme Court's second answer was that members of the National Guard of the United States are federal soldiers.⁹⁸ As discussed at the beginning of this section, members of the National Guard of the United States are members of the United States Armed Forces; they are integrated fully into the United States Army and the United States Air Force. As a result, Congress can call members of the National Guard into active duty federal service at any time and for any reason because members of the National Guard of the United States are federal soldiers. Thus, the Supreme Court ruled that Congress can constitutionally send the members or units of any state's National Guard overseas simply for training purposes because Congress can raise armies and Congress raised an army that it designated as the National Guard of the United States. That Army comprises all of the memberships and units of the states' National Guards.

And so, when Congress sends any member or unit of the National Guard of the United States on a training exercise, Congress sends a federal soldier—a "troop" in the constitutional sense—or a federal unit on a federal

Warrior Course (Ft. Bliss, TX), Northern Warfare Training Center (Black Rapids, AK), and Jungle Operations Training Course (Oahu, HI).

98. See *Perpich*, 496 U.S. at 347 (positing being a member of the National Guard implies being a federal soldier as well).

operation. And that is constitutional. This reasoning is valid *if* the members of the state National Guards are federal soldiers at all times. However, one arrives at the question of how federal soldiers can also be militia members? One may respond that the National Guard is still the militia because it performs a state mission (e.g., disaster response). One may say that members of a state's National Guard only become federal soldiers when they are called into actual federal service. Thus, this is the same system that the early American leaders created. Unfortunately, this response is not adequate.

Though the early American leaders did provide for the militia to enter federal service, there are only three constitutionally enumerated situations in which the federal government can call the militia into federal service: (1) invasion, (2) insurrection, and (3) to enforce the country's laws.⁹⁹ However, according to *Perpich*, Congress essentially can call members of the National Guard into active duty federal service whenever Congress wants and for whatever reason Congress wants.¹⁰⁰ Yet, if the National Guard is a militia, neither Congress nor the Supreme Court has provided constitutional grounds on which Congress can call members of the National Guard into active duty federal service outside of the three constitutionally enumerated situations.

The Supreme Court's second explanation does not provide these constitutional grounds because that explanation rests on members of the National Guard simultaneously being members of a federal army, subject at all times to being called by Congress into active duty federal service. Therefore, the second explanation does not provide constitutional grounds for calling the militia into federal service for reasons outside of the three constitutionally enumerated situations; rather the Court's second explanation only states that members of the National Guard are federal soldiers who are continuously subject to being called into active duty federal service.¹⁰¹

This state of affairs reflects a severe misunderstanding of the militia's primary reason for existence. This understanding of the National Guard suggests the militia's primary reason for existence is to support a standing

99. U.S. CONST. art. 1, § 8, cl. 15.

100. See *Perpich*, 496 U.S. at 349 (describing the power of Congress to call upon the National Guard under the Militia Clauses).

101. See Wiener, *supra* note 48, at 208 (According to Wiener, after the National Defense Act of 1933, the National Guard—and, as a result, the entire membership of the National Guard—became “a part of the Army at all times”).

army. This is a misunderstanding.¹⁰² The primary reason for the militia's existence is to guarantee the "security of a free State."¹⁰³ A militia is "necessary to the security of a free State."¹⁰⁴ The militia is the "palladium of the country";¹⁰⁵ it is the "true palladium of liberty."¹⁰⁶

But against what, or whom, is the militia supposed to safeguard the country and the people's liberty? The answer is the militia is supposed to safeguard the country and the people's liberty against a standing army.¹⁰⁷ The early American leaders made this point several times.¹⁰⁸ According to James Madison, the militia was supposed to prevent a large standing army from existing.¹⁰⁹ However, Madison later made the point that even if a large standing army did exist, no standing army would ever be large enough to overcome the militia.¹¹⁰ Justice Joseph Story also considered the militia to be "the palladium of the liberties of a republic."¹¹¹ He believed the militia either would prevent leaders from attempting to use a standing army to destroy the people's liberty, or would allow the people to defeat a leader

102. See U.S. CONST. amend. II (noting explicitly the primary reason for a well-regulated militia is to maintain the security of a free state).

103. *Id.*

104. *Id.*

105. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES 125 (Phillip H. Nicklin, 2d ed. 1829).

106. 1 ST. GEORGE TUCKER, 1 BLACKSTONE'S COMMENTARIES 300 (1803) [hereinafter TUCKER].

107. THE FEDERALIST No. 46, at 242 (James Madison) (Buccaneer Books ed., 1992) (hereinafter No. 46).

108. In an oft-cited passage, St. George Tucker explicitly orients the Second Amendment as protecting the people's liberty from the dangers of a standing army: "Wherever standing armies are kept up, and the right of the people to keep and bear arms is, under any [color] or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction." TUCKER, *supra* note 106, at 300.

109. FERRAND, *supra* note 94, at 388 (New Haven: Yale University Press, 1911); JAMES MADISON, DEBATES IN THE FEDERAL CONVENTION OF 1787 (1787) ("[T]he greatest danger to liberty is from large standing armies, [thus] it is best to prevent them by an effectual provision for a good Militia.").

110. See No. 46, *supra* note 107, at 242 ("[T]he United States [could not support] an army of more than twenty-five or thirty thousand men. To these would be opposed 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 [state] governments possessing their affections and confidence. It may well be doubted whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops.").

111. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 620 (1873).

who attempted to destroy the people's liberty.¹¹² Similarly, Noah Webster wrote that the militia's duty was to protect the country and the people's liberty not only from a standing army, but from any "military force at the command of Congress."¹¹³

If the primary reason for the militia's existence, then, is to safeguard the country and the people's liberty from the dangers posed by a standing army—or "troops" as used in the Constitution—how can the militia consist of "troops" who are members of a standing federal army and who ultimately are answerable to federal authority? There is a long-standing distinction between "troops" in the constitutional sense and the militia, and neither Congress nor the Supreme Court has presented a compelling case for why this distinction should be discarded. The militia is the manifestation of the people's right to keep and bear arms.¹¹⁴ Therefore, if one wishes to take the position that the membership of the National Guard of the United States—a permanent component of the standing United States Armed Forces—is also the militia (the manifestation of the people's right to keep and bear arms), then that person must also accept the Army is the embodiment of the people's right to keep and bear arms. After all, the membership of the National Guard of the United States is as much a part of the U.S. Armed Forces as the membership of the Army.

Unfortunately, such a position was not supported by the early American leaders and is not supported by the Constitution. Just because the United

112. *Id.* ("The militia is the natural [defense] of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers. It is against sound policy for a free people to keep up large military establishments and standing armies in time of peace, both from the enormous expenses with which they are attended and the facile means which they afford to ambitious and unprincipled rulers to subvert the government or trample upon the rights of the people. The right of the citizens to keep and bear arms has justly been considered the palladium of the liberties of a republic, since it offers a strong moral check against the usurpations and arbitrary power of rulers, and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.").

113. NOAH WEBSTER, AN EXAMINATION INTO THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION PROPOSED BY THE LATE CONVENTION HELD AT PHILADELPHIA 43 (1787) ("Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom in Europe. The supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed, and constitute a force superior to any band of regular troops that can be, on any [pretense], raised in the United States. A military force, at the command of Congress, can execute no laws, but such as the people perceive to be just and constitutional; for [the people] will possess the *power*, and jealousy will instantly inspire the *inclination*, to resist the execution of a law which appears to them unjust and oppressive.") (emphasis in original).

114. DAVID C. WILLIAMS, THE MYTHIC MEANINGS OF THE SECOND AMENDMENT: TAMING POLITICAL VIOLENCE IN A CONSTITUTIONAL REPUBLIC 49 (2003).

States Armed Forces (through the National Guard) took over part of the militia's responsibilities (e.g., state disaster response) does not mean that it is no longer the United States Armed Forces. Indeed, the United States Armed Forces—a standing federal military force—cannot even perform the primary duty of the militia, which is to act as a bulwark between the people's liberty and a standing federal military force.¹¹⁵

In addition, claiming—as the United States Supreme Court did in *Perpich*—that the militia is a military force that may deploy overseas to engage in offensive combat operations and occupation also reflects a misunderstanding of the militia. At the end of December 1911, Judge Advocate General of the Army Enoch Crowder delivered an advisory opinion to the Secretary of War, explicitly stating “the National Guard is none other than the Organized Militia of the Constitution”¹¹⁶ As a result, General Crowder concluded the National Guard could not be sent “into a foreign country as a part of an army of occupation, either in case of war or in case of intervention”¹¹⁷

On the contrary, General Crowder wrote, “[t]he militia or the National Guard may be called into the service of the United States for three specific purposes only: (1) To execute the laws of the Union; (2) to suppress insurrections; and (3) to repel invasions.”¹¹⁸ Only a couple of months later, Attorney General of the United States George Wickersham reached the same conclusion. When asked to provide an advisory opinion on whether the President can send the militia into a foreign country, Wickersham responded “in the negative.” He also cited the three constitutionally enumerated situations as the only situations in which the federal government can call out the militia.¹¹⁹ Both Enoch and Wickersham added the caveat that the militia could operate beyond the borders of the United

115. See Wiener, *supra* note 48, at 219 (stating the National Guard cannot be used to fight the United States).

116. Preparedness for National Defense, Hearings before the Committee on Military Affairs United States Senate on Bills for the Reorganization of the Army and for Creation of a Reserve Army 64th Cong. 741 (1916) [hereinafter Preparedness for National Defense].

117. *Id.*

118. *Id.* at 738.

