THE CONSTITUTIONALLY PRESCRIBED ROLE OF STATES IN PROTECTING THE NATION'S SECURITY

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Clashes between the President and Congress over control of national security have erupted during almost every presidential administration. To provide two examples during the Trump administration, President Trump refused to comply with Congress's War Powers Resolution in using force against the Assad regime in Syria,[1] and Congress disputed the President's authority to declare a national emergency to fund the border wall.[2] Prior presidents have declined to comply with the War Powers Resolution as well[3] and, while the Constitution vests Congress with the power to declare war,[4] presidents have sent troops to battle on countless occasions on their own initiative.[5] Presidents today unquestionably play the preeminent role in providing for national security.

Lost in the debates over the respective powers of Congress and the President has been any recognition of the role that *states* play in the national security arena. Although states currently exercise almost no direct authority, such was not the case at our Founding. Indeed, as a matter of necessity, states played a critical role in defending the new nation, as they had under the Articles of Confederation. The Constitution in Article I enshrines the role of the states in national security.[6] Congress tasked the states with significant functions thereafter, and that lost history strongly suggests that, at least according to the framework at the Founding, Congress can exercise substantial discretion in deciding how best to pursue national security measures, including placing some responsibilities outside the President's direct control.

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1. *See* Tess Bridgeman, *Trump's War Powers Legacy and Questions for Biden*, JUST SEC. (Feb. 23, 2021), https://www.justsecurity.org/74903/trumps-war-powers-legacy-and-questions-for-biden/.

2. *Trump Vetoes Measure to End His Emergency Declaration on Border Wall*, REUTERS (Oct. 15, 2019), https://www.reuters.com/article/us-usa-trump-congress-emergency/trump-vetoes-measure-to-end-his-emergency-declaration-on-border-wall-idUSKBN1WV06P; Susan Davis, *Trump Vows Veto After Congress Blocks His Order to Build Border Wall*, NPR (March 14, 2019), https://www.npr.org/2019/03/14/703379399/congress-overturns-trumps-national-emergency-declaration-to-build-the-wall. For a broader discussion, see Nahal Toos & Marianne Levine, *Congress Looks to Usurp Trump's Foreign Policy Powers*, POLITICO (Dec. 6, 2018), https://www.politico.eu/article/congress-looks-to-usurp-trumps-foreign-policy-powers-after-jamal-khashoggi-killing/.

3. *See The War Powers Resolution: Concepts and Practice*, CONG. RSCH. SERV. (2019), https://crsreports.congress.gov/product/pdf/R/R42699.

4. U.S. CONST. art. I, § 8.

5. *See, e.g.*, Charlie Savage, Iran & Presidential War Powers Explained, N.Y. TIMES (Jan. 6, 2020), https://www.nytimes.com/2020/01/06/us/politics/war-powers-resolution-iran.html.

6. *See infra* text accompanying notes 7-34.

THE COMPACT CLAUSE

Start with the Constitution itself. Congress under Article I, Section 10 can consent to state agreements with foreign entities: "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power." Although an antecedent provision prohibits States from entering "into any Treaty, Alliance or Confederation,"[7] states may and have concluded agreements short of treaties with foreign powers, and the Constitution sanctions such efforts contingent on congressional approval. In other words, Congress under the Constitution can displace the President's role in foreign affairs to some extent and vest power instead in a particular state or group of states. The President can veto such plans, but Congress has the power to override the veto and authorize the agreement.

The Compact Clause followed a similar provision set out in the Articles of Confederation. Article VI provided that "No two or more states shall enter into any treaty, confederation or alliance whatever without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue."[8] The earlier Compact Clause permitted an orderly way to adjust boundary and other disputes among the semi sovereign states,[9] and the Articles of Confederation vested the Continental Congress with the authority to resolve any disputes that arose from a compact.[10] Under the Articles of Confederation, for example, the Continental Congress in 1784 directed the Massachusetts Governor to negotiate with British rulers in Canada in an effort to stem invasions in the aftermath of the Revolutionary War.[11]

Congress has triggered its power to consent to state agreements with foreign powers on relatively few occasions.[12] When New York, a decade after the Constitution Convention, entered into an agreement with the Oneida Tribes for land, the Senate ratified it, apparently on the ground that New York state leaders

7. U.S. CONST. art. I, § 10.

8. ARTICLES OF CONFEDERATION of 1781. States on their own initiative evidently reached out to conclude agreements with foreign entities. *See Abrahm D. Sofaer*, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER 24 (Ballinger 1976).

