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The Limits of Executive Power in Crisis in the Early Republic: Martin v. Mott—An Old Gray Mare—Reexamined Through Its Own History

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"The old gray mare, she ain't what she used to be,
Ain't what she used to be, ain't what she used to be,
The old gray mare, she ain't what she used to be,
Many long years ago."[1]

INTRODUCTION

Decided in 1827, *Martin v. Mott* is one of the Supreme Court's earliest opinions on executive power over United States citizens during a national crisis.[2] Perhaps because Justice Joseph Story, the author of *Mott*, penned, "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," scholars have insisted that the Court recognized a vast power in the presidency to call citizens into military service as well as possess an absolute command over the armed forces.[3] For instance, in 1951, Clinton Rossiter expounded that *Mott* stood for the proposition that a president's "war power" cannot be "shackled" with "sophistries about the nature and purpose of the militia."[4] He also penned, "the complex system of government of the democratic, constitutional state is essentially designed to function under normal, peaceful condition," and then implied that in wartime the courts cannot protect individual rights to the same degree as in times of peace.[5]

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1. On this song, see Frances M. Barbour, *Some Uncommon Sources of Proverbs*, 13 MIDWEST FOLKLORE 97–100 (1963).

2. Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827).

3. *Id.* at 30. *See also* CLINTON ROSSITER, THE SUPREME COURT AND THE COMMANDER IN CHIEF 16–17 (1951) [hereinafter ROSSITER, THE SUPREME COURT] (concluding that when the president decides to use military force to preserve the peace, neither the decision itself nor the methods employed are open to the courts of the United States); John F. O'Connor, *The Origins and Application of the Military Deference Doctrine*, 35 GA. L. REV. 161 (2000) (citing *Mott* as the first opinion to advance the judicial branch's deference doctrine on military law).

4. ROSSITER, *supra* note 3, at 15. On Rossiter's influence in political science studies as well as on the law, see David Rudenstein, *Roman Roots for an Imperial Presidency: Revisiting Clinton Rossiter's 1948 Constitutional Dictatorship: Crisis Government in the Modern Democracies*, 34 CARDOZO L. REV. 1063, 1064 (2013); Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789, 1799 (2009).

5. CLINTON L. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 5 (1948) [hereinafter ROSSITER, CONSTITUTIONAL DICTATORSHIP].

Rossiter was not alone in his views. In 1972 Eugene Rostow, a one-time dean of Yale's law school and Under Secretary of State during President Lyndon Johnson's presidency, claimed that *Mott* enabled a president to commit the United States to an undeclared war.[6] In 1996, Professor John Yoo, an adherent to the unitary executive theory,[7] gave Rossiter's observation further life in writing that Jacob Mott had failed to convince the judiciary that it, rather than the president, should be the final arbiter of what constitutes an emergency.[8] None of these statements, as evidenced in the history of the appeal and what the Court actually decided, are close to being fully accurate. Indeed, preeminent among the misinterpretations of *Mott* is that the Court actually continued to tolerate a degree of state judicial oversight of federal courts-martial, thereby not recognizing a wholly new expanded executive power.

Although there are several scholars who advocate for a unitary executive theory, it is helpful to recognize that Justice Antonin Scalia articulated a judicial definition for the theory in his *Morrison v. Olson*

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6. Eugene Rostow, Letter to the Editor, *Undeclared War is Not Unconstitutional*, N.Y. TIMES, Aug. 22, 1972, at 42.

7. *See* Neal Kumar Katyal, Hamdan v. Rumsfeld*: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65 (2006). Professor Katyal notes that the unitary executive theory of the presidency typically refers to the idea that the president controls the executive branch and the corollary proposition that Congress cannot dictate how the president supervises or directs subordinates who exercise executive power. *Id.* at 69 n.16 (citing Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165–66 (1992)). Professor Katyal then notes that the Bush administration employed an extreme view of executive power, which emphasized an alleged presidential authority to act even without Congress or in defiance of the laws, as the administration "was sold a wild-eyed theory, masquerading as a unitary executive concept." *Id.* I agree with Katyal's interpretation of both the traditional view and the recent extremism of the theory. For the purpose of this Article, the extreme view of the theory is what is criticized.

8. John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 289–90 (1996). For a similar interpretation, see Amy McCarthy, *Unequal Law, Unequal Burden: The All-Male Selective Service Act, Civilian Rights, and the Limits of Military Deference in Modern Supreme Court Jurisprudence*, 45 FLA. ST. L. REV. 137, 150–52 (2017). In 1880, Thomas McIntyre Cooley penned, "Congress may confer upon the President the power to call [the militia] forth, and this makes him the exclusive judge when the exigency has arisen for the exercise of the authority." THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 91 (2d ed. 1891). But this is not necessarily so, as Congress could also withdraw its discretionary grant.

dissent.[9] *Morrison* arose from Assistant Attorney General Theodore Olson's challenge to the Office of Independent Counsel's subpoena authority.[10] Olson argued, with Scalia in agreement, that the independent counsel's issuance of subpoenas intruded into the separation of powers.[11] Scalia insisted that all executive powers reside in the executive and, as such, are immunized from judicial, if not direct legislative, incursion.[12] Three years after the Court issued *Morrison*, in *Freytag v. Commissioner*, an appeal arising from a challenge to the appointment of tax court judges, Scalia obliquely cited to *Mott* for the proposition that while a presidential determination to employ the militia may have a judicial aspect as a result of the deliberative process in deciding the existence of an emergency, the determination to do so is solely vested in the president.[13] Certainly, a president's commander in chief authority is broad and demands a higher adherence of obedience of service-members because of its military application, but Scalia's incorporation of *Mott* into his reasoning in *Freyberg* was in error.[14]

A number of scholars, jurists, and pundits have also posited that *Mott* reinforces a president's ability to use military forces, including the National Guard under the current version of the Insurrection Act, by precluding judicial review of presidential actions.[15] Others have argued

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9. Morrison v. Olson, 487 U.S. 654, 697–734 (1988) (Scalia, J., dissenting).