119. 29 Op. Att’y Gen. 324 (1913) in GEORGE WICKERSHAM, OFFICIAL OPINIONS OF THE ATTORNEYS GENERAL OF THE UNITED STATES 329 (1912) [hereinafter WICKERSHAM] (“I think that the constitutional provision here considered not only affords no warrant for the use of the militia by the General Government except to suppress insurrections, repel invasions, or to execute the laws of the Union, but, by its careful enumeration of the three occasions or purposes for which the militia may be used, it forbids such use for any other purpose; and your question is answered in the negative.”).

States in accordance with its responsibility to repel invasions. However, both of them added this applied only in the event of an actual invasion which was either imminent or already underway.¹²⁰ The mere possibility of invasion or simply a state of war would not suffice.¹²¹

The opinions of both Enoch and Wickersham were part of a long and bitter political fight over reforming the United States' military land forces.¹²² Previously, the federal government got around the constitutional limits placed on the militia by forming a volunteer army during wartime.¹²³ However, the mobilization of the volunteer army during the war with Spain in 1898 left many politicians and officers convinced that reform was necessary.¹²⁴ Specifically, prior to the National Defense Act of 1916, members of the militia deployed to a foreign country only if they volunteered to do so. However, after the war with Spain, many politicians wanted a way in which to compel members of the National Guard into federal service for overseas deployments.¹²⁵

The federal government accomplished this in 1916 by effectively disbanding the militia and then drafting the individual members of the then-defunct militia into a federal army.¹²⁶ Those in favor of the 1916 Act essentially stated that Congress's authority to raise armies gave it the authority to disband the militia in order to conscript individual members of

120. *Id.* at 324; Preparedness for National Defense, *supra* note 116, at 740 ("But . . . such a construction [that the militia's responsibility to repel invasions allows it to operate outside the borders of the United States] should not be so extended as to virtually destroy the distinction between the Regular Army and the militia. The mere existence of a state of war would hardly be sufficient to justify the use of the militia for the purpose of repelling an invasion unless it should be threatening or imminent, and a mere possibility of an invasion would hardly justify offensive operations. The contrary view would eliminate the distinction between the scope of service of the Regular or Volunteer Army and that of the militia, and would destroy the limitation which the Constitution has placed upon the use of the latter.").

121. WICKERSHAM, *supra* note 119, at 324.

122. The particulars of this political fight are beyond the scope of this Article. However, those interested can find detailed discussions of this fight in JERRY COOPER, *THE RISE OF THE NATIONAL GUARD: THE EVOLUTION OF THE AMERICAN MILITIA, 1865–1920* (2002); JERRY COOPER, *CITIZENS AS SOLDIERS: A HISTORY OF THE NORTH DAKOTA NATIONAL GUARD* (2005); JEFFREY A. JACOBS, *THE FUTURE OF THE CITIZEN-SOLDIER FORCE: ISSUES AND ANSWERS* (1994).

123. See *Kerr v. Jones*, 19 Ind. 351, 355–56 (1862) (ruling the volunteer army of the United States in not the militia); BARRY M. STENTIFORD, *THE RICHARDSON LIGHT GUARD OF WAKEFIELD, MASSACHUSETTS: A TOWN MILITIA IN WAR AND PEACE, 1851–1975*, at 108 (2013).

124. ROBERT P. SALDIN, *WAR, THE AMERICAN STATE, AND POLITICS SINCE 1898*, at 34 (2011); CLAYTON D. LAURIE & RONALD H. COLE, *THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS 1877–1945*, at 186 (1997).

125. LAURIE & COLE, *supra* note 124, at 187.

126. *Perpich v. Dep't of Def.*, 496 U.S. 334, 345 (1990).

the militia into the federal army.¹²⁷ Thus, members of the militia became federal soldiers and could be sent overseas. However, Congress does not have the authority to raise the militia, so it is unclear how Congress possesses the authority to disband the militia. Eventually, this idea evolved into the “dual enlistment” doctrine so that, rather than having to explicitly disband the militia, the federal government stated that the militia members also were federal soldiers—“troops” as used in the Constitution—at all times.¹²⁸ As a result, the federal government can deploy these federal soldiers overseas at any time.

And so, one confronts some of the confusion that surrounds efforts to understand the militia. For instance, some commentators believe the distinction between the militia as a part-time nonprofessional force and “troops” as a full-time professional force is obsolete.¹²⁹ Yet, the Supreme Court’s decision in *Perpich* rests precisely on this distinction.¹³⁰ One must decide, then, is this distinction still accurate? Or is it indeed obsolete? If the distinction is accurate, then members of the National Guard—a part-time nonprofessional force—cannot be “troops” in the constitutional sense; rather, members of the states’ and territories’ National Guards can be only militia members. If “troops” per the Constitution are distinct from members of the militia, and if “troops” are full-time professionals, and if federal armies consist of “troops,” then the National Guard of the United States cannot be an army. This means the federal National Guard of the United States cannot be an army because it comprises part-time nonprofessional militia members.

In addition, if the distinction between the militia and “troops”—as used in the Constitution—is accurate and, as a result, the National Guard is a militia, then there exists no constitutional grounds on which Congress can call the National Guard into active duty of federal service for any purpose other than the three situations in the Constitution. However, if the distinction is obsolete, then “troops” do not have to be full-time professionals. An army can comprise part-time nonprofessional “troops” in the constitutional sense. This means, contrary to the Supreme Court’s decision in *Perpich*,¹³¹ the National Guard’s part-time nonprofessional

127. *Id.* at 342.

128. NICHOLAS J. JOHNSON ET AL., FIREARMS LAW AND THE SECOND AMENDMENT: REGULATIONS RIGHTS AND POLICY 509 (2d ed. 2015); *see also* Wiener, *supra* note 48, at 208.

129. Wiener, *supra* note 48, at 216–17.

130. *Perpich*, 496 U.S. at 354–55.

131. *Id.* at 348.

nature is not sufficient to qualify the organization as a militia. Instead, the National Guard consists entirely of federal “troops” who are a part of the Army “at all times.”¹³² In addition, Congress possesses “plenary and exclusive” authority over these federal “troops.”¹³³ Thus, the National Guard is unable to perform the primary duty of the militia—to protect the country and the people’s liberty from a standing army, because the National Guard of the United States *is* a standing army under the plenary and exclusive command of Congress.¹³⁴ As a result, the argument that the National Guard is also the militia is not compelling.

One comes to the point, then, where a choice must be made. Is the distinction between the militia as a part-time nonprofessional force and “troops” as a full-time professional force still accurate? Or is it obsolete? This appears to be a point where one actually must make an arbitrary decision. However, perhaps General Crowder can be of some assistance. When discussing whether or not the National Guard consists of militia members or “troops” in the constitutional sense, General Crowder advised answering one question: “Did Congress intend to make out of the militia a quasi[-]addition to the Regular or Volunteer Army, under the name of the National Guard, and to invest it with a character different from that of the State militia?”¹³⁵ Though General Crowder’s response was no, the Supreme Court’s response in *Perpich* was yes. Not only did Congress make the National Guard system a “quasi-addition” to the United States Army and United States Air Force, but Congress made the National Guard system a permanent fixture.

Thus, the exact reason behind congressional actions concerning the National Guard since 1916 has been to assign to the National Guard system the primary responsibility of supporting and augmenting the United States’ regular Armed Forces. In doing so, Congress fundamentally changed the character of the National Guard system from a state militia to a federal army. The Supreme Court’s decision in *Perpich* solidified the National Guard’s status as “troops.” In doing so, the Supreme Court invalidated the distinction between the militia and “troops” made in the Illinois Supreme

132. Wiener, *supra* note 48, at 208.

133. *Perpich*, 496 U.S. at 339.

134. See WILLIAMS, *supra* note 114, at 49 (“The court never explains why the National Guard, designed to be subservient to the federal government, can act as an acceptable analogue for the old state militias, designed to check the federal government.”).

135. Preparedness for National Defense, *supra* note 116, at 741.

Court's 1879 definition of the militia and in *Miller*.¹³⁶ The Supreme Court in *Perpich*, then, ruled that the distinction between the militia as a part-time nonprofessional force and "troops" as a full-time professional force is obsolete. And as a result, the National Guard's part-time nonprofessional nature is no longer sufficient to qualify the National Guard as a militia. Instead, the members of the current National Guard system are federal soldiers. The National Guard is not the militia. It is a federal army.

B. *The Militia's Commander in Chief*

Beginning in the early twentieth century, Congress turned the question of who or what the militia is into a confusing mess. In 1990, the Supreme Court further exacerbated this confusion with its decision in *Perpich*. And yet, even with all of the confusion and uncertainty about who or what the militia is, that question still is not the greatest source of confusion or uncertainty regarding the militia. Rather, the greatest source of confusion and uncertainty regarding the militia is who controls it.¹³⁷ The early Supreme Court doctrine of concurrent jurisdiction lies at the heart of this confusion and uncertainty. The concurrent jurisdiction doctrine recognizes the states and the federal government have simultaneous authority over the militia.¹³⁸ For instance, Congress has jurisdiction over the militia to organize, arm, and discipline the militia,¹³⁹ while the states have jurisdiction over their militias in all other matters.¹⁴⁰ Similarly, the governor of each state is the Commander in Chief of the state's militia, while the President is the Commander in Chief of the militia when it is called to serve the United States.¹⁴¹ This concurrent jurisdiction creates significant confusion and uncertainty over precisely where one jurisdiction ends and another begins. This problem became clear when a militia crisis severely tested these jurisdictions during the War of 1812.

