Calling Forth Clause

"The Congress shall have Power . . . To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions . . . ."

I. Introduction

On certain occasions, Anglo-American law has recognized that able-bodied civilians may be required to perform military service. Those able-bodied civilians are collectively referred to as the "militia." The power to call forth the militia was the power to summon all or part of the able-bodied manpower of the civilian community for emergency military purposes. The power to call forth the militia into federal service was the most clear expression of federal power to conscript citizens for military purposes in land warfare. Depending on one's views about the constitutionality of conscription into the army (see Armies Clause), the calling forth power might have even been the exclusive method.

II. History before 1787

Until the seventeenth century, England saw no need to maintain a standing army, and the English viewed such an institution as dangerous to civil liberty (see Armies Clause). Because of its geographic separation from Europe, England relied primarily on its navy for defense.[1] When land forces were needed for specific conflicts abroad, the Crown raised temporary armies. And when war came to England, the Crown could either raise temporary armies or call upon the able-bodied citizenry (the militia) to come to the realm's defense.

During the Middle Ages, the Crown experimented with different legal authorities for raising land forces. Among some others, these included feudal requirements to perform military service as a condition of land ownership, the hiring of soldiers on contract (enlistments), and compelling individuals to perform military service.[2] The collapse of feudalism in the Late Middle Ages left voluntary enlistment contracts and compulsion as the primary means of raising land forces.[3]

The English disliked mandatory military service, and they largely resisted it. Under traditional international law, war could be classified as either defensive or offensive.[4] England did not recognize a general duty to perform military service in offensive wars. Instead, England recognized only a more limited duty to perform defensive military service.[5] During the late 13th- and early 14th centuries, the Crown tried to compel military service abroad. But this effort "was not in the end successful, and had proved politically dangerous."[6]

Over the succeeding centuries, Parliament enacted various preventative statutes. These statutes prohibited the Crown from calling militiamen outside their counties of residence, except in cases of invasion and rebellion.[7] English law also prohibited compelling militiamen to serve abroad.[8] If

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[1] Ian Beckett, *The Amateur Military Tradition*, *in* THE OXFORD HISTORY OF THE BRITISH ARMY 385 (David Chandler & Ian Beckett, eds., 1996) [hereinafter Oxford History]..

[2] Michael Prestwich, *The English Medieval Army to 1485*, *in* OXFORD HISTORY, *supra* note 1, at 4–17. The Crown also hired mercenaries. *Id.* at 10–11.

[3] *Id.* at 5, 10.

[4] EMER DE VATTEL, THE LAW OF NATIONS 471, 187–91 (Bela Kapossy & Richard Whatmore eds., Liberty Fund 2008) (1797).

[5] Prestwich, *supra* note 2, at 15; CORRELLI BARNETT, BRITAIN AND HER ARMY 1509–1970: A MILITARY, POLITICAL AND SOCIAL SURVEY 41 (1970); A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 285 (3d ed. 1889).

[6] Prestwich, *supra* note 2, at 10.

[7] Statute the Second 1326, 1 Edw. 3 c. 5 (Eng.), 1 Statutes of the Realm 255; Militia Act 1776, 16 Geo. 3 c. 3 (Gr. Brit.); F.W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 277 (Cambridge Univ. Press 1920) (1908).

[8] DICEY, *supra* note 6, at 285.

the Crown wanted to send a land force outside the realm, it had to seek volunteers.[9] And although no constitutional principle prohibited embodying the militia for the duration of a defensive conflict,[10] England often limited how long militiamen could be in actual service before being rotated out.[11]

At the Founding of the British colonies in America, similar legal rules applied in the colonies. Service in the militia was generally limited to defensive service within the person's colony.[12] The colonies also frequently limited active service to three months at a time.[13] If the colonies wanted a person to serve a longer period—or if they wanted to send the person on an expedition or offensive operation outside the colony—they had to seek war volunteers.[14]

The result was two tracks of military land service. Army service under enlistment contracts was not restricted. Professional soldiers could be used in defensive or offensive wars, and they could serve at home or abroad. Militiamen, in contrast, were liable to serve only in defensive conflicts, and their service was restricted to Britain or, in America, to their colony.