10. *Id.*

11. *Id.*

12. *Id.* at 705 (Scalia, J., dissenting) (describing article II, § 1, clause 2 of the U.S. Constitution as lodging "*all of* the executive power [in the president]"). For a view that Justice Scalia's dissent was merely a "warm-up" to advance his belief, see Noel J. Francisco, *Justice Scalia: Constitutional Conservative*, 84 U. CHI. L. REV. 2169, 2171 (2017).

13. Freytag v. Comm'r, 501 U.S. 868, 909–10 (1991) (Scalia J., concurring) (citing Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 280 (1856)). That the Court in *Murray's Lessee* emplaced *Mott*—as a matter of executive branch authority to declare an emergency—into a gratuitously favorable comparison with the auditing of public money accounts by a federal receiver does not seem to have troubled Scalia.

14. *See, e.g.*, United States v. Denedo, 556 U.S. 904, 926 (2009) (citing United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 22 (1955)).

15. Jackie Gardina, *Toward Military Rule? A Critique of Executive Discretion to Use the Military in Domestic Emergencies*, 91 MARQ. L. REV. 1027, 1062–64 (2008). In 1941, the eminent historian Henry Steele Commager argued to the nation that allegations that President Franklin Roosevelt's military policies were dictatorial were unfounded, in part, as a result of *Martin v. Mott*. *See* Henry Commager, *The War Powers of The President: A Historian Examines the Present Charge of "Dictatorship,"* N.Y. TIMES, Oct. 19, 1941, at 3.

that *Mott* enables presidential determinations of emergencies as an innate constitutional power.[16] Yet another category of scholarship has stressed that when officials act under the color of presidential order they are immune from suit.[17] The view of *Mott* sanctioning a broad commander in chief authority over the military makes further sense when one considers that as the War of 1812 came to an end, Story expressed to a confidant that the United States' future greatness rested, in part, on its military and naval strength.[18]

Nowhere in the contemporary military law scholarship does the actual history of *Mott* appear, and without such a history, Rossiter's line of reasoning, as well as the conventional interpretation that Story and the Court intended to preclude judicial review of presidential national-security actions, remains an important part of legal discourse regarding executive branch supremacy.[19] An expansive use of *Mott*, as characterized by Rossiter, Rostow, and Yoo, has insulated the presidency in other areas. For

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16. *See, e.g.*, Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1380–81 (2009); s*ee also* Michael Bahar, *The Presidential Intervention Principle: The Domestic Use of the Military and the Power of the Several States*, 5 HARV. NAT'L SEC. J. 537, 553–54 (2014) (arguing the *Mott* Court's broad affirmation of presidential power over the States for foreign invasions hints at more than just statutory interpretation).

17. *See* Kevin M. Stack, *The Reviewability of the President's Statutory Powers*, 62 VAND. L. REV. 1171, 1182–83 (2009). Stack's comment, however, appears to be an exaggeration of *Mott*'s early impact. For instance, in 1828, in *Shoemaker v. Nesbit*, the Supreme Court of Pennsylvania determined, in following *Vanderheyden v. Young*, 11 Johns. 150 (N.Y. Sup. Ct. 1814)—a decision of New York's Supreme Court of Judicature—that if a militia soldier were amendable to a court-martial, the officer charging the soldier was immune from suit when the officer followed orders, as would be the officers serving on the court-martial should they mistakenly conclude jurisdiction when no jurisdiction existed. 2 Rawle 201, 203 (Pa. 1828). One might conclude that the Court, in *Mott*, made very little impact on the issue of civil suits arising from military actions, since the state court did not cite to the opinion.

18. Irving Brant, *Madison and the War of 1812*, 74 VA. MAG. HIST. & BIOGRAPHY 51, 54 (1966) (citing Letter from Joseph Story to Nathaniel Williams (Feb. 22, 1815), *in* 1 LIFE AND LETTERS OF JOSEPH STORY 254 (William W. Story ed., 1851)); R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 84 (1986).

19. For a countervailing view, see Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy*, 70 GEO. WASH. L. REV. 649 (2002). Professor Turley commented that while there is merit to applying the demand for obedience to military orders, this demand should not form the basis for a separate comprehensive system of military justice such as under the Uniform Code of Military Justice. *Id.* at 698.

instance, in decisions on executive authority in non-military matters, judges have cited to *Mott* for the proposition that when Congress grants to the executive an authorization, the executive branch's determination to act on the authorization is not subject to judicial review.[20] This Article illustrates how *Mott*'s history evidences that the Court intended the decision to be confined to a singular question over presidential use of militia to repel a foreign invasion and not for a broader purpose, save one: in 1962, Henry Steel Commager penned in a *New York Times* article that in the aftermath of the War of 1812, "nationalism found eloquent spokesmen in every realm," and in the following two sentences he listed Joseph Story and *Mott* as evidence of this claim.[21] But Story's "nationalism" was not specifically designed to create a powerful president; rather, it was designed to nationalize the law.[22]

In one sense, *Mott* originated in a British invasion from Canada into New York in August 1814 during a congressionally declared war. On August 4, 1814, and again on August 29, New York Governor Daniel Tompkins ordered his state militia into the military service of the United States and to assemble in an area designated as the Third Military District.[23] As a citizen of New York, Jacob Mott had a state constitutional duty to comply with the governor's order.[24] Prior to Tompkins' orders,

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20. *See, e.g.*, United States v. George S. Bush & Co., Inc., 310 U.S. 371, 380 (1940) (holding that a presidential determination on tariff increases to Japanese canned goods is not subject to judicial review); Am. Fed'n of Gov't Emps. v. Reagan, 870 F.2d 723, 728 (D.C. Cir. 1989) (finding the presumption of regularity in executive branch decisions emanates from *Mott*); Oak Tree Farm Dairy, Inc. v. Block, 544 F. Supp. 1351 (E.D.N.Y. 1982) (finding that the Secretary of Agriculture may issue milk marketing order, and such order is deemed regular); *but see Ex parte* Milligan, 71 U.S. 2, 18 (1866) (Although in *Mott* the Court recognized that the president is the "sole judge of the exigencies, necessities, and duties of the occasion, their extent and duration," there is no authority to prosecute citizens in a military trial when the civil courts are functioning.).