At the war's onset, Governors Caleb Strong of Massachusetts, Roger Griswold of Connecticut, and William Jones of Rhode Island refused President Madison's request to release their respective militias into federal

136. *United States v. Miller* 307 U.S. 174, 178–79 (1939).

137. *See Houston v. Moore*, 18 U.S. 1, 1–2 (1820) (drawing the question of inconsistency between Congress's authority and state statutes arising from concurrent jurisdiction).

138. *See id.* at 8–10, 12–13 (recognizing the necessity of concurrent jurisdiction and specifying separate powers of Congress and states).

139. U.S. CONST. art. I, § 8, cl. 15.

140. *Houston*, 18 U.S. at 50–51.

141. U.S. CONST. art. II, § 2, cl. 1.

service. Shortly before the federal government formally declared war on Great Britain, General Henry Dearborn wrote to Connecticut Governor Roger Griswold, warning that the Connecticut militia might be required to provide coastal defense. Governor Griswold promised to execute this order.¹⁴² Ten days later, General Dearborn requested that Governor Griswold release part of the Connecticut militia into federal service so that it could reinforce the garrisons at two forts—one at New London and one at New Haven.¹⁴³ Governor Griswold resisted this order. In a series of letters between Governor Griswold, General Dearborn, and Secretary of War William Eustis, the Governor made clear that he would not release part of the Connecticut militia into federal service.

Governor Griswold gave two reasons for why he would not release part of the Connecticut militia into federal service: (1) the United States was not invaded, and (2) the United States was not in imminent danger of being invaded. The Governor alleged the federal government based its requisition for Connecticut's militia only on the fact that a state of war existed and, as a result, an invasion *may* happen. Governor Griswold argued neither a state of war, nor the mere possibility of invasion, gave the federal government the authority to call the militia into federal service under either the constitutional provision to repel invasions or the 1795 Militia Act's statutory language allowing the President to call out the militia if there was an imminent danger of an invasion.¹⁴⁴ In August 1812, Griswold submitted the correspondence between himself, General Dearborn, and Secretary of

142. C. EDWARD SKEEN, *CITIZEN SOLDIERS IN THE WAR OF 1812*, at 66 (1999).

143. *Id.*

144. Letter from Roger Griswold, Governor, Pa., to William Eustis, Sec'y of War, U.S., (Aug. 13, 1812) (on file with the General Assembly at the Special Session 19–20) ("The war which has commenced, and the cruising of a hostile fleet on our coast, is not invasion: and the declaration of the President, that there is imminent danger of invasion, is evidently a consequence, drawn from the facts, now disclosed, and is not in my opinion warranted by those facts. If such consequences were admitted to result from a declaration of war, and from the facts now mentioned, and which, it may be observed, always must attend a war with a[n] European power, it would follow, that every war, of that character, would throw the militia, into the hands of the national government—and strip the states, of the important right, reserved to them But whether the Congress in 1795, were justified in the expression [allowing the president to call out the militia when faced with an imminent danger of invasion] or not, is unimportant, there being no difficulty, in the present case, as none of the facts disclosed, furnish any thing more, than a slight danger of invasion, which the Constitution could not contemplate, and which might exist even in time of peace."); *see also* Act of Feb. 28, 1795, ch. 36, § 1, 1 Stat 424 (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) (stating the United States president may, under imminent threat, call forth the militia as he deems necessary).

War Eustis to Connecticut's General Assembly. The Governor asked for the General Assembly's opinion on whether he should agree to the federal government's request. The General Assembly published a report unanimously supporting the Governor, which reads in part:

[I]t is very apparent, that the claim set up, by the administration of the government of the United States, is, that when a war has been declared to exist, between this, and any foreign country, the Militia of the several states are liable to be demanded, by the Administration of the Government of the United States, to be called into the service of the United States, to enter their [the federal government's] forts, and there remain, upon the presumption, that the enemy *may* invade the place or places, which they [the militia] are ordered to garrison and defend. And that for this purpose they may be ordered to any part of the United States It is true that the Secretary of War, after expressing his [surprise] that any other evidence [besides a declaration of war] should be required of imminent danger of invasion, after the Declaration of War had been promulgated and officially communicated, does say, "that I am instructed by the President to state to you that such danger actually exists." No *place* is pointed out, as in more danger of such invasion, than any other. It all rests upon the danger apprehended, from the state of war.¹⁴⁵

Governor Griswold's and the Connecticut General Assembly's position was that a state of war with any foreign power always brings with it a danger of invasion. But, the danger of invasion that accompanies any war with a foreign state does not give the federal government the authority to call the militia into federal service under the pretense of either repelling an invasion or preparing for an imminent danger of invasion. Stated another way, Governor Griswold and the Connecticut General Assembly's position was that the federal government could not declare war on a foreign state and then demand that the state militias enter federal service because it was possible—or even probable—that the foreign state would invade the United States.¹⁴⁶ Governor Griswold and the Connecticut General Assembly

145. Comm. to the Gen. Assembly at their Special Sess., at 4–5 (Conn. 1812).

146. See *id.* at 5–6 ("The war, in which this country is now unhappily engaged, has been declared by our own government. Not because the country is invaded, or threatened with invasion, but to seek redress and indemnification for injuries and wrongs of which we complain, by *invasion* and *conquest* of the territories of the enemy. It is not a *defensive*, but *offensive* war. At the time when the demand was made for the Militia, the war had been recently declared; it was not then even known to the nation against which [the war] was declared. The invasion then existing, or danger of invasion then expected, must be presumed to last, as long as the war shall last.—It may be presumed to increase. Invasion of the territory of the enemy may be expected, when known, to produce retaliation. If then the Militia

argued that—before the federal government could call the militia into federal service—there had to be either an actual invasion underway or an actual imminent danger of invasion. This is the same position Judge Advocate General of the Army Enoch Crowder outlined in December 1911 and Attorney General of the United States George Wickersham outlined in February 1912.¹⁴⁷

A similar situation unfolded in Massachusetts. After receiving requests from General Dearborn and Secretary of War Eustis to release parts of the Massachusetts militia into federal service, Governor Caleb Strong submitted to his council the question of whether Massachusetts should comply with the federal government's request.¹⁴⁸ Both the Governor and the council agreed to ask the Supreme Judicial Court of Massachusetts for an advisory opinion. Governor Strong submitted two questions to the Supreme Judicial Court. The first question was whether a governor, as Commander in Chief of the militia, had the authority to determine whether one of the constitutionally enumerated situations that allowed the federal government to call the militia into federal service existed.¹⁴⁹ The second question was whether federal officers could command the militia once the militia was in federal service.¹⁵⁰ The Supreme Judicial Court replied that “the authority of commanding the militia of the commonwealth is vested exclusively in the governor, who has all the powers incident to the office of Commander in Chief”¹⁵¹

The Supreme Judicial Court continued, writing that because the governor

can be constitutionally required to man the garrisons of the United States, they may continue to be so required, as long as the danger continues to exist; and so become, for all the purposes of carrying on the war, within the United States, standing troops of the United States. And a declaration of war made by the administration of the government of the United States, and announced to the [Governors] of the States, will substantially convert the Militia of the States into such troops.” (emphasis in original).

147. Preparedness for National Defense, *supra* note 116, at 741 (“[I]t is my opinion that the President is not authorized to call out the National Guard . . . unless as an incident to its use in repelling invasion or in executing laws”); WICKERSHAM, *supra* note 119, at 329 (“I think that the constitutional provision here considered not only affords no warrant for the use of the militia by the General Government except to suppress insurrections, repel invasions, or to execute the laws of the Union, but, by its careful enumeration of the three occasions or purposes for which the militia may be used, it forbids such use for any other purpose; and your question is answered in the negative.”).

148. Letter from the Governor of the Commonwealth of Mass. to the Justices of the Supreme Judicial Court, with the Answers of the Justices, 8 Mass. 547 (1812).

149. *Id.*

150. *Id.*

151. *Id.* at 548–49.

was the Commander in Chief of the state's militia, "this right [of determining whether there existed one of the constitutionally enumerated situations that allowed the federal government to call the militia into federal service] is vested in the commanders in chief of the militia of the several states."¹⁵² In addition, the Supreme Judicial Court warned against: (1) any legal construction allowing the federal government to unilaterally decide whether there existed one of the constitutionally enumerated situations permitting it to call the militia into federal service, and (2) any legal construction that bound the governors to follow any such unilateral federal decision.¹⁵³ Based on this opinion, Governor Strong refused to release the Massachusetts militia into federal service.¹⁵⁴ In addition to the Supreme Judicial Court's opinion, the Governor also refused to release the Massachusetts militia into federal service on the grounds that the federal government's plan to concentrate the militia into a few locations would not make Massachusetts safer.¹⁵⁵ Rather, Governor Strong believed that doing so placed in more danger those communities whose militia units would be called away.¹⁵⁶ Governor Strong also stated that the locations to which General Dearborn wanted to send the militia did not need

152. *Id.* at 549.

153. *See id.* at 549 ("It is the duty of these commanders [i.e., the governors] to execute this important trust [the office of Commander in Chief of the militia] agreeably to the laws of their several states respectively, without reference to the laws or officers of the *United States*, in all cases, except those specially provided for in the federal constitution. They must, therefore, determine when either of the special cases exist, obliging them to relinquish the execution of this trust, and to render themselves and the militia subject to the command of the president. A different construction giving to congress the right to determine when those special cases exist, authorizing them to call forth the whole of the militia, and taking them from the commanders in chief of the several states, and subjecting them to the command of the president 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 federal constitution. Indeed, since passing the act of congress of February 28th, 1795, vesting in the president the power of calling forth the militia, when the exigencies mentioned in the constitution shall exist; if the president has the power of determining when those exigencies exist, the militia of the several states is in fact at his command and subject to his control.").