After the Declaration of Independence, the states quickly established their own constitutions. Most of these early state constitutions contained clauses similar to the U.S. Constitution's "Calling Forth" clause. The state constitutions, however, typically vested the power to call forth the militia in the Governor rather than the legislature, but they required the Governor to act with the consent of the legislature or of a privy council or they allowed the governor to act alone only in limited situations.[15]

The Articles of Confederation did not empower Congress by itself to call forth the militia. But they did provide that "every state shall always keep up a well regulated and disciplined militia, sufficiently armed and accounted."[16] They further allowed Congress "to make requisitions from each state for its quota" of troops for the Continental Army.[17]

III. Constitutional Convention and State Ratifying Conventions

The Constitutional Convention debated when the federal government should be allowed to call forth the militia and against whom. An early proposal authorized the federal government "to call forth the force of the union against any member of the union failing to fulfill its duty under the articles thereof."[18] James Madison thought the provision should operate against individuals, not against the states because it "would look more like a declaration of war."[19] Elbridge Gerry additionally expressed

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[9] BARNETT, *supra* note 5, at 41.

[10] *Ex parte* Coupland, 26 Tex. 386, 429 (1862) (Bell, J., dissenting in part) (interpreting the Confederate Constitution, but with reference to the same general law reflected in the U.S. Constitution) (explaining that the militia "may be kept in service as long as the necessities of the case may require").

[11] Ian Roy, *Towards the Standing Army*, *in* OXFORD HISTORY, *supra* note 1, at 24, 26.

[12] JOHN K. MAHON, HISTORY OF THE MILITIA AND THE NATIONAL GUARD 32 (1983).

[13] *Id.*

[14] *Id.*

[15] *See, e.g.*, Del. Const. of Sept. 11, 1776 art. IX: ("The president, with the advice and consent of the privy council, may embody the militia."); Md. Const of Nov. 11, 1776 art. XXXIII ("[T]he Governor, by and with the advice and consent of the Council, may embody the militia . . . ."; Mass. Const. of June 15, 1780 pt. 2, ch. II, § I, art. X ("The governor of this commonwealth . . . shall have full power . . . for the special defence and safety of the commonwealth, to assemble in martial array, and put in warlike posture, the inhabitants thereof"); N.C. Const. of Dec. 18, 1776 art. XVIII ("The Governor . . . in the recess of the General Assembly, shall have power, by and with the advice of the Council of State, to embody the militia for the public safety."); Va. Const. of Jun. 29, 1776 ("The Governor may embody the militia, with the advice of the Privy Council").

[16] Arts. of Confederation art. VI, cl. 3.

[17] Id. art. IX, cl. 5.

[18] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 61 (Max Farrand ed., 1911).

[19] *Id.* at 54.

concern that "this clause 'ought to be expressed so as the people might not understand it to prevent their being alarmed.'"[20] A revised proposal was also considered.[21]

Eventually, the Committee on Detail listed, among Congress's enumerated powers, "to (make laws for) call(ing) forth the Aid of the Militia, in order to execute the Laws of the Union, (to) enforce treaties, (to) suppress Insurrections, and repel invasions."[22] The Convention struck the part about enforcing treaties as duplicative of enforcing federal laws.[23] So amended, the provision was agreed to without dissent.[24]

Although the provision passed the Constitutional Convention easily, debates were more heated in the state ratifying conventions. Debates fell into three categories: the circumstances that would justify deploying the militia, what restrictions should be placed on federal exercise of the power, and the role of the states.

Circumstances. The militia could be used to fight foreign enemies or domestic ones. With respect to foreign enemies, the state ratifying conventions had no significant debate about the propriety of using the militia to repel invasions.