21. Henry Steele Commager, *Second War of America's Independence: The War of 1812 is the 'forgotten' war*, N.Y. TIMES, June 17, 1962, at 15.

22. *See, e.g.*, Paul Finkelman, *Story Telling on the Supreme Court:* Prigg v. Pennsylvania *and Justice Joseph Story's Judicial Nationalism*, 1994 SUP. CT. REV. 247, 264.

23. RICHARD V. BARBUTO, NIAGARA 1814: AMERICA INVADES CANADA 336 (2000) [hereinafter BARBUTO, NIAGARA 1814].

24. *See* N.Y. CONST. art. XL (1777). Article XL stated:

> And whereas it is of the utmost importance to the safety of every State that it should always be in a condition of defence; and it is the duty of every man who enjoys the protection of society to be prepared and willing to defend it; this convention therefore, in the name and by the

President James Madison had issued a requisition for several state militias to assemble into the federal army to thwart the invasion.[25] Both Madison and Tompkins possessed the constitutional and statutory authority to order the militia into service, so Mott not only failed to comply with the governor's order, he also did not comply with Madison's requisition.[26] Mott was later prosecuted in a federal court-martial for his failure to muster into the militia and sentenced to a fine.[27] When Mott neglected to pay the assessed fine, a marshal seized his gray farm horse, hence the "old gray mare" comment under the title of this Article.[28] Mott then sued Martin—the deputy marshal who seized the horse—in a replevin action to recover the mare, and Martin, the "avowant," failed in the state courts to defend his actions.

In a broader sense though, *Mott* arose as a result of a combination of an unpopular war; a structural weakness in the Constitution in terms of the nation's ability to defend against an external enemy; and an important, but now largely abandoned, philosophy critical to the nation's founding: the fear of a standing army. This fear was a crucial element in protecting the liberty of the new Republic's white, male citizens and for the preservation of the Republic itself.[29] In April 1814, Jasper Yeates, while serving as a justice on the Supreme Court of Pennsylvania, lamented in his concurring

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> authority of the good people of this State, doth ordain, determine, and declare that the militia of this State, at all times hereafter, as well in peace as in war, shall be armed and disciplined, and in readiness for service.

Id. The state constitution exempted religious Quakers, but as Mott did not claim his faith as a defense, it should be assumed that he was not a conscientious objector as a Quaker.

25. Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827).

26. On Tompkins's authority, see N.Y. CONST. art. XVIII (1877). This article read: "That the governor shall continue in office three years, and shall, by virtue of his office, be general and commander in chief of all the militia, and admiral of the navy of this State." *Id. See Mott*, 25 U.S. (12 Wheat.) 19; *see also* JAMES MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION: A STUDY IN POLITICAL AND LEGAL THOUGHT 266 (1971).

27. *Mott*, 25 U.S. (12 Wheat.) 19. The status of the court-martial bears importance to *Mott*'s legal history, partly because a New York state court issued a decision adverse to the executive branch, and partly because the Court did not erode the ability of state courts to issue writs against the federal government.

28. *Mott*, 25 U.S. (12 Wheat.) 19, *microformed on* U.S. Supreme Court Records and Briefs, Reel 72 (National Archives). The New York Supreme Court of Judicature, however, fashioned Mott's horse as an old "Brown Mare." *Id.*

29. Lawrence Delbert Cress, *Republican Liberty and National Security: American Military Policy as an Ideological Problem, 1783-1789*, 38 WM. & MARY Q. 73, 75 (1981).

opinion in *Duffield v. Smith* that court-martial jurisdiction extended over a militia soldier who did not muster into service when called to do so.[30] Yeates began his concurrence with, "I cannot reconcile my mind to the exercise of the powers of courts martial over private citizens, or militia men, who have not mustered or been in actual service, consistently with the provisions of the constitution of the United States, or of this Commonwealth," underscoring that such an extension of military jurisdiction might lead to "wanton oppression."[31] Put another way, Yeates articulated a fear that the greater the numbers of citizens amenable to the control of a commander in chief, the likelier the danger to individual liberties for the whole citizen population. And he implied that a normal trial by one's peers—rather than a court-martial—would be the better course to preserve liberty. However, because Duffield had pled guilty, the jurisdictional issue was not before the state supreme court. Although this Article centers on *Mott*, it should not be missed that Yeates was familiar with the use of the militia in the early Republic and had been a member of Pennsylvania's convention to vote in favor of the federal constitution.[32]

This Article is divided into five parts. The first three parts give context to *Mott* by providing the legal and political realities in which the Court addressed the appeal. By the time the Court took up Martin's appeal, the

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30. Duffield v. Smith, 6 Binn. 302, 306 (Pa. 1814) (Yeates, J., concurring). Story, in his Commentaries on Vol. III, wrote that the constitutionality of the 1795 Militia Act has not been questioned, but this is an overstatement as Justice Yeates did, in fact, question the validity of subjecting a delinquent militia soldier to a court-martial prior to the soldier actually mustering into service. *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 88–89 (1833).