154. *See* Letter from Caleb Strong to William Eustis (Aug. 5, 1812), in 1 AMERICAN STATE PAPERS: DOCUMENTS, LEGISLATIVE AND EXECUTIVE, OF THE CONGRESS OF THE UNITED STATES 323 (Walter Lowrie & Matthew St. Clair Clarke, eds., 1832) (explaining Governor Strong's order to dispatch the militia according to the recommendation of his Council, thereby refusing to release the militia to the federal government).

155. *See id.* (positing General Dearborn's plan to concentrate troops in only a few port cities would leave others more vulnerable than before).

156. *Id.* at 323.

reinforcements.¹⁵⁷ Thus, Governor Strong declined to release the Massachusetts militia into federal service, writing: “[C]onsidering the state of the militia in this Commonwealth, I think there can be no doubt that, detaching a part of it, and distributing it into small portions will tend to impair the defensive power [of the commonwealth].”¹⁵⁸

When the war ended, this militia crisis led to a debate over the role of the governor in military affairs. In 1820, the Supreme Court first discussed the issue, albeit obliquely.¹⁵⁹ In 1814, the federal government requested that Pennsylvania Governor Simon Snyder release part of the state’s militia into federal service.¹⁶⁰ Governor Snyder complied with the federal government’s request and ordered part of the Pennsylvania militia into federal service.¹⁶¹ One private, Houston, refused.¹⁶² Under Pennsylvania law, a member of the militia who refused to serve when called into federal service was subject to the penalties laid out by Congress in the Militia Act of 1795.

As a result, Governor Snyder authorized a court martial, which ordered Houston to pay a fine. In order to pay the fine, state officers levied upon Houston’s property. Houston then brought an action of trespass against the officer who levied upon his property, arguing the state law was unconstitutional. The state supreme court ruled the state law was constitutional, and the United States Supreme Court confirmed the ruling.

In a dissenting opinion, Justice William Johnson touched on a governor’s military authority. Justice Johnson wrote a governor’s authority as Commander in Chief of a state’s militia subordinated the governor to the President, who was Commander in Chief of the entire militia.¹⁶³ However, Justice Johnson added that the governor’s power is subordinate to the President’s “when it [the state militia] is in actual service [of the United

157. *See id.* (“The places contemplated in General Dearborn’s specification, as the rendezvous of the detached militia, excepting in one or two instances, contain more of the militia than the portion of the detached militia assigned to them.”).

158. *Id.*

159. *See* *Houston v. Moore*, 18 U.S. 1, 40 (1820) (Johnson, J., dissenting) (“Yet if [the governor] is to be addressed [Commander in Chief of the militia], and not as the general organ or representative of state sovereignty, surely he has a right to be apprised of it.”).

160. *Id.* at 3.

161. *Id.*

162. *Id.*

163. *Id.* at 40 (Johnson, J., dissenting) (“For when the constitution of Pennsylvania makes her Governor Commander in Chief of the militia, it must subject him in that capacity (at least when in actual service) to the orders of him who is made Commander in Chief of all the militia of the Union.”).

States].”¹⁶⁴ In fact, this is the only time in which the governor, as Commander in Chief, conceivably could be subordinate to the President, as Commander in Chief, for the President is not Commander in Chief of the entire militia at all times. Rather, the President is Commander in Chief of the militia only when the militia is in actual service of the federal government.¹⁶⁵

In the majority opinion, the Supreme Court explained what it meant for a militia to be called into the actual service of the United States. Justice Bushrod Washington, delivering the majority opinion, wrote that neither (1) the federal government providing federal equipment to the militia nor (2) simply requesting that the militia enter into federal service constituted the militia being in the actual service of the United States.¹⁶⁶ Justice Washington wrote that not even the federal government ordering the militia into federal service constituted the militia being in the actual service of the United States.¹⁶⁷ Rather, in order to enter the actual service of the United States, the governor had to order members of a state's militia to assemble at a rendezvous area designated by the federal government.¹⁶⁸ Only once the militia assembled at the rendezvous area by the governor's command did the militia enter the actual service of the United States.

Some may assert the President's request for the militia compels a governor to order the militia to assemble, but it is difficult to see how either Justice Washington's or Justice Johnson's interpretation supports this position. Until the militia is in the actual service of the United States, the President is not the Commander in Chief of the militia. And until the militia is in the actual command of the United States, the governor is not a subordinate officer to the President. As Justice Johnson wrote:

I will make one further observation in order to prevent myself from being misunderstood. I have observed, that the Governors of States, as military commanders, must be considered as subordinate to the President: I do not mean to intimate, nor have I the least idea, that the act of 1795 gives authority

164. *Id.*

165. U.S. CONST. art. II, § 2, cl. 1.

166. *Houston*, 18 U.S. at 18 (“I am . . . of [the] opinion, that a fair construction of the different militia laws of the United States, will lead to a conclusion, that something more than organizing and equipping a detachment [of militia], and ordering it into service, was considered as necessary to place the militia in the service of the United States.”).

167. *Id.*

168. *See id.* at 18–19 (implying the governor's order of the militia in response to the President's requisition of the militia is required to bring them into actual service).

to the President to issue an order to a Governor in that capacity. I hold the opinion to be absurd; for [the governor] comes not within the idea of a *militia officer* in the language of that act.¹⁶⁹

Justice Johnson's opinion mirrors the conclusions of a congressional report on the militia produced in 1818, two years before Justice Johnson delivered his opinion. According to the report: "The Governor of a State is not a militia officer, bound to execute the orders of the President . . ."¹⁷⁰ Thus, a governor is not a subordinate of the President until the governor orders the militia to assemble at a federally designated rendezvous area for the explicit purpose of entering the actual service of the United States. And since the governor is not a subordinate of the President, the President—even when vested by Congress with the power to call the militia into federal service—cannot order or compel a governor to release a state's militia into federal service. However, the Supreme Court seemed to reverse this position seven years later.¹⁷¹

In 1814, the federal government requested Daniel Tompkins, the Governor of New York, release part of the states militia into federal service.¹⁷² Governor Tompkins complied with the federal government's request and ordered part of the New York militia into federal service.¹⁷³ One private, Jacob Mott, refused.¹⁷⁴ In 1818, a general court martial fined Mott ninety-six dollars which Mott did not pay.¹⁷⁵ As a result, the court martial sentenced Mott to twelve months' imprisonment.¹⁷⁶ In addition, Martin—a deputy U.S. Marshall—seized property belonging to Mott.¹⁷⁷ Mott attempted to recover the seized property by action of replevin, but the Supreme Court ruled unanimously against Mott.¹⁷⁸ In its opinion, the

169. *Id.* at 46 (emphasis in original).

170. Report on the Militia, Communicated to the House of Representatives, January 9, 1818, in 1 AMERICAN STATE PAPERS: DOCUMENTS, LEGISLATIVE AND EXECUTIVE, OF THE CONGRESS OF THE UNITED STATES 675.

171. *See* *Martin v. Mott*, 25 U.S. 19, 30 (1827) ("We are all of the opinion, that the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons.").

172. *See, e.g.*, 1 PUBLIC PAPERS OF DANIEL D. TOMPKINS, GOVERNOR OF NEW YORK 1807-1817, at 494 (1898) (stating the President made a requisition for a portion of the militia).

173. *See id.* (stating the New York Governor promptly complied and furnished a regiment).

174. *Martin*, 25 U.S. at 22.

175. *Id.* at 23.

176. *Id.*

177. *Id.*

178. *Id.*

Court ruled that Congress's authority to repel invasions "includes the power to provide against the attempt and danger of invasion" ¹⁷⁹ According to the Supreme Court: "One of the best means to repel invasion is to provide the requisite force for action before the invader himself has reached the soil."¹⁸⁰ The Court then cautioned that Congress's power to repel invasions is a limited power.¹⁸¹ The power is "confined to cases of actual invasion, or of imminent danger of invasion."¹⁸² Justice Joseph Story, delivering the Court's opinion, then asked: "If it be a limited power, the question arises, by whom is the exigency to be judged and decided?"¹⁸³ The Supreme Court's answer was that the "authority to decide whether the exigency has arisen [i.e., invasion or an imminent danger thereof] belongs exclusively to the President, and that his decision is conclusive upon all other persons."¹⁸⁴ Many interpret this decision as settling the question of who controls the militia decisively—"in favor of the national government."¹⁸⁵

Unfortunately, Justice Story rewrote the Constitution and the Militia Act of 1795. According to Justice Story's interpretation, Congress's authority to repel invasions includes the authority to provide "against the attempt and danger of invasion."¹⁸⁶ This may be true generally. If there is a sufficiently serious danger of invasion, Congress may deem it prudent to raise an army in order to provide "against the attempt and danger of invasion."¹⁸⁷ However, this is not the language one finds in the Constitution regarding the militia and invasion. On the contrary, the Constitution gives Congress the authority to provide for calling the militia into federal service to "repel invasions."¹⁸⁸

Now, it may be debatable whether Congress can delegate this authority to the President at all, but it is not debatable that Congress cannot delegate more power to the President than Congress possesses. Therefore, it is unclear how the constitutional authority to call the militia into federal service to repel invasions becomes a power to call the militia into federal service

179. *Id.* at 29.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at 30.

185. Robert L. Kerby, *The Militia System and the State Militias in the War of 1812*, 73 IND. MAG. HIST. 102, 114 (1977).