9. For the classic account see Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution: A Study in Interstate Adjustments*, 34 YALE L.J. 685 (1925).

10. ARTICLES OF CONFEDERATION of 1781, art. IV.

11. *See* Resolve for Appointing Agents to Repair to the Eastern Part of this State to Inform Themselves of Encroachments Made by British Subjects, and Instructing Them How to Proceed – July 7, 1784, in *A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debaters*, 1774-1875, available at https://memory.loc.gov/cgi-bin/ampage?collId=llsp&fileName=001/llsp001.db&Page=90 (last visited June 11, 2021) (This database created by the Library of Congress compiled "records and acts of Congress from the Continental Congress and Constitutional Convention through the 43rd Congress, including the first three volumes of the *Congressional Record*, 1873-75.").

12. On the other hand, Congress frequently has consented to state compacts over matters such as use of rivers, disposition of garbage, and the like. *See Congressional Consent*, BALLOTPEDIA, https://ballotpedia.org/Congressional_consent (last visited May 31, 2021).

were negotiating on behalf of the United States.[13] Less controversially, Congress approved New York and Canada's agreement to construct a bridge over the Niagara River in 1870.[14] More recently, Congress approved the International Emergency Management Assistance Memorandum of Understanding, which provided a framework for responding to national disasters among six northeastern states and five Canadian provinces.[15] Congress has even less frequently rejected state agreements with foreign powers, as it did by blocking part of the Great Lakes Basin Compact in 1968.[16] While vesting significant powers in states, the Compact Clause ensures that Congress can exert a check on states' self-dealing and also protect the nation's foreign interests.[17]

Indeed, states have crafted agreements with foreign nations over a wide variety of matters without ever receiving Congressional assent.[18] Notably, Kansas entered into an agreement with Cuba's food trade agency in 2003 to sell ten million dollars of Kansan agricultural products in return for Kansas' commitment to encourage a change in U. S. policy towards Cuba.[19] The tension with the prevailing presidential foreign policy at that time is clear. For another example, ten states joined ten European nations, two Canadian provinces and New Zealand in 2007 to form an International Carbon Action Partnership to promote cap and trade markets to combat global warming,[20] even though the federal government at that time had refused to join the Kyoto Protocol.[21] Congress for a number of reasons may have ignored such state efforts,[22] but the takeaway is that, immanent within the Constitution is a mechanism by which Congress can sanction state efforts to participate in national security outside the direct control of the President. Others have noted the potential federalism aspects of foreign compacts,[23] but the states' role under the Constitution also sheds light on the respective roles of Congress and

13. *See* UNIVERSITY OF NEBRASKA-LINCOLN, http://treatiesportal.unl.edu/earlytreaties/treaty.00028.html (last visited May 31, 2021).

14. Act to Authorize the Construction and Maintenance of a Bridge Across, the Niagara River, ch.176, 16 Stat. 173 (1870).

15. S.J. Res. 13, 110th Cong. Pub. L. No. 110-171, 121 Stat. 2467 (2007).

16. Act of July 24, 1968, Pub. L. No. 90-419, 82 Stat. 414. The Great Lakes Charter concluded by several states and Canadian provinces now manages the waters of the Great Lakes. GREAT LAKES COMMISSION, www.glc.org (last visited May 31, 2021).

17. That is not to suggest that the Supreme Court has demarcated clearly when such congressional consent is needed. *See, e.g.*, United States Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452 (1969) (minimizing need for congressional approval). For a critique, see Michael S. Greve, *Compacts, Cartels and Congressional Consent*, 68 MO. L. REV. 285 (2003).

18. *See, e.g.*, Duncan B. Hollis, *The Elusive Foreign Compact*, 73 MO. L. REV. 1071 (2008) (describing Missouri's agreement with Canada on water rights).