31. *Dufffield*, 6 Binn. at 306. However, in *Duffield*, Yeates noted that no oppression occurred because the defendant had pled guilty and ceded the question of jurisdiction. *Id.* Under Pennsylvania law, the doctrine of waiver would have applied to Duffield in regard to not preserving an objection to be tried by a jury of his peers, subject to a grand jury. *See* Commonwealth v. Franklin, 4 U.S. 316 (1804). The Pennsylvania Supreme Court held, "In criminal cases, too it is a rule, that errors in form shall be taken advantage of as soon as is reasonable after they occur, or a waiver of the advantage shall be inferred." *Id.* at 317.

32. For a biography of Yeates, see Charles I. Landis, *Jasper Yeates and His Times*, 46 PA. MAG. HIST. & BIOGRAPHY 199 (1922). Yeates became a member of the bar prior to the Revolutionary War, took an oath and supported the Revolution, and then was appointed to the Pennsylvania Supreme Court in 1791. Most importantly, he was a member of the state convention to ratify the United States Constitution. *Id.* at 214. In 1794, President Washington appointed him to lead a commission to encourage the leaders of the Whiskey Rebellion to reconcile with the federal government. *Id.* at 217.

nation had both entered and exited the so-called "Era of Good Feelings"; the Federalist Party was gone, and only one national political party remained; and the sectionalism that characterized the war was being replaced by a nascent sectionalism over slavery.[33] When the Court decided *Mott*, the war was quite distant from the political and social realities of 1827. The first three parts incorporate original source material from the National Archives and Records Administration (NARA), including military reports from the Third Military District as well as the original case files from *Martin v. Mott*.[34]

Part I briefly details the Constitution's militia structure as well as the War of 1812's political, economic, and military character. It includes the standing army fears of the Constitution's framers.[35] Within the analysis of the militia's legal construct, particular attention is paid to Federalist No. 29.[36] Part II examines the judicial treatment of the war in appeals both at the state and federal courts, including *Houston v. Moore*, an 1820 Supreme Court opinion arising out of a challenge to state court-martial jurisdiction.[37] Unlike Jacob Mott, who challenged a president's authority, Robert Houston, the aggrieved petitioner in the 1820 appeal, challenged the authority of Pennsylvania's legislature and governor.[38]

Part III further expands on opposition to the war as well as the condition of New York's militia. Part IV provides a brief biographic comment on the justices who served on the Court at the time of *Mott*. This Part also analyzes *Mott* based on the context of the War of 1812 and the courts. It should be noted that unlike the Pennsylvania Supreme Court in *Houston*, New York's Supreme Court of Judicature did not print its decision, and the Supreme Court took review of an unpublished decision. Moreover, the Supreme Court of Judicature did not specify any individual basis—that is, which of the 19 objections *Mott* raised in the replevin

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33. *See, e.g.*, ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 101-114 (1995).

34. The case file for *Martin v. Mott* is located at (No. 1286), *microformed* on U.S. Supreme Court Records and Briefs, Reel 72 (National Archives). For the purpose of identifying frame numbers, "F-M-xx" is used. The case file for *Houston v. Moore* is located at (No. 881). For the purpose of identifying frame numbers, "F-H-xx" is used.

35. In addition to the works cited below, on the standing army fears, see generally Hasan Bashir & Phillip W. Gray, *Arms of the Republic: Republicanism and Militia Reforms During the Constitutional Convention and the First Federal Congress 1787–91*, 36 HIST. POL. THOUGHT 310, 314–17 (2015).

36. THE FEDERALIST NO. 29 (Alexander Hamilton).

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

38. *Id.*; *see also* MCCLELLAN, *supra* note 26, at 268.

action—when it sided with Mott. Finally, Part IV concludes with a short traverse of opinions that have followed *Mott*, both by direct citation and in spirit, and provides a summation that *Mott* itself should not be used outside of a narrow arena of law: the authority of a president to issue lawful orders to persons already in the armed services.

Before proceeding, there are three matters essential for framing *Mott*'s history and its historic limitations. First, any analysis of presidential authority must include, if not begin with, the Constitution's plain text. Article I, Section 8, Clause 14 empowers Congress to "make Rules for the Government and Regulation of the land and naval Forces."[39] By the time of the War of 1812, Congress had narrowly limited court-martial jurisdiction under the Articles of War to regular army soldiers.[40] In other words, Congress had confined the authority of the army to prosecute common law crimes in courts-martial to crimes that had occurred outside of the states.[41] As a result, courts-martial were practically limited to prosecuting military offenses such as desertion or failure to follow orders, but not crimes such as premeditated murder.[42] And, as noted below, federal courts-martial were subject to habeas review by state judiciaries.

Second, the Constitution grants Congress the authority to limit predicate conditions for calling the militias into federal service.[43] These conditions were limited to the execution of the federal laws, the suppression of insurrections, and the repelling of invasions.[44] While the

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39. U.S. CONST. art. I, § 8, cl. 14.

40. Joseph W. Bishop, *Court-Martial Jurisdiction Over Military-Civilian Hybrids: Retired Regulars, Reservists, and Discharged Prisoners*, 112 U. PA. L. REV. 317, 321–22 (1964). The term "regular" meant those soldiers who were enrolled into the standing army in peacetime, and not the thousands of state militia forces that could be called upon to join the army in a national emergency. On the distinction between "regulars" and Militia, see Robert Reindeers, *Militia and Public Order in Nineteenth Century America*, 11 J. AM. STUD. 81, 82–85 (1977).

41. Robert D. Duke & Howard S. Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 VAND. L. REV. 435, 445 (1960). For the operation of the subject matter limitation under the law, see Kahn v. Anderson, 255 U.S. 1, 9 (1921) (permitting the court-martial prosecution of a soldier for murder prior to the formal end of hostilities with Germany, but noting the existence of the limitation), and WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 666–67 (2d ed. 1920).