186. *Martin*, 25 U.S. at 29.

187. *Id.*

188. U.S. CONST. art. I, § 8, cl. 15.

because there is a *danger* of invasion. Likewise, the Militia Act of 1795 does not authorize the President to call the militia into federal service when there is danger of invasion. Quite to the contrary, the Militia Act of 1795 authorizes the President to call the militia into federal service only when there is an actual invasion or an actual *imminent* danger thereof.¹⁸⁹

Again, it may be debatable whether Congress has the authority to stretch its constitutional power to call the militia into federal service to repel invasions *into* a statutory power for the President to call the militia into federal service when there is an imminent danger of invasion. But, it is not debatable that the statutory language explicitly gives the President the power to call the militia into federal service in only two cases: invasion and when there is an imminent danger thereof—not any time a *danger* of invasion exists. Indeed, when referring to invasion, the phrase “imminent danger” is the same phrase used in the Constitution as a caveat to the clause prohibiting the states from engaging in war.¹⁹⁰

In this case, “imminent” does not mean “probable,” “possible,” or “likely.” It is a poor interpretation to read Article 1 Section 10 of the Constitution to mean a state cannot engage in war with a foreign power without the consent of Congress unless the state deems war with that foreign power to be probable, possible, or likely. Rather, “imminent” in this context brings to mind an action already in motion, an action so far advanced in its execution that the executor of that action either cannot or will not stop. The best interpretation of the Militia Act of 1795 is that Congress clarified that the President did not have to wait until after the United States was invaded; the President could repel an invasion that either already had begun or was so far advanced in preparation that the President could assume the invading force either could not or would not stop the preparations, even though foreign soldiers had not yet literally invaded the country.¹⁹¹ Justice Story continued that providing “the requisite force for

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

190. U.S. CONST. art. I, § 10, cl. 3 (“No state shall, without the Consent of Congress, . . . 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.”).

191. See, e.g., Speech of the Hon. Richard Stockton Delivered in the House of Representatives on the 10th December 1814 (“But, Mr. Speaker, perhaps it may be demanded of me whether the militia may not be called forth until an invasion actually takes place. It may be asked, must the government wait until the enemy lands upon our shores, before it can resort to [calling the militia into federal service]? Upon this point I would answer, that the act of Congress passed in 1795 to carry into effect

action” before the invader reaches the soil is one of the best ways to repel an invasion.¹⁹² Unfortunately, Justice Story confused the word “repel” for the word “deter.” A large force (or strong coastal or border defenses) may indeed *deter* a foreign power from attempting an invasion; however, the Constitution does not authorize the federal government to call the militia into federal service to deter an invasion.¹⁹³

Thus, Justice Story’s restatements of both Congress’s constitutional power to repel invasions and the President’s statutory power under the Militia Act of 1795 are inaccurate. As a result, Justice Story’s arguments in favor of allowing the federal government to call the militia into federal service in a situation other than an actual invasion or an imminent danger of invasion is unconvincing.

The Constitution, then, gives Congress the authority to call the militia into federal service to repel an invasion. In the Militia Act of 1795, Congress stretched that authority and authorized the President to call the militia into federal service when there was an imminent danger of invasion. The

that part of the Constitution now under consideration places this subject on its proper footing. That act authorizes the President to call forth the militia in case of invasion or imminent danger of invasion. This in terms is an extension of the provisions of the instrument, and it certainly goes to the very verge of the Constitutional limit; but I am disposed to think that it is a sound exposition of its true intent and meaning. The words of this law, not to be found in the Constitution, are “imminent danger of invasion,” and they seem to have been carefully selected for their accuracy and precision. By imminent danger is meant—impending; threatening, danger—danger at hand. It does not include danger only expected, or probable, resulting from a general state of war. For instance, it is no such emergency as is provided for in the constitution, that we are engaged in a war with a powerful nation, and that there is a moral certainty that she will invade some part of our territory. This would induce a provident administration to have a good army in the field, but does not authorize ordering the militia into actual service.” (emphasis omitted).

192. *Martin*, 25 U.S. at 29.

193. Some may posit that Justice Story referred to a scenario in which an invasion force arrives and finds a strong force, and as a result, the invasion force retreats without launching the invasion. Though, in this scenario the invasion was not imminent. Any number of factors, other than a strong defending force, explains the invasion force’s retreat: sickness, poor logistics, poor harbors, poor coordination, and so on. In other words, one cannot say that the defensive force even deterred the invasion force. One certainly cannot say the defensive force repelled an imminent invasion. Rather, any number of variables on the invading force’s part might have convinced the invasion force not to launch the invasion. Had one or more of those variables been absent, the invasion force might have launched the invasion regardless of the size of the defensive force. Finally, the number of soldiers and militia available to repel an invasion would be identical regardless of if the militia was under the command of the federal government or the state governments. Thus, if the number of militia under the command of the state governments available to repel an invasion is not enough to deter an invader, it is unclear how the exact same number of militia under the command of the federal government will be enough to deter an invader—especially since it is unlikely that an invader would know whether the militia were under the command of the state governments or the federal government.

Supreme Court ruled that neither of these two scenarios had to exist “in point of fact.” Rather, the Supreme Court ruled it was enough for the President to decide one of these scenarios existed, regardless of whether or not invasion or an imminent danger thereof in fact existed. The Supreme Court also ruled the President’s decision bound “all other persons.”¹⁹⁴ The Supreme Court gave the President such wide latitude because, according to Justice Story, one must presume the President’s determination is correct because the President is the head of the executive branch.¹⁹⁵ Justice Story wrote that to insist the President’s power is limited only to the two enumerated situations of actual invasion or actual imminent danger of invasion—and to insist on verifying one of those situations actually existed before accepting that the President’s order as legal—is to treat the President like a low government official.¹⁹⁶ Finally, the Supreme Court vested the President with the power to make this decision on the grounds that the President is the Commander in Chief of the militia when it is in the actual service of the federal government.

As discussed earlier, the President is not the Commander in Chief of the militia at all times. In addition, the Supreme Court ruled in *Houston v. Moore* that the militia was not in the actual service of the federal government only because the federal government helped equip or organize the militia, or because the federal government simply called out the militia, or even because the federal government ordered out the militia.¹⁹⁷ Rather, the militia was not in the actual service of the federal government until a governor ordered the state’s militia to assemble at a federally designated rendezvous area.¹⁹⁸ As a result, the President was not the Commander in

194. *Martin*, 25 U.S. at 30 (“[T]he authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons.”).

195. *See id.* at 32 (positing the high qualities possessed by the President and contending Congress and the public operate as effective checks on the President’s decision making).

196. *See id.* at 32–33 (“The argument is, that the power confided to the President is a limited power, and can be exercised only in the cases pointed out in the statute [the Militia Act of 1795], and therefore it is necessary to aver the facts which bring the exercise within the purview of the statute. In short, the same principles are sought to be applied to the delegation and exercise of the power entrusted to the Executive of the nation for great political purposes, as might be applied to the humblest officer in the government, acting upon the most narrow and special authority. It is the opinion of the Court, that this objection cannot be maintained. When the President exercises an authority confided to him by law, the presumption is that it is exercised in pursuance of law.”).

197. *Houston v. Miller*, 18 U.S. 1, 18 (1820).

198. *See id.* at 18–19 (implying the governor’s order of the militia in response to the President’s requisition of the militia is required to bring them into actual service).

Chief of the militia until a governor ordered the militia to assemble at a rendezvous area.

And so, the Supreme Court adopted two odd positions in *Martin v. Mott*. In the first position, the Supreme Court stated that the President's power to call the militia into federal service in order to repel an invasion, or because there was imminent danger of invasion, was a limited power that could be exercised only in those two instances.¹⁹⁹ However, the Court then stated neither one of those instances actually had to exist; the President simply had to determine *one* of those instances existed. In addition, the Supreme Court then admonished that to insist the "power confided to the President is a limited power, and can be exercised only in the cases pointed out in the statute" is to treat the President's authority as the same as a low government official's authority.²⁰⁰

In the second position, the Supreme Court ruled this presidential authority derives from the President's role as Commander in Chief of the militia when the militia is in the actual service of the United States.²⁰¹ However, the militia is not in the actual service of the United States until ordered by a governor to assemble at a federally designated rendezvous area. And so, the President is not the Commander in Chief of the militia until the governor releases the militia into federal service.

As a result, it is not clear how the President's decision that there exists an invasion, or the imminent danger of an invasion, can be "conclusive on all other persons" if one interprets "all other persons" to mean every single government official.²⁰² Though this interpretation has been dogma for many years,²⁰³ the phrase "all other persons" does not seem to refer to every single government official. Rather, the phrase "all other persons" seems to refer to everyone in the President's military chain of command:

Is the President the sole and exclusive judge whether the exigency [i.e., invasion or the imminent danger thereof] has arisen, or is it to be considered as an open question, upon which every officer to whom the orders of the President are addressed, may decide for himself, and equally open to be contested by every militia-man who shall refuse to obey the orders of the

199. *Martin*, 25 U.S. at 31.

200. *Id.* at 30.

201. *Id.* at 31.

202. *Id.* at 30.

203. See, e.g., TOMPKINS, *supra* note 172, at 494 (providing background of the act of Congress passed on April 18, 1814); see also Kerby, *supra* note 185 at 114.