19. This example is canvassed in Hollis, *supra* note 18, at 1083.

20. *Id.* at 1082.

21. *Id.*

22. Congress presumably has little interest in consenting or blocking less politically charged state agreements promoting tourism or creating sister city programs and the like.

23. Hollis, *supra* note 18: Edward T. Swaine, *Does Federalism Constrain the Treaty Power*? 103 COLUM. L. REV. 403 (2003); Julian Ku, *The Most Dangerous Branch? Mayors, Governors, Presidents and the Rule of Law*, 115 YALE L.J. 2380 (2006).

the President. Aside from the veto power, presidents have no clear legal power to assert presidential prerogative in the face of a state compact approved by Congress.

The Supreme Court addressed this forgotten state power in *Holmes v. Jennison.*[24] The Governor of Vermont had ordered a murder suspect, who was Canadian, arrested and sent to Canada for trial even though neither the United States nor Vermont had an extradition treaty with Canada. The suspect filed a habeas petition, arguing in part that Vermont lacked authority to remit him to Canada. Although there was no majority decision, Chief Justice Taney wrote an opinion joined by three others that addressed the merits. He noted that the extradition authority must be considered one of the powers of foreign affairs that the Constitution vests in the federal government, and he concluded that Vermont could only agree to hand the suspect over to Canada if Congress had consented to Vermont's exercise of such power, which it had not. Although the decision stresses that the power to negotiate treaties with a foreign power is one for the federal government, not the states, it recognizes the role of Congress in approving less significant state agreements with foreign powers.[25]

The Supreme Court today might be inclined to limit the authority of states to influence foreign policy. For example, in *Zschernig v. Miller*,[26] the Court invalidated an Oregon statute limiting the rights of foreigners to inherit real property unless the foreign national's home country provides U.S. citizens an equivalent right. The Court reasoned that such foreign affairs measures rested exclusively in the federal government's purview -- the state measure represented an impermissible "intrusion by the State into the field of foreign affairs, which the Constitution entrusts to the President and Congress."[27] But, consider that Oregon instead might have entered into bilateral agreements defining inheritance rights with other countries. Through the Compact Clause, Oregon then would have accomplished the very result blocked by the Supreme Court in *Zschernig*. Congress can approve such bilateral agreements, even over the President's opposition.

An analogous separation of powers aspect of state compacts arose in the Ninth Circuit's decision in *Seattle Master Builders Ass'n v. Pacific Northwest Electric Power and Conservation Planning Council.*[28] There, Congress had approved a state compact entered into by Washington, Oregon, Montana, and Idaho to develop energy policies for the area served by the Bonneville Power Administration, a federal agency. Industry representatives challenged the policies formulated by the Council, arguing in part that, because the Council exercised

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24. Holmes v. Jennison, 39 U.S. 540 (1840).

25. *Id*. at 570-72.

26. Zschernig v. Miller, 389 U.S. 429 (1968). The Court more recently has recognized a limited role for states in foreign policy. *See, e.g*., American Insurance Assoc. v. Garamendi, 539 U.S. 396 (2003) (using its discretion to hold that certain state initiatives are not barred in and of themselves, but rather preempted). *See also* Movsesian v. Versicherung AG, 670 F.3d 1067 (9th Cir. 2012) (en banc) (holding that California's label of "genocide" affixed to slaughter of Armenians by Turks preempted by federal governmental policy).

27. 389 U.S. at 440.

28. Seattle Master Builders Ass'n v. Pac. Nw. Elec. Power & Conservation Plan. Council, 786 F.2d 1359 (9th Cir. 1986).

significant authority under the laws of the United States, its officers must be subject to the President's appointment authority. Although the Ninth Circuit did not dispute that the Council membership exercised significant authority, it held that Congress's consent for the state compact circumvented what otherwise would be the President's constitutional appointment authority.[29] Indeed, the Court concluded that there was nothing constitutionally suspect about a state compact, if approved by Congress, shaping the activities of a federal agency, in this case the Bonneville Power Administration. The President's Article II authority to superintend congressional delegation of the laws did not extend to a state compact's exercise of lawmaking authority.[30] Congress's assent to a state compact alters the separation of powers calculus. To a limited extent, Congress through the Compact Clause can direct state officials to discharge responsibilities that otherwise would be the President's to direct.