42. Duke & Vogel, *supra* note 41, at 445.

43. U.S. CONST. art. I, § 8, cl. 15.

44. *Id.* The clause specifically reads: "The Congress shall have Power . . . To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." *Id.* One viable argument is that the Militia

Constitution authorized Congress to "provide for organizing, arming, and disciplining the Militia," it also left to state governments the authority to appoint officers and authorize militia training.[45] A state citizen called into militia service who refused or failed to muster into the service was not guilty of desertion, but rather, a crime of delinquency.[46] Desertion in wartime was punishable by death.[47] The failure to muster was punishable by a fine and, if the accused soldier were unable to pay the fine, a term in prison.[48]

Finally, in *Wise v. Withers*, the Court determined that the army's court-martial jurisdiction extended only to soldiers who were enrolled in the federal army or statutorily liable for militia service.[49] In 1792, in regard to the District of Columbia, Congress exempted judicial officers, members of Congress, and certain executive branch officers from militia service.[50] Peter Wise, as a justice of the peace, was considered exempt under this law.[51] After a militia officer entered Wise's house and seized his property as a punishment for a failure to muster, Wise sued the militia officer for trespass and prevailed at trial, as well as on appeal to the Supreme Court.[52]

Clause was an intentional signaling of executive impotence even in crisis times. *See* Saikrishna Prakash, *The Imbecilic Executive*, 99 VA. L. REV. 1361, 1394 (2013).

45. U.S. CONST. art. I, § 8, cl. 16

46. *See, e.g.*, WINTHROP, *supra* note 41, at 96.

47. *Id.* at 636.

48. *See, e.g.*, Antrim's Case, 1 F. Cas. 1062, 1063 (E.D. Penn. 1863) (No. 495) (noting that prior to 1863, a militia soldier who failed to muster was subject to a fine).

49. Wise v. Withers, 7 U.S. 331 (1806). There is little mention of Peter Wise in the decision. However, President Thomas Jefferson appointed Wise to the position in 1801, and unlike William Marbury, who was nominated by the outgoing President John Adams, Wise was confirmed by the Senate to the position and had his commission delivered to him. *See* Charles S. Bundy, *A History of the Office of Justice of the Peace in the District of Columbia*, 5 RECS. COLUM. HIST. SOC'Y 259, 282 (1902).

50. *Wise*, 7 U.S. 331.

51. *Id.*

52. *Id.* In *Brush v. Bogardus*, New York's Supreme Court of Judicature indicated that statutory exemptions from militia duty were to be read very narrowly in favor of the government. 8 Johns. 157 (N.Y. Sup. Ct. 1811). Bogardus was a merchant sailor on a "coastal vessel" and claimed that Congress, in exempting "all mariners actually employed in the sea-service of any citizen or merchant, within the United States; and all persons who now are, or may hereafter be exempted by the laws of the respective States," rendered him exempt from militia service. *Id.* at 157 (internal citation omitted). New York's justices determined, however, that a sloop involved "in the coasting trade" was not a part of the sea-service. *Id.* at 159.

It is not directly evident that the brief opinion, as authored by Chief Justice John Marshall, was premised on a fear of standing armies, but it is clear that the decision curtailed military jurisdiction to only those citizens who were in the military, or owed an obligation to militia service when lawfully ordered to do so.

I. THE MILITIA AND THE DIFFICULTIES OF MILITARY CONFLICT

Professor Gordon Wood, a preeminent scholar of early United States history, coined the War of 1812 as "the Strangest war in American History."[53] Professor Wood's characterization is partly premised on the fact that the United States Army had less than 7,000 "regular troops," and yet President Madison was confident that the American force could defeat the considerably larger, battle-tested British Army.[54] Madison's assuredness, for several reasons, was grossly misplaced. Britain had been at war since the end of the 18th century against Napoleonic France and its allies.[55] In 1801, Britain sent 18,000 soldiers to Egypt to dislodge Napoleon's forces, proving that it was capable of transiting a large force to overseas locations.[56] Additionally, Britain retained control over Canada, which would become a base of operations. Although Britain possessed a militia system that helped to create an army of 237,000 soldiers, by 1812, these soldiers, based on drill, discipline, and foreign battlefield experience, could be classified as "regulars," and they were a formidable force, albeit one focused on Napoleon.[57] The United States possessed no military forces that equaled the British Army.

On top of the military's unpreparedness to wage war, the United States' population and political leadership were hardly aligned on the decision to go to war. As a general observation on the popularity, or lack thereof, for the 1812 war with Britain, northeastern Federalists who were reliant on overseas trade with Britain for their economic success opposed

53. GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815, at 658 (2009); *see also* DAVID J. BARON, WAGING WAR: THE CLASH BETWEEN PRESIDENTS AND CONGRESS, 1776 TO ISIS, at 84 (2016). Baron characterizes the war as "eminently avoidable." *Id.*

54. WOOD, *supra* note 53, at 658.

55. DAVID ANDRESS, THE SAVAGE STORM: BRITAIN ON THE BRINK IN THE AGE OF NAPOLEON 1–3 (2012).

56. RUSSELL F. WEIGLEY, THE AGE OF BATTLES: THE QUEST FOR DECISIVE WARFARE FROM BREITENFELD TO WATERLOO 337 (1991).

57. *Id.* at 412.

going to war.[58] The Federalists also distrusted alignment with Napoleonic France and believed the French Revolution's ideology posed a greater danger to the Republic than Britain.[59] Political opposition to war has existed throughout United States history, but the partisan rancor in 1812 was unique, and not only so because the United States was actually invaded. For instance, opposition to President Polk's decision to wage war against Mexico existed in both the Democratic and Whig parties.[60] In the Civil War, there were pro-Union Democrats.[61] In World War I, opposition to the war crossed party lines, and the congressional vote to declare war in 1941 was bipartisan.[62] So too was there bipartisan agreement in support of President Harry Truman's sending of forces into the Korean War.[63] Even in 1964, the Gulf of Tonkin Resolution had overwhelming bipartisan support.[64] But to one of the two predominate political ideologies in 1812, the decision to fight Britain was a gross error against the national interest.