President? We are all of opinion, that the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons. . . . A prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object. The service is a military service, and the command of a military nature; and in such cases, every delay, and every obstacle to an efficient and immediate compliance, necessarily tend to [jeopardize] the public interests. While subordinate officers or soldiers are pausing to consider whether they ought to obey, or are scrupulously weighing the evidence of the facts upon which the Commander in Chief exercises the right to demand their services, the hostile enterprise may be accomplished without the means of resistance.²⁰⁴

Thus, the phrase “conclusive on all other persons,” refers to officers and members of the militia while they are in the actual service of the United States. But a congressional report had already found that the governor of a state was not a militia officer and, thus, was not bound to obey the orders of the President.²⁰⁵ Justice Johnson subsequently reached the same conclusion.²⁰⁶ Still, Justice Johnson held a possibly contradictory view that the governor, as a military commander, was subordinate to the President on the grounds that the governor was Commander in Chief only of a state militia, while the President was Commander in Chief of the entire militia.²⁰⁷ But, the President is not Commander in Chief of the militia at all times; the President is Commander in Chief of the militia only after the militia is in the actual service of the United States.²⁰⁸

And the Supreme Court ruled the militia is not in the actual service of the United States until a governor orders the militia to assemble at a federally designated rendezvous area.²⁰⁹ Thus, the governor could not be a subordinate military commander to the President until the governor agreed to release a state’s militia into federal service. That is precisely what happened in both of the Supreme Court cases discussed in this section. The

204. *Martin*, 25 U.S. at 29–30.

205. Report on the Militia, *supra* note 170 at 675.

206. See *Houston v. Moore*, 18 U.S. 1, 40 (1820) (Johnson, J., dissenting) (“I will make one further observation in order to prevent myself from being misunderstood. I have observed, that the Governors of States, as military commanders, must be considered as subordinate to the President: I do not mean to intimate, nor have I the least idea, that the act of 1795 gives authority to the President to issue an order to a Governor in that capacity. I hold the opinion to be absurd; for he [the governor] comes not within the idea of a *militia officer* in the language of that act.”).

207. *Id.*

208. *Martin*, 25 U.S. at 31.

209. *Houston*, 18 U.S. at 40 (Johnson, J., dissenting).

governors of both Pennsylvania and New York complied with the federal government's request to release parts of the Pennsylvania and New York militias into federal service.²¹⁰ Both governors ordered their respective militia to assemble at a federally designated rendezvous area so as to enter federal service.²¹¹ When viewed in this way, Justice Story's opinion makes significantly more sense. The President decided there was either an invasion or an imminent danger of invasion. The President requested the governors call their respective state's militia into federal service. The governors complied, thereby agreeing with the President's decision.

As a result, when the governors ordered their militia to assemble at a rendezvous area, the members of the militia could not refuse because they would be refusing an order from their Commander in Chief (i.e., the governor). Therefore, it did not matter whether an officer or enlisted person agreed with the President's decision because, even though they were not yet in the actual service of the United States, they were in the service of the state. The officer or enlisted person could not refuse an order from their Commander in Chief. Once the militia assembled at the rendezvous area, the President became the militia members' Commander in Chief; thus, the militia members were unable to question the President's orders because the President was, at that point, the militia members' Commander in Chief. However, some may argue that when Justice Story called the President the "sole and exclusive judge" of whether there exists an invasion, or an imminent danger of invasion, the Justice intended for his opinion to prevent any future actions like those of the governors of Massachusetts, Connecticut, and Rhode Island when they refused to release their militias into federal service during the War of 1812. If that is the case, then Justice Story's opinion falls far short of its goal.

First, both cases the Supreme Court decided dealt with governors who complied with the government's request and ordered their respective militias to assemble in order to enter federal service. The case of a governor refusing to release the militia into federal service was not adjudicated. Secondly, the Supreme Court failed to show the governor is either a militia

210. It is worth noting there were material differences between when the President called out the New York and Pennsylvania militias in 1814 and when the governors of Massachusetts, Connecticut, and Rhode Island refused to release their militias in 1812. In July and August of 1812, the U.S. government had only just declared war. There had been no invasion and no indication one was imminent. By August 1814, the United States faced either actual invasion or imminent danger of invasion both in the north and on the coast.

211. *Houston*, 18 U.S. at 40 (Johnson, J., dissenting); *Martin*, 25 U.S. at 39–40.

officer or a subordinate military commander to the President at all times. In fact, one Justice and a congressional report stated the governor is not a militia officer and is not bound to carry out a President's military orders. In addition, it is unclear how a governor could be a subordinate military commander to the President before the governor has released the state's militia into federal service, since the President is not the Commander in Chief of the militia until that time.

III. THE MILITIA DEFINED

The Supreme Court and Congress have created a mess when it comes to understanding the militia. Currently, laws that do not have clear constitutional grounding govern the militia while Supreme Court decisions supporting these laws rest only on assertions that attempt to reconcile irreconcilable positions. For instance, the Illinois Supreme Court's 1879 definition of the militia is still in effect, even though the United States Supreme Court contradicted that definition in the same opinion in which the Court endorsed it.²¹² So, as discussed in Part II, either the *Perpich* decision invalidates itself since, according to the definition of the militia that the Court endorsed in that opinion, it is not possible to have either a militia made up of federal troops or a federal army made up of militia, or the Illinois Supreme Court's 1879 definition of the militia is obsolete. Earlier, we determined the evidence suggests this definition is obsolete.²¹³ As a result, we should establish a new definition.

The first step in establishing a new definition is to move away from thinking of members of the militia as people who belong to a particular organized body like the National Guard. Rather, the militia's membership is all persons in a state or territory who are of arms-bearing age.²¹⁴ The

212. *Dunne v. Illinois*, 94 Ill. 120, 138 (1879); *Perpich v. Dep't. of Def.*, 496 U.S. 334, 348 (1990).

213. *See supra* Part II.

214. Even though the United States Supreme Court in its *Perpich* decision ruled that the National Guard was an active militia, the Court did not rule that the National Guard was "the militia." On the contrary, the Court ruled that the National Guard (i.e., the "organized militia") was just a "portion" of the militia. *See Perpich*, 496 U.S. at 353 n.25 ("It is nonetheless possible that they [state defense forces] are subject to call under 10 U.S.C. §§ 331–33, which distinguish the 'militia' from the 'Armed Forces,' and which appear to subject all portions of the 'militia'—organized or not—to call if needed for the purposes specified in the Militia Clauses."). In 2016, 10 U.S.C. sections 331–33 cited by the Court were renumbered as sections 251–53. These sections allow the President to use the militia, the Armed Forces, or both to put down "insurrection in any State against its government" or "unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States . . ."

definition of the militia the Court endorsed in *Perpich* called this membership the “body of the militia.”²¹⁵ The second step is to create a definition that contains clear, necessary characteristics courts can apply uniformly. I submit the four characteristics that define the constitutional militia are: first, the militia is a military force;²¹⁶ second, the militia consists of all persons in a state or territory who are of arms-bearing age;²¹⁷ third, the militia cannot be deployed overseas;²¹⁸ and fourth, the militia is under the command of the state’s or territory’s governor. As a result, I submit the courts should define the militia as: (1) a military force; (2) that consists of all persons in a state or territory who are of arms-bearing age; (3) that cannot be deployed overseas; and (4) is under the command of the state’s or territory’s governor.

In the following sections, I briefly discuss three of these necessary characteristics. I believe the second necessary characteristic, that the militia consists of all persons in a state or territory who are of arms-bearing age, is self-explanatory.

A. *The Militia Is a Military Force*

The first characteristic of the militia is it is a military force.²¹⁹ Members of the militia should be outfitted and armed so they can be effective on a battlefield.²²⁰ This is a distinction largely forgotten by the courts.

or “insurrection, domestic violence, unlawful combination, or conspiracy . . .” Section 246 divides “the militia” into two classes: the organized militia and the unorganized militia. The National Guard is the organized militia. The unorganized militia is “the members of the militia who are not members of the National Guard or the Naval Militia.” 10 U.S.C. § 246(b)(2).

215. See *Perpich*, 496 U.S. at 348 (“The men comprising [the active militia] come from the body of the militia, and when not engaged at stated periods in drilling and other exercises, they return to their usual avocations, as is usual with militia, and are subject to call when the public exigencies demand it.”).

216. *Martin v. Mott*, 25 U.S. 19, 30 (1827).

217. *United States v. Miller*, 307 U.S. 174, 179 (1939) (“These [historical examples] show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense.”). With this necessary characteristic, my proposed definition of the militia differs from historical definitions of the militia only in that it includes all persons in a state or territory rather than only all males in a state or territory.

218. WICKERSHAM, *supra* note 119, at 325; Preparedness for National Defense, *supra* note 116, at 780.

219. See *Martin*, 25 U.S. at 30. Justice Joseph Story makes this point explicitly. Discussing the need for the militia members and officers to obey orders without question, Justice Story writes: “The [militia] service is a military service, and the command of a military nature . . .” *Id.*

220. The Supreme Court ruled in *Miller* that a shotgun barrel of less than eighteen inches did not qualify for protection under the Second Amendment because “it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the

Justice Scalia, for instance, described members of the militia as citizens capable of military service who used whatever weapons they possessed at home.²²¹ However, this is an inaccurate representation. Congress required that militia members possess a certain type of weapon for militia duty. In the Militia Act of 1792, Congress initially required the militia to equip themselves with only “a good musket or firelock” or with a “good rifle.”²²² However, Congress specified that within five years of the Act each musket would have to meet certain bore specifications.²²³ These bore specifications matched the bore size of the Charleville musket the French imported to the United States during the Revolution.²²⁴ The Charleville musket also served as the pattern for the first rifles contracted by the U.S. government in 1798.²²⁵ The United States military used weapons with the same bore specification through the War of 1812.²²⁶ In 1803, Congress amended the Militia Act of 1792 and required that all members of the militia “shall be constantly provided with arms, accouterments, and ammunition, agreeably to the direction of the [Militia Act of 1792].”²²⁷ Courts ruled the phrase “shall be constantly provided with arms” meant militia members

common defense” *Miller*, 307 U.S. at 178 (quoting *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 158 (1840)). Here, the Supreme Court cited the opinion of the Supreme Court of Tennessee in *Aymette v. State*. The justices of the Supreme Court of Tennessee ruled the Second Amendment allows citizens to keep and bear weapons that are “usually employed in civilized warfare, and that constitute the ordinary military equipment. If the citizens have these arms in their hands, they are prepared in the best possible manner to repel any encroachments upon their rights by those in authority.” *Aymette*, 21 Tenn. (2 Hum.) at 158.