Viewed another way, the Compact Clause reflects a constitutionally grounded mechanism to permit congressional delegations of authority to states. When Congress delegates directly to state officials, subject to the President's veto, the President's ability to superintend that delegation is limited, and the President cannot exercise the appointment and removal authorities over state officials. Congress has authorized state officials to enforce a wide range of federal laws, such as the controversial delegation to enforce the Prohibition laws under the Volstead Act.[31] Congress more generally has incentivized state officials to enforce federal standards under the Environmental Protection Act,[32] and recruited state officials to determine social security benefits.[33] The Constitution accommodates the President's Article II supervisory authority with Congress' power to determine when to elicit state participation in law governance, authorizing states upon congressional consent to exercise delegated authority domestically and to enter into agreements with foreign nations.

To be sure, congressional agreement (over a President's veto) of a state compact might, at some point, violate the President's Article II responsibilities. If the agreement constitutes a "treaty," then the agreement could be struck as contrary to the constitutional scheme. Moreover, if the President imposed an embargo on Iran, congressional assent for a state agreement to provide goods and services to Iran (no matter how unlikely) might be invalidated, assuming that a court would find that the President enjoyed the authority to impose the embargo either unilaterally under the Constitution or due to prior congressional delegations. The Court might find that Congress could not alter the President's embargo policy indirectly through a compact, but rather must countermand the President's authority more directly through legislation. But, wherever the line drawn by the courts between the President's exercise of foreign affairs responsibilities under

29. *Id.* at 1364-65.

30. *See also* The Constitutional Separation of Powers Between the President and Congress, 20 Op. O.L.C. 124, 145 (1996) (arguing that Appointments Clause not triggered by duties exercised by state officials, even when duties flow from congressional delegation).

31. National Prohibition Act, ch. 85, 41 Stat. 305 (1919).

32. *See, e.g.*, Train v. Natural Res. Def. Council, 421 U.S. 60 (1975).

33. *See* Mathews v. Eldridge, 424 U.S. 319 (1976).

Article II and Congress's power to consent to compacts under Article I, Congress has wide leeway in approving state compacts with foreign entities and thereby influencing foreign policy outside the President's direction.

STATE POWER TO RAISE ARMIES

Article I also permits states to raise armies if Congress so consents: "No State shall, without the Consent of Congress . . . keep Troops, or Ships of War in time of Peace."[34] State militias were of course critical in the fight for Independence, and militias historically were drawn from all able bodied men within the state borders. The Constitutional provision suggests that, in addition, states could establish *standing armies* if Congress determined the need. Those armies would be under the supervision of state officers, not the President as Commander in Chief. Although never utilized, this provision reflects the Framers' conviction that Congress could choose to vest considerable military authority to states to defend the nation outside the President's direct control as Commander in Chief. The federalism underpinnings of the Constitution reveal Congress's prerogative, subject apparently only to presidential veto, to enlist state armies in plans for national security.

THE STATES' MILITIA AUTHORITY

The states' constitutional role in superintending militias played a more fundamental role historically. Under the Articles of Confederation, the new country relied upon state militias for most aspects of national defense, and when the Shays rebellion erupted, it was the Massachusetts militia rather than federal forces that quelled the rebellion.[35] The Constitution provides that Congress can call forth the Militia "to execute the Laws of the Nation, suppress Insurrections and repel Invasions," and that the states' militia can be "employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."[36] Thus, the Constitution envisions that states are to both appoint and train state militias even when Congress or the President has called the state militias to federal service. In calling forth the militia, the President would not be able to control either appointment of key military leaders or arrange for their training, and it was up to Congress, not the President, to specify what the training would entail.

Events soon after the Constitution was ratified highlight the key role played by state militias. Continuing incursions from Indian Tribes and the Spanish required state militias to protect the new nation. The militias, for the most part, served to safeguard the territory in their respective states. Congress authorized a

34. U.S. CONST. art. I, § 8.

35. *See* ALLAN R. MILLETT & PETER MASLOWSKI, FOR THE COMMON DEFENSE: A MILITARY HISTORY OF THE UNITED STATES 85-87 (1984).