A. Fears of a Standing Army and Federalist No. 29

The United States was not only hampered by a small standing army, but also by an overarching philosophy of a fear of a standing army

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58. *See, e.g.*, Donald R. Hickey, *Federalist Party Unity and the War of 1812*, 12 J. AM. STUD. 23, 25–28 (1978); John E. Talmadge, *Georgia's Federalist Press and the War of 1812*, 19 J.S. HIST. 488 (1953).

59. *See, e.g.*, Lawrence A. Peskin, *Conspiratorial Anglophobia and the War of 1812*, 98 J. AM. HIST. 647, 647–48 (2011).

60. *See, e.g.*, K. JACK BAUER, THE MEXICAN WAR: 1846-1848, at 66–81 (1974); Eric Foner, *The Wilmot Proviso Revisited*, 56 J. AM. HIST. 262, 275–76 (1969). Professor Sean Wilentz noted that "along with the War of 1812 and the Vietnam intervention, the war against Mexico generated more dissent than any major military conflict in U.S. history," but unlike the War of 1812 and Vietnam, the Mexican War resulted in a stunning military victory. SEAN WILENTZ, THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN 602–03 (2005).

61. *See, e.g.*, CHARLES A. BEARD, AMERICAN GOVERNMENT AND POLITICS 116 (rev. ed. 1919).

62. *See* JOSHUA E. KASTENBERG, TO RAISE AND DISCIPLINE AN ARMY: MAJOR GENERAL ENOCH CROWDER, THE JUDGE ADVOCATE GENERAL'S OFFICE AND THE REALIGNMENT OF CIVIL AND MILITARY RELATIONS IN WORLD WAR I, at 26 (2017).

63. *See, e.g.*, LARRY BLOMSTEDT, TRUMAN, CONGRESS, AND KOREA: THE POLITICS OF AMERICA'S FIRST UNDECLARED WAR 30–31 (2016).

64. *See, e.g.*, Mark Souva & David Rohde, *Elite Opinion Differences and Partisanship in Congressional Foreign Policy, 1975–1996*, 60 POL. RSCH. Q. 113 (2007).

becoming destructive to the democratic institutions of government.[65] Professor Richard Kohn, in his *Eagle and Sword: The Federalists and the Creation of the Military Establishment in America, 1783-1802*, observed that "no principle of government was more widely understood or more completely accepted by the generation of Americans that established the United States than the danger of a standing army in peacetime."[66] As late as 1829, none other than military icon and former general President Andrew Jackson in his first inaugural address stressed that "standing armies" were "dangerous to free government in time of peace."[67] Even at the beginning of the twentieth century, the standing army fears remained a part of the political and legal landscape.[68]

The standing army fear was rooted in seventeenth century Britain, and at the time of the Constitution, it contributed to three salient features of the United States defense.[69] The first was that the small standing army's existence was reliant on biannual congressional funding, and the laws governing the army's discipline were congressional in origin, rather than purely executive.[70] In his charge to the jury on the libel case of Thomas Cooper in 1800, Justice Samuel Chase insisted that because of the biannual funding requirement, the United States could not be considered to possess

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65. *See, e.g.*, REGINALD C. STUART, CIVIL-MILITARY RELATIONS DURING THE WAR OF 1812, at 23–24 (2009); Earl F. Martin, *America's Anti-Standing Army Tradition and the Separate Community Doctrine*, 76 MISS. L.J. 135, 145–147 (2006). Delegate Edmund Randolph noted at the Virginia ratifying convention, "there was not a member of the federal convention who did not feel indignation" at the idea of a standing army. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 401 (Jonathan Elliot ed., 1901).

66. RICHARD KOHN, EAGLE AND SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT IN AMERICA, 1783–1802, at 2 (1975). Kohn further observed that "a standing army represented the ultimate in uncontrolled and uncontrollable power," and that any nation that maintained permanent forces surely risked the overthrow of legitimate government and the introduction of tyranny and despotism. *Id.*

67. Andrew Jackson, First Inaugural Address (Mar. 4, 1829), *in* JAMES D. RICHARDSON, 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENT 437–38 (1867).

68. KASTENBERG, *supra* note 62, at 26.

69. On the standing army fears in Britain, see E. SAMUEL, AN HISTORICAL ACCOUNT OF THE BRITISH ARMY AND OF THE LAW MILITARY AS DECLARED BY THE ANCIENT AND MODERN STATUTES AND ARTICLES OF WAR 134 (1816); THEODORE ROPP, WAR IN THE MODERN WORLD 77–80 (rev. ed. 1962).