221. *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008) (“But as we have said, the conception of the militia at the time of the Second Amendment’s ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty.”). In the most technical sense, Justice Scalia’s statement is true since Congress sent the Bill of Rights to the states in 1789 which was ratified in 1791, and the first Militia Act was not passed until 1792. However, this is inaccurate for an understanding of the militia after 1792.

222. Militia Act of 1792, ch. 33, 1 Stat. 271 (establishing a Uniform Militia throughout the United States).

223. *Id.* ([A]ll muskets for arming the militia . . . shall be of bores sufficient for balls of the eighteenth part of a pound.”); 16 U.S. Rev. Stat. § 1628 (1874).

224. JAMES E. HICKS, *U.S. MILITARY FIREARMS 1776–1956*, at 21 (1962).

225. *Id.*

226. Compare CARL P. RUSSEL, *GUNS ON THE EARLY FRONTIERS: FROM COLONIAL TIMES TO THE YEARS OF THE WESTERN FUR TRADE* 322–23 (1980) (discussing weapons used during the settlement and westward expansion of America), with 10 U.S.C. § 246(b)(2) (discussing militia composition and classes).

227. See Act of May 18, 1792, ch. 15, 2 Stat. 207 (providing efficiency for the national defense by establishing a uniform Militia throughout the United States).

must provide their own arms.²²⁸ Whereas the 1792 Act required militia members to furnish a weapon only when appearing for militia duty, the 1803 Act required each militia member be able to furnish a weapon at all times (i.e., a militia member could not simply borrow a weapon during training days; the weapon had to be in the militia member's possession at all times).²²⁹ The militia members owned these weapons for military service privately;²³⁰ though, in the early republic, militia members had significant difficulty obtaining weapons that met congressional specifications.²³¹ A

228. See *Commonwealth v. Annis*, 9 Mass. 31, 32 (1812) (“[E]very citizen so enrolled and notified shall, within *six months* thereafter, provide himself with a good musket.”); *Haynes v. Jenks*, 19 Mass. (2 Pick.) 172, 185, 187 (1824) (“[H]e should within that time voluntarily provide himself with arms and equipments.”).

229. Act of May 8, 1792, ch. 33, 1 Stat. 271.

230. Report by Mr. Varnum, from the Committee Instructed to Inquire What Measures Are Necessary to Be Adopted to Complete the Arming the Militia of the United States, April 2, 1806, in 1 AMERICAN STATE PAPERS: DOCUMENTS, LEGISLATIVE AND EXECUTIVE OF CONGRESS OF THE UNITED STATES 198 (1834) (“That, by the laws of the United States, each citizen enrolled in the militia is put under obligation to provide himself with a good musket or rifle, and all the other military equipments prescribed by law. From the best estimate which the committee have been able to form, there is upwards of 250,000 [firearms] and rifles in the hands of the militia, which have, a few instances excepted, been provided by, and are the property of, the individuals who hold them.”). It is unclear whether the figure, 250,000, that Varnum gives is a count of every firearm in the United States, or only those firearms suitable for militia duty according to the specifications established by Congress. However, it was the deficiency of muskets indicated in the militia returns from certain parts of the country that caused Varnum to ask that a congressional committee be formed to look into the matter. See *Arming the Militia*, THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES, 9th Cong. 337 (1852).

While it is possible that some weapons that did not strictly adhere to Congress's specifications appeared in the count, the fact that the congressional committee was focusing on weapons that should appear in the militia returns, thus weapons that met Congress's specifications, and the fact that the committee blamed the wars in Europe on a shortage of suitable militia weapons, it is most likely that this count includes only muskets and rifles that met Congress's specifications for military rifles suitable for militia duty, rather than every type of firearm in the country. In addition, the Militia Act of 1792 makes clear that the militia members' weapons were privately owned. The Act explicitly exempts the weapons from being used or seized for tax or debt repayment. See Act of May 8, 1792, ch. 33, 1 Stat. 271 (establishing a Uniform Militia throughout the United States). In addition, even an older English law that disarmed Catholic subjects strongly implies private ownership. See An Act to prevent & avoid dangers which may grow by Popish Recusants, 3 Jac. 1 c. 5 1077, 1082 (1689). Even when the English government confiscated the Catholic subject's weapon or weapons, the English government kept the weapon and maintained it at the subject's expense. Thus, the Catholic subject maintained private ownership of the weapon or weapons, but the subject no longer was allowed to “keep” the weapon or weapons, except for those weapons deemed necessary for self and home defense.

231. Report by Mr. Varnum, from the Committee Instructed to Inquire What Measures Are Necessary to Be Adopted to Complete the Arming the Militia of the United States, April 2, 1805, in 1 AMERICAN STATE PAPERS: DOCUMENTS, LEGISLATIVE AND EXECUTIVE OF CONGRESS OF THE UNITED STATES 198 (1834) (“It is highly probable, that many more of the militia would have provided

congressional committee attributed this difficulty to the wars in Europe, which stopped the importation of European firearms, as well as the United States' limited domestic capacity to produce quality firearms.²³²

However, if the militia is a military force, then that implies the militia should be organized. Some critics of the idea of a militia point out that it is not organized. However, strict organization is not a necessary factor in a militia. For example, the current laws governing the militia make clear a militia does not have to be organized in any way to qualify as a militia. Part of the current militia of the United States is the "unorganized militia."²³³

The early American leaders, though, tasked Congress with ensuring the militia was well-regulated. The early American leaders gave Congress the responsibility of organizing and disciplining the militia. As a result, the responsibility for the militia's regulation is Congress's responsibility—not the members of the militia. The early American leaders were clear that if Congress was derelict in its duty, the states had the authority to assume responsibility.²³⁴ As discussed in Part I, Congress has been derelict in its

themselves with fire arms in the same way, if they had been for sale in those parts of the United States where the deficiencies have happened; but the wars in Europe have had a tendency to prevent the importation of fire arms from thence into the United States, which, together with the limited establishments for the manufacture of that implement in the United States, has rendered it impossible for individuals to procure [firearms].").

232. *Id.*

233. 10 U.S.C. § 246(b)(2).

234. *Houston v. Moore*, 18 U.S. 1, 50–52 (1820) ("It is almost too plain for argument, that the power here given to Congress over the militia[] [i.e., the authority to organize, arm, and discipline the militia] is of a limited nature, and confined to the objects specified in these clauses; and that in all other respects, and for all other purposes, the militia are subject to the control and government of the State authorities. Nor can the reservation to the States of the appointment of the officers and authority of the training the militia according to the discipline prescribed by Congress, be justly considered as weakening this conclusion. That reservation constitutes an exception merely from the power given to Congress 'to provide for organizing, arming, and disciplining the militia;' and is a limitation upon the authority, which would otherwise depend upon their own appointment of officers. But the exception from a given power cannot, upon any fair reasoning, be considered as an enumeration of all the powers which belong to the States over the militia. What those powers are must [depend upon their constitutions]. Nor has Harvard College any surer title than constitutions; and what is not taken away by the Constitution of the United States, must be considered as retained by the States or the people. . . . Nor does it seem necessary to contend, that the power 'to provide for organizing, arming, and disciplining the militia,' is exclusively vested in Congress. It is merely an affirmative power, and if not in its own nature incompatible with the existence of a like power in the States, it may well leave a concurrent power in the latter. But when once Congress has carried this power into effect, its laws for organization, arming, and discipline of the militia, are the supreme law of the land; and all interfering State regulations must necessarily be suspended in their operation. It would certainly seem reasonable, that in the absence of all interfering provisions by Congress on the subject, the States should have authority to organize, arm, and discipline their own militia. . . . If Congress should not have exercised

responsibility to organize and discipline the militia. What the federal government calls the militia—the National Guard—is actually a federal army.²³⁵ However, even if one concedes that the National Guard is the militia, Congress remains derelict in organizing, arming, or disciplining the vast majority of the militia—the unorganized militia.²³⁶

As a result, the state governments have the authority to organize, arm, and discipline the unorganized militia within their own states. However, since the National Guard is not the militia, Congress has been completely derelict in its responsibilities to ensure the militia is well-regulated. Because of that dereliction, the states have the authority to ensure the militia is well-regulated. And in the event the states are derelict in that duty, the people have the authority to regulate themselves as a militia as best they can.²³⁷

its own power, how, upon any other construction, than that of a concurrent power, could the States sufficiently provide for their own safety against domestic insurrections or the sudden invasion of a foreign enemy? . . . Yet what would the militia be without organization, arms, and discipline? It is certainly not compulsory upon Congress to exercise its own authority upon this subject. . . . If, therefore, the present case turned upon the question, whether a State might organize, arm, and discipline its own militia in the absence of, or subordinate to, the regulations of Congress, I am certainly not prepared to deny the legitimacy of such an exercise of authority.”; *see also* 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 206 (1888) (Randolph, Va.) (“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.”).