Domestic use of the militia, however, was more controversial. At the Virginia Ratifying Convention, Anti-Federalists objected to allowing the federal government to use the militia for law enforcement. Contemporary political thought believed that obedience to the laws should generally be secured by consent, not by force.[25] Patrick Henry feared that allowing the federal government to use the militia (a military force) as the routine method of law enforcement would allow the implementation of oppressive and unconstitutional laws.[26] Moreover, the Constitution did not explicitly provide for civil officers to enforce the law. Madison responded that the provision provided Congress with the power to use the militia when necessary, but that, in the ordinary course, the authority to use the militia did not displace civil officers as the principal means of law enforcement. Madison also argued that, when resistance overwhelmed civilian authorities, it was better for the militia (a civilian army representative of the people) to enforce the laws than for a standing army of professional soldiers to do so.[27] Here, it is interesting to note that although the Constitution expressly permits the federal government to use the militia for domestic law enforcement, it is silent on whether the federal government may use the regular army and navy for the same domestic purposes.

Limitations. The Anti-Federalists were also afraid that Congress might abuse its power to call forth the militia in various ways, such as by marching the militia of Georgia into the New England states.[28] George Mason particularly feared that the federal government might intentionally make militia duty so burdensome that the citizenry would appeal to Congress to raise a large standing army so that they would not have to perform military service.[29] Consequently, Anti-Federalists sought various limitations on the federal power to call forth the militia.

Role of the States. When it came to state power, two major issues arose. First, Anti-Federalists sought to interject state governments into the process of calling forth the militia by requiring some form

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[20] *Id.*
[21] *Id.* at 245.
[22] 2 *id.* at 168.
[23] *Id.* at 389–90.
[24] *Id.* at 390.
[25] JOHN PHILLIP REID, IN DEFIANCE OF THE LAW 103–07 (1981).
[26] *The Virginia Convention: Monday, 16 June 1788 Debates*, *in* 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1300 (John P. Kaminski et al. eds., 2000).
[27] *Id.* at 1302–03.
[28] *Id.* at 1269–70.
[29] *Id.* at 1271.

of state-level consent.[30] Second, Anti-Federalists sought assurances that the power to call forth the militia was not exclusive in Congress and that states could still use their militia forces for domestic law enforcement or to suppress insurrections.[31]

At the state ratifying conventions, the Anti-Federalists proposed various amendments to address their objections. As Justice Story observed in 1833, these amendments "were never duly ratified, and have long since ceased to be felt, as matters of general concern."[32]

IV. Early Practice

Academics have long debated whether the President's Commander-in-Chief power includes the power to deploy regular forces without Congress's advance consent. For the militia, however, the Constitution explicitly grants deployment power to Congress. Initially, Congress exercised the power directly on a case-by-case basis. In 1789, for example, Congress authorized the president, during the current session of Congress only, to call forth the militia "for the purpose of protecting the inhabitants of the frontiers of the United States from the hostile incursions of the Indians."[33]

Beginning in 1792, Congress enacted a broad delegation to the President to use the militia for the reasons enumerated in the Constitution. (During the congressional debates, the breadth of Congress's delegation to the president created some controversy.[34]) In case of invasion, Congress authorized the president "to call forth such number of the militia" as he thought necessary.[35] To respond to insurrections against a state, Congress authorized the president to call forth the militia of other states.[36] And for law enforcement, Congress authorized the president to call forth the militia of the state where the obstruction of the laws was occurring, and if that was insufficient, the militia of other states.[37]

Congress also imposed significant limitations on the president's authority. When calling forth the militia to repel an invasion, Congress directed the president to call forth the militia "of the state or states most convenient to the place of danger or scene of action."[38] And before using the militia for domestic law enforcement, Congress required that a judge first notify the president that the resistance was "too powerful to be suppressed by the ordinary course of judicial proceedings."[39] Thus, in providing for calling forth the militia by statute, Congress addressed earlier Anti-Federalist objections that Congress might march the militia long distances or use the militia as the routine means of enforcing the laws.