70. *See, e.g.*, Act of September 29, 1789, 1 Stat. 96; Act of April 30, 1790, 1 Stat. 121.

a standing army.[71] The second feature, the 1806 Articles of War—the body of military law at the time of Mott's court-martial—may have been Thomas Jefferson's and John Quincy Adams's creation, but the Articles did not become law until Congress enacted them.[72] The third feature was that even when the various state militias were brought into federal service, the primary disciplinary mechanism to punish errant soldiers—the federal court-martial—had a significant jurisdictional constraint. No militia soldier could be court-martialed with regular army officers sitting in judgment as "jurors."[73] Rather, militia soldiers could be court-martialed with only militia officers deciding guilt or a sentence.[74]

The term "standing army" may, for the purpose of this Article, be interchanged with the concept of a professional army. Although the Roman Empire possessed professional armies—in the sense that its legions often consisted of career soldiers and officers—from 400 AD until the early seventeenth century, European military forces were officered by aristocrats, and the rank and file were an ill-disciplined and unreliable mixture of peasant levees and mercenary forces.[75] Put another way, from the fall of Rome through the Renaissance, Europe's myriad of armed forces often resembled uncontrollable mobs that terrorized civilian populations but were incapable of cohesion on a battlefield.[76] But in the late sixteenth century in the Netherlands, and then during the Thirty-Years War (1618–1648) in Sweden, disciplined armies were formed that drew

71. United States v. Cooper, 25 F. Cas. 631 (C.C.D. Pa. 1800) (No. 14,865). On the trial of Thomas Cooper, see Forrest K. Lehman, *"Seditious Libel" on Trial, Political Dissent on the Record: "An Account of the Trial of Thomas Cooper" as Campaign Literature*, 132 PA. MAG. HIST. & BIOGRAPHY 117, 126–131 (2008).

72. 1 MEMOIRS OF JOHN QUINCY ADAMS 338 (C.F. Adams ed., 1874).

73. BREN HALLET, DECLARING WAR: CONGRESS, THE PRESIDENT, AND WHAT THE CONSTITUTION DOES NOT SAY 31 (2012).

74. Militia Act of 1795, ch. 36, § 6, 1 Stat. 424. This section of the Militia Act reads: "And be it further enacted, that courts martial for the trial of militia shall be composed of militia officers only." *Id.* § 6. That this act had significance in the early republic can been adduced from the Court's opinion in *McClaughry v. Deming*, 186 U.S. 49 (1902). In *Deming*, the Court held that volunteers were not a part of the regular army, and therefore as a matter of statutory interpretation, officers serving on a court-martial had to come from the state militias or the volunteers rather than the regular army. *Id.* at 69–70. The term "juror" was not used to describe the officers serving on a court-martial; in military law the term "member" was used. *See*, WINTHROP, *supra* note 41, at 205.

75. *See, e.g.*, WEIGLEY, supra note 56, at 3–5.

76. John A. Mears, *The Emergence of the Standing Professional Army in Seventeenth-Century Europe*, 50 SOC. SCI. Q. 106, 106–08 (1969).

much of their soldiery from the population and were professionalized through a long tenure of service that included drill, an austere military disciplinary system, and fealty to a sovereign.[77] In the 1631 Battle of Breitenfeld, Sweden's forces practically maneuvered as a single body and concentrated their firepower to devastating effect against a larger Catholic army that had conquered almost all of Northern Europe up to the Baltic.[78] By the American Revolution, Britain had possessed a small standing army, designed on the Swedish model, for over a half century.[79] British soldiers were subject to a rigorous disciplinary code predicated on loyalty to a monarch and lengthy service.[80]

Following the Seven Years War (1756–1763), several leading colonists, as evidenced by surviving pamphlets, were upset that Britain had retreated from its use of a colonial militia in favor of the permanent army, the "Redcoats," to police society both in Britain and in the colonies.[81] One scholar has posited that in the colonies, "it became a tenet of faith" that colonial authorities retain jurisdiction over their militia.[82] Once the colonies achieved independence, the nation's pre-constitutional leadership, including Washington, did not depart from the concept of a militia-centered national defense, but a few sought a small standing army to be dependent on Congress for its existence.[83] Alexander Hamilton, the author of Federalist No. 29, was instrumental in the creation of the nation's new military establishment.[84]

In writing Federalist No. 29, Hamilton struck a balance between the Republican ideals of localized, state control over militia and the means for assuring that the militia could be called into federal service should the need

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77. *Id.* at 108–10.

78. *Id.*

79. WEIGLEY, *supra* note 56, at 79–81; *see also* VICTORIA HENSHAW, SCOTLAND AND THE BRITISH ARMY, 1700-1750: DEFENDING THE UNION 30–33 (2014); HANS DELBRUCK, THE DAWN OF MODERN WARFARE 186–92 (1985) (noting that Oliver Cromwell, rather than the monarchy, was instrumental in the construction of a professional British Army with an austere military code).

80. ROGER B. MANNING, AN APPRENTICESHIP IN ARMS: THE ORIGINS OF THE BRITISH ARMY 1585-1702, at 208–18 (2006).

81. Don Higgenbotham, *The Federalized Militia Debate: A Neglected Aspect of Second Amendment Scholarship*, 55 WM. & MARY Q. 39, 40–41 (1998).

82. *Id.*

83. *See* Bashir & Gray, *supra* note 35, at 318.

84. *See* Edward Meade Earle, *Adam Smith, Alexander Hamilton, Friedrich List: The Economic Foundations of Military Power* 230–38, *in* MAKERS OF MODERN STRATEGY: FROM MACHIAVELLI TO THE NUCLEAR AGE (Peter Paret ed., 1986) [hereinafter MAKERS OF MODERN STRATEGY].

arise.[85] The beginning of Federalist No. 29 recognized that a trained militia was a necessity to the national defense.[86] To achieve this end, Congress would be responsible for arming, disciplining, and setting the standards of drill and training for the state militia.[87] However, the states selected the officers who would command the militia.[88] In regard to the militia not being a part of the military establishment that the public feared—the standing army—Hamilton urged that in trusting the militia, the citizenry would be trusting their sons and neighbors.[89] But while Federalist No. 29 provides a reason for public faith in the militia, it is silent as to the disciplinary instruments that would be used against militia soldiers, except that Congress would have the authority to proscribe the legal instruments of discipline.[90]

The reason the government had to rely on militia in 1812, even in the deepest moments of crisis, had to do with the war's proximity to the nation's founding. Several of Madison's own Republican allies who supported the war with Britain remained wedded to a fear of a standing professional federal army. Professor Wood observed that even though the Republicans knew the nation's armed forces were wholly unready for war, they nonetheless feared the threat of a domestic standing army more than

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85. *See, e.g.*, Robert J. Delahunty, *Structuralism and the War Powers: The Army, Navy, and Militia Clauses*, 19 GA. ST. L. REV. 1021, 1029 (2003).