An observant critic may argue: if the federal government’s authority to arm and discipline the militia is concurrent and not exclusive, then the State’s authority to train the militia also must be concurrent and not exclusive, and, therefore, Congress has the authority to train the militia. This was the same concern Patrick Henry expressed at the Virginia ratification convention; however, James Madison rejected the possibility, arguing Congress did not have the authority to train the militia. *See id.* at 90 (Madison, Virginia) (“The authority of training the militia, and appointing the officers, is reserved to the states. Congress ought to have the power to establish a uniform discipline throughout the states, and to provide for the execution of the laws, suppress insurrections, and repel invasions: these are the only cases wherein [Congress] can interfere with the militia . . .”). The word “reserve” appears only twice in the Constitution: first, when reserving to the states the rights to train the militia and appoint officers; and second, when reserving to the states or the people “powers not delegated to the United States by the Constitution, nor prohibited by it to the States.” U.S. CONST. art. I § 8 cl. 16, amend. X. We must presume that every word in the Constitution is deliberate. *Marbury v. Madison*, 5 U.S. 137, 174 (1803); *Holmes v. Jennison*, 39 U.S. 540, 570–71 (1840). As a result, we also must presume there is a reason the states’ rights to train the militia and appoint officers are the only rights the Constitution both explicitly reserves to the states and does not delegate to the United States. We must presume it is because the states possess those rights exclusively.

235. *See* discussion *infra* Section II.A.

236. *See* *United States v. Wright*, 117 F.3d 1265 (11th Cir. 1997) (stating an unorganized militia is not sufficiently well-regulated according to the intentions of the Second Amendment’s framers).

237. *See* GEORGE N. VOURLOJIANIS, *THE CLEVELAND GRAYS: AN URBAN MILITARY COMPANY, 1837–1919*, at 5–10 (2002) (discussing how several citizens formed private or “independent” militia companies when the state militia system began to fail and how members of these

However, the actual responsibility to ensure the militia is well-regulated rests with Congress. The fact that Congress neglects this responsibility does not mean Congress can disarm²³⁸ or disband the militia—Congress does not have the authority to do either. It means the states and territories or, if the states and territories also neglect that responsibility, the people themselves can exercise the authority to ensure the militia is well-regulated.

B. *The Militia Cannot Deploy Overseas*

The militia cannot be used to invade a foreign country or to conduct military operations in a foreign country. General James Parker was a Medal of Honor recipient who served as Head of Militia Affairs from 1903 to 1904. The Militia Act of 1903 created the National Guard.²³⁹ Seven months after the Act's passage, then-Lieutenant-Colonel Parker published an article explaining the National Guard's role. Parker wrote that the federal government intended the Militia Act of 1903 to increase "the defense power" of the United States.²⁴⁰ Indeed, the "paramount value of the law of 1903 is that its passage enables us now, for the first time, to evolve a competent system of defence."²⁴¹ Such a defensive system was necessary, Lieutenant-Colonel Parker wrote, because war was "foreordained."²⁴² The United States' entry into world affairs had made war with "a [p]ower of the first order" inevitable.²⁴³ However, Lieutenant-Colonel Parker cautioned that one no longer could count on a declaration of war to precede hostilities. Rather, "the first notice of hostilities may be the landing of an Army on our shores, the sacking or burning of our sea-coast towns."²⁴⁴ And here, Lieutenant-Colonel Parker wrote, the National Guard would serve its purpose. In such a situation, "we shall want . . . a first line of fairly well-trained troops, who will form a solid bulwark behind which our [v]olunteers may be got ready. This bulwark we are going to find in the Regular Army

companies used private funds to arm and uniform themselves, then presented themselves to state governments for recognition).

238. See *Wright*, 117 F.3d at 1265 (concluding the Second Amendment right to keep and bear arms does not apply to individuals because an unorganized militia is not sufficiently well-regulated).

239. See *Perpich v. Dep't of Def.*, 496 U.S. 334, 342 n.11 (1990) ("[T]he militia shall . . . be divided into two classes—the organized militia, to be known as the National Guard of the State . . .").

240. See James Parker, *The Militia Act of 1903*, 177 N. AM. REV. 278, 278 (1903) (explaining the main features of the Militia Act of 1903).

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

and the National Guard”²⁴⁵ Once the invasion had been halted, and the volunteer army formed, the volunteers would relieve the National Guard in order to carry on the war.²⁴⁶ Thus, those who first created the National Guard intended it to be a domestic force, primarily to offer a first defense against an invasion. Indeed, the Illinois Supreme Court’s 1879 definition of the militia quoted in *Perpich* states explicitly, “[the active militia] is simply a domestic force”²⁴⁷

C. *The Militia Is Under the Command of a State’s or Territory’s Governor*

A governor is the Commander in Chief of a state’s or territory’s militia. The President cannot be the Commander in Chief of a state’s or territory’s militia until that state’s or territory’s militia enters federal service. A state’s or territory’s militia can enter federal service only if one of the three constitutionally enumerated situations actually exists, and only after the governor has released the militia into the federal government’s service. Neither Congress nor the President has the authority to assume command of a state’s or territory’s militia unless the governor releases all or part of the militia into federal service and one of the constitutionally enumerated situations actually exists.²⁴⁸

However, Congress has expanded its authority, allowing itself to call the militia into federal service in situations other than those enumerated in the Constitution. For example, the Constitution allows Congress to call the militia into federal service to repel invasions. Congress later reworded that to “imminent danger of invasion,” which Richard Stockton considered “the very verge of the Constitutional limit.”²⁴⁹ However, under current law, the President can call the militia into federal service when there is only a danger of invasion²⁵⁰—which is well beyond Congress’s original constitutional

245. *Id.*

246. *Id.*

247. *See* *Perpich v. Dep’t of Def.*, 496 U.S. 334, 348 (1990) (“The men comprising it come from the body of the militia, and when not engaged at stated periods in drilling and other exercises, they return to their usual avocations, as is usual with militia, and are subject to call when the public exigencies demand it.” (quoting *Dunne v. People*, 94 Ill. 120, 138 (1879))).

248. 10 U.S.C. section 253 allows the President to take command of a state’s National Guard, without the consent of the governor, and command it in its capacity as a state force.

249. Speech of the Hon. Richard Stockton Delivered in the House of Representatives on the 10th December 1814, at 16; *see also* Militia Act of 1795, ch. 36, 1 Stat. 424 (providing authority to call forth the Militia to execute the laws of the Union, suppress insurrections, and repel invasions).

250. 10 U.S.C. § 12406(1) (2020). It is clear Congress understands this authority to apply to the “militia” and not to the National Guard as a federal army. *Id.* This statute gives the President the

authority. Congress cannot delegate more authority than it has, nor increase its constitutional authority over the militia.²⁵¹ Specifically, Congress cannot call—and cannot authorize the President to call—the militia into federal service for situations not enumerated in the Constitution.²⁵² And neither Congress nor the President can assume command of a state's or territory's militia without the consent of the governor.

IV. CONCLUSION

Here at the end, one may be tempted to ask: “What now?” It is a fair question. Some may worry this Article calls for disbanding the National Guard and doing away with all of its jobs and training dollars in the process. This is not the case. The current National Guard system is constitutional if one understands the current National Guard system is a federal army and its members are “troops”—as that word is used in the Constitution. The only real change needed regarding the current system is to abandon the fiction that the current National Guard system is a militia. It is a federal army.

The great danger is that Congress's apathy and dereliction regarding the militia may turn to belligerence. As a result, Congress may enact onerous regulations ostensibly in the name of disciplining the militia, but in fact regulating the militia out of existence. We should not commit the same mistake as the early American leaders, believing a governing body in which so much trust is placed will not exceed its authority simply because so much trust has been placed in it. As we have seen, Congress steadily has exceeded its authority regarding the militia.

authority to call “the National Guard of any State” into federal service. *Id.* Furthermore, section 101 defines “National Guard” as “the Army National Guard and the Air National Guard.” *Id.* at 101(c)(1). The following subsection defines “Army National Guard” as “that part of the organized militia of the several States and Territories, Puerto Rico, and the District of Columbia, active and inactive[] . . .” *Id.* at 101(c)(2). Likewise, section 101(c)(4) defines “Air National Guard” as “the organized militia of the several States and Territories,” that is a federally recognized and funded, trained land force “appointed[] under the sixteenth clause of section 8, article I, of the Constitution[] . . .” *Id.* at 101(c)(2)(A–D). Thus, section 12406, authorizing Congress to call the militia into federal service whenever a mere danger of invasion exists, is well beyond Congress's constitutional authority. Congress's constitutional authority allows it to call the militia into federal service to repel an invasion, not whenever there is only a danger of invasion.

251. Preparedness for National Defense, *supra* note 116, at 741 (“It is clear that Congress [cannot] by legislation extend the limits of its constitutional authority over the militia[] . . .”).

252. *Id.*

This leaves the courts as the best avenues for reasserting and protecting the militia. For most of United States history, courts have had a difficult time defining “the militia.”²⁵³ Consequentially, jurisprudence regarding the militia has become a tangled mess of contradictions.²⁵⁴ But, the militia’s four necessary characteristics outlined in this Article will provide a firm foundation upon which courts can rest future opinions regarding the militia—and facilitate the untangling of this mess.

253. *See supra* Part II.

254. *Id.*