36. U.S. CONST. art. I, § 8. The Second Amendment as well enshrines the key role of state militias, recognizing that "A well regulated Militia" was "necessary to the security of a free State."

small federal force, but its use proved insufficient to fend off major attacks, evidenced by the disastrous defeat suffered by General St. Clair in 1791 at the hands of the Western Confederacy of Tribes in the Northwest Territories.[37] The longstanding fear of standing armies left the federal government to depend upon state militias when confronting national security threats.[38] As Justice Story noted in his *Commentaries on the Constitution of the United States*, "if the militia could not be called to act, it would be absolutely indispensable to the common safety, to keep up a strong regular force in time of peace."[39] He concluded that "the regulation of the whole subject is always to be in the power of Congress."[40] Congress need not rely on the state militias, but the Constitution and early history of our nation reveal their critical function.

Congress's actions after ratification of the Constitution bolster what the constitutional provisions indicate on their face – the states played a fundamental role in national security. For instance, Congress in 1792 sought to regularize use of state militias and specify the conditions under which militias could be called to help with threats to *national* security.[41] In the Calling Forth the Militia Act, Congress, following the constitutional clause, provided three different contexts in which the President could call forth the militias.[42] First, the President on his own could call out the militia "whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe."[43] Second, whenever a state legislature or Governor affirmed that unrest within that state could not be contained, the President could call out militias from other states to help.[44] Third, Congress provided that the President could summon the militia "whenever the laws of the United States shall be opposed or the execution thereof obstructed, in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act."[45] In this third context, Congress provided in relevant part that the President could only then call out the militia if an Associate Justice or district judge certified that such a condition of lawlessness existed.

The Uniform Militia Act passed shortly after[46] provided for the organization of state militias and followed the Constitution in providing that each state militia, even when called into federal service, would be led by state-appointed officers. Congress also provided that such troops should be trained according to federal

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37. RICHARD H. KOHN, EAGLE AND SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT IN AMERICA 107-16 (Free Press, 1st ed. 1975).

38. *Id.* at 2-13

39. STORY, J., COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1196 (1833) at sec. 587.

40. *Id.*

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

42. *See* Stephen I. Vladeck, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 159-60 (2004).

43. *Id.*

44. *Id.*

45. *Id.*

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

standards, but that the training itself would be overseen by state officials. Congress included no penalties for a state's refusal to comply.[47]

The two militia acts highlight Congress' role in providing for national security, checking the President's ability to command state militias even in times of emergency. The President could not appoint officers in the militia and could only call out the militia in face of an internal threat when either a state through its legislature or governor affirmed the need or if an Associate Justice or district judge certified that the rule of law was threatened. As Justice Jackson later noted in the *Youngstown Steel* case, the First Militia Clause's "limitation on the command power, written at a time when the militia rather than a standing army was contemplated as the principal means of defense of the Republic, underscores the Constitution's policy that Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy."[48]

As during the period under the Articles of Confederation, militias attempted to protect settlers from warring Indian Tribes.[49] Moreover, the Washington Administration sought the help of militias to enforce the 1793 Neutrality Proclamation, because the modest federal forces could not have been deployed at key ports to prevent the outfitting of privateers and provision of other aid to one of the two belligerents – England and France.[50] The Administration also requested the help of the Kentucky militia to curtail French incursions in the Northwest Territory.[51]

Indeed, the Washington Administration initially failed to convince Pennsylvania to call out the militia against the Whiskey Tax protesters.[52] When Pennsylvania could not or would not contain the Whiskey Rebellion, President Washington called out the militia from other states as well in 1794, but only after Justice Wilson certified that a condition of lawlessness existed – "in the counties of Washington and Allegany, in Pennsylvania, laws of the United States are opposed and the execution thereof obstructed by combinations too powerful to be suppressed by the ordinary course of judicial proceedings or by the process vested in the marshal of that district."[53] President Washington scrupulously followed the limitations in the Act. Although Congress granted the President greater control over the militias in 1795,[54] the fact remains that state-controlled militias constituted the primary means of national defense for the first generation.