V. Controversies and Judicial Precedent

The federal nature of the militia—the militia is split between the national and state governments—has caused significant problems. During the War of 1812, Federalist governors in Connecticut and Massachusetts, who opposed the war, refused the call of the President to deploy their militia. The Massachusetts Supreme Judicial Court ruled that state commanders-in-chief could

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[30] *See, e.g.*, DAVID E. YOUNG, THE ORIGIN OF THE SECOND AMENDMENT 160, 476 (1995) (collecting sought amendments).
[31] *Id.* at 1270.
[32] 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1197 (1833).
[33] Act of Sept. 29, 1789, ch. 25, § 5, 1 Stat. 95, 96.
[34] 1 DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789–1801, at 160–31 (1997).
[35] Act of May 2, 1792, § 1, 1 Stat. 264, 264
[36] *Id.*
[37] *Id.* § 2.
[38] *Id.* § 1.
[39] *Id.* § 2. The restriction was removed in the Militia Act of 1795. Act of Feb. 28, 1795, ch. 36, § 2, 1 Stat. 424, 424.

determine whether a sufficient emergency existed to deploy the militia.[40] The states, moreover, refused to place their militia forces under the command of regular army officers.[41]

Both positions met strong objections from the federal government. In *Martin v. Mott*, the Supreme Court held that Congress gave the president sole and unreviewable authority to determine when an emergency exists to deploy the militia.[42] And at the conclusion of the War of 1812, Secretary of War James Monroe sent a letter to the Senate rebuking the obstructionist actions of the Federalist governors in New England.[43] Justice Story also noted that if the Massachusetts court's opinion were correct, "the public service must be continually liable to very great embarrassments."[44]

Finally, the explicit power to call forth the militia only for domestic, defensive purposes has caused great trouble. In the War of 1812, some militia units refused to pursue the British into Canada, believing that to be an unconstitutional use of the militia to invade another country.[45] And, particularly in the 20th century, Congress has sought to use nonprofessional forces for offensive operations overseas.[46]

Legally, the consensus has been that the three enumerated constitutional purposes are exclusive. In 1912, Attorney General George W. Wickersham opined that Congress could only authorize use of the militia to enforce the laws, suppress insurrections, and repel invasions.[47] The militia might be sent outside the country incidental to repelling an invasion, but it could not be used offensively.[48] But the consensus has seen occasional dissent. In 1812, during another debate over the constitutional status of the volunteers (see Armies Clause), some Congressmen argued that Congress could deploy the militia abroad incidental to its power to declare war.[49]

In the 20th century, these legal disputes were largely mooted through using the Armies Clause.[50] Congress can now conscript the body of the militia into the regular army using the Selective Service System. And Congress has effectively required the organized militia of the states (i.e., the state Army National Guard forces) to enroll in the Army. By using the Armies Clause, Congress has assumed the power to deploy nonprofessional soldiers abroad for offensive operations, rendering these limitations on the militia effectively nugatory. And because officers and soldiers of the organized militia are also enrolled in the Army, Congress can exercise direct authority over them in their capacity as Army soldiers, bypassing state governmental officers when necessary.

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[40] Op. of Justices, 8 Mass. 548 (1812).
[41] *See id.*
[42] Martin v. Mott, 25 U.S. (12 Wheat.) 19, 28 (1827).
[43] Robert Leider, *Federalism and the Military Power of the United States*, 73 VAND. L. REV. 1011–14 (2020) (recounting incident).
[44] 3 STORY, *supra* note 32, § 1210.
[45] RUSSELL F. WEIGLEY, HISTORY OF THE UNITED STATES ARMY 120 (1967).
[46] Leider, *supra* note 43, at 1018–19.
[47] Auth. of President to Send Militia into A Foreign Country., 29 U.S. Op. Atty. Gen. 322 (1912).
[48] *Id.* at 324.
[49] *See, e.g.*, 23 ANNALS OF CONGRESS 735–37, 743–46 (Joseph Gales ed., 1837) (1812).
[50] Leider, *supra* note 43, at 1017–50; Robert Leider, *Deciphering the Armed Forces of the United States*, 57 WAKE FOREST L. REV. 1195, 1228–33 (2022) (both discussing).