Moreover, on several occasions, states refused presidential orders with respect to deployment of their militias. Massachusetts and Connecticut declined President Jefferson's request to utilize their militias to enforce the Embargo of

47. For the Common Defense, *supra* note 35, at 90.

48. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 644 (1952).

49. Unfortunately, the militias at times committed depredations against Indian Tribes instead of adopting a defensive posture. *See generally* KOHN, *supra* note 37.

50. ROBERT W. COAKLEY, THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS, 1789-1878 24-28 (1988).

51. *Id*. at 26.

52. *Id*. at 36.

53. Hollis, *supra* note 18, at 37.

54. Act of Feb. 28, 1795, ch. 36, 1 Stat. 424 (removing requirement of judicial certification).

1808.[55] Later, Massachusetts and other New England states refused a presidential order to launch an attack into Canada during the War of 1812.[56] These examples reveal that presidents were largely dependent upon states in providing for the national defense.

The Framers' decision to recognize the importance of states in protecting national security should not be surprising. States played the vital role in supplying troops and the wherewithal to fight the British (and Native American tribes) after Independence. State participation in national security continued after the Constitution was ratified. There simply was too little federal infrastructure in terms of military might for the federal government to go it alone.[57] Taken together, the Constitutional provisions authorizing Congress to consent to state agreements with foreign entities; to authorize states to establish standing armies; and for states to retain control over the militias that were the backbone of the nation's defense support a congressional power to look beyond the President in determining how best to safeguard national security.

CONCLUSION

This brief canvas of forgotten history may not influence anyone concerned today about the respective roles of Congress and the President in providing for national security. Although the threats to national security were acute at the Founding, the nature of the threats have changed substantially. The Framers faced constant peril, but the dangers of biologic warfare, cyberwarfare, and atomic power were generations away. Some today accordingly may focus entirely on which governmental entity is best positioned to pursue national security initiatives effectively, while others may seek to ensure that a system of checks and balances, which underlies so much of the Constitution's framework, applies in the national security context as well. But the lessons of history are worth reviewing. By vesting states with such a prominent role in national security, the Framers

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55. COAKLEY, *supra* note 50, at 89-90. The Massachusetts courts deemed the use of militia to enforce the embargo illegal, as did the Connecticut Governor.

56. Glenn S. Gordiner, The Rockets' Red Glare: THE WAR OF 1812 AND CONNECTICUT, 88 (2012). Under the Militia Acts, it was not clear whether the President enjoyed the authority to order the militia to cross national boundaries. *See also* MILLETT, *supra* note 35, at 103 (New England Governors asserted the right to determine if militias were deployed for an appropriate purpose).

57. Congress enlisted state support in criminal law enforcement as well. Congress provided that fines for violation of the 1794 Carriage Act, Act of June 5, 1794, ch. 45, 1 Stat. 375, might be sought before any state court, as for penalties under the License Tax on Wines and Spirit Act, Act of June 5, 1794, ch. 49, 1 Stat. 378. Congress assigned state officials direct enforcement authority under the notorious Fugitive Slave Act, Act of Feb. 12, 1793, ch. 7, 1 Stat. 302, and state officials were directed to apprehend deserting seamen, Act of July 20, 1790, ch. 29, 1 Stat. 71. Congress also vested state courts with the authority to direct apprehension of enemy aliens and order their removal. Alien Enemy Act, Act of July 6, 1798, ch. 66, 1 Stat. 577. Indeed, the South Carolina Supreme Court later upheld prosecution of a federal postal offense in state court, stating that "[a]n offense against the laws of the United States is an offense against the laws of South Carolina, and she has the right to punish it." State v. Wells, 20 S.C.L. 687, 695 (S.C. App. L. & Eq. 1835). *See generally* Harold J. Krent, *Executive Control over Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275 (1989). But, in contrast to reliance on state actors in federal criminal law enforcement, the role of states in national security is "baked in" the Constitution.

contemplated that Congress would exercise significant discretion in determining the most effective means to safeguard the country, including permitting states to exercise responsibilities that today we associate exclusively with the President.