86. THE FEDERALIST NO. 29 (Alexander Hamilton). The tract, in pertinent part, states:

> It requires no skill in the science of war to discern that uniformity in the organization and discipline of the militia would be attended with the most beneficial effects, whenever they were called into service for the public defense. It would enable them to discharge the duties of the camp and of the field with mutual intelligence and concert an advantage of peculiar moment in the operations of an army; and it would fit them much sooner to acquire the degree of proficiency in military functions which would be essential to their usefulness.

Id.

87. *Id.*

88. *Id.*

89. *Id.* The document states:

> Where in the name of common-sense, are our fears to end if we may not trust our sons, our brothers, our neighbors, our fellow-citizens? What shadow of danger can there be from men who are daily mingling with the rest of their countrymen and who participate with them in the same feelings, sentiments, habits and interests?

Id.

90. *Id.*

a British invasion.[91] For instance, Secretary of the Treasury Albert Gallatin noted that the war would have to be fought without "the evils inseparable from it," including "military establishments."[92]

B. The Militia in the Early Republic: Expeditionary Incompetence and Policing

A century ago, Professor William Ganoe, a military historian and retired army officer, commented that in 1812, the United States "found itself with . . . nothing that might be mistaken for trained forces."[93] Ganoe's statement is well-supported by the militia's failures. In 1790, an expedition under the command of General Josiah Harmer was defeated by a Miami-led tribal confederation after the poorly equipped Kentucky and Pennsylvania militia retreated, some without firing their weapons.[94] In 1792, the House of Representatives investigated the failure of General Arthur St. Clair's expedition against Native American tribes in Indiana.[95] In its report, the House specifically pinpointed that at a critical point before the expedition's defeat, Kentucky's militia deserted.[96] Expanding on Ganoe, Frederick Bernays Wiener, one of the nation's leading military law scholars of his generation, opined in December 1940 that "the problem of making the militia clause into a workable instrument of national defense has not been one of broad vision or constructive imagination, but a task of avoidance and evasion."[97]

The disasters that befell Harmar and St. Clair were predictable because the militias had proven problematic even before the colonies broke from Britain. The colonial militia was, as Professor Kohn concluded, "not a

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91. WOOD, *supra* note 53, at 671. There is a consensus of historians who agree with Wood on this point. *See, e.g.*, C. EDWARD SKEEN, CITIZEN SOLDIERS IN THE WAR OF 1812, at 3 (1999); WILENTZ, *supra* note 60, at 165.

92. Letter from Henry Gallatin to Thomas Jefferson (Mar. 10, 1812), *in* HENRY ADAMS, THE LIFE OF HENRY GALLATIN 455–56 (1879).

93. WILLIAM GANOE, THE HISTORY OF THE UNITED STATES ARMY 116–117 (1924).

94. THOMAS P. SLAUGHTER, THE WHISKEY REBELLION: FRONTIER EPILOGUE TO THE AMERICAN REVOLUTION 94 (1988).

95. On the defeat of St. Clair, see Leroy V. Eid, *American Indian Military Leadership: St. Clair's 1791 Defeat*, 57 J. MIL. HIST. 71 (1993).

96. *See, e.g.*, UNITED STATES CONGRESS HOUSE SELECT COMMITTEE, CAUSES OF THE FAILURE OF THE EXPEDITION AGAINST THE INDIANS, IN 1791, UNDER THE COMMAND OF MAJOR GENERAL ST. CLAIR (1793).

97. Frederick Bernays Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181, 182 (1940).

system at all."[98] He noted that English military officers and government officials complained about the colonial militia's poor training, high desertion rates, unwillingness to serve at all, and legal constraints against serving outside of a colony's borders.[99] During the Revolutionary War, General George Washington had a low opinion of the colonial militia.[100] While the concept of militia forces was important to the defense of the colonies and critical in the formation of the United States, the individual state militias were a weak match against the professional European armies that had formed out of a sixteenth century revolution in military affairs.[101] Put another way, citizens in a state militia, who at best were game hunters, were unlikely to succeed against an army that had been professionally drilled and trained for war, been cowed by an austere disciplinary system, and regularly experienced the horror of war.[102] Nonetheless, the militia system at the United States' beginning, including its weaknesses, was intentional in design.

In 1792, Congress passed two Militia Acts. The first act, which became law on May 2, 1792, authorized the president to order the militia into federal service to repel a foreign invasion.[103] The May 2 act also permitted the president to order the militia into federal control "whenever the laws of the United States shall be opposed or the execution thereof

98. KOHN, *supra* note 66, at 7.

99. *Id.*

100. DON HIGGINBOTHAM, GEORGE WASHINGTON AND THE AMERICAN MILITARY TRADITION 10–12 (1985). Higginbotham explained, "Militia training had always fluctuated between being haphazard and nonexistent. As an organization the militia could hardly be effective when it included almost all free white males and when officers owed their appointments to their political and social standing." *Id.* at 12.

101. John Shy, *New Look at the Colonial Militia*, *in* JOHN SHY, A PEOPLE NUMEROUS & ARMED: REFLECTIONS ON THE MILITARY STRUGGLE FOR INDEPENDENCE 29–42 (1992). The distinction between professional military and militia emerged in the late Middle Ages. WILLIAM H. MCNEILL, THE PURSUIT OF POWER 206–208 (1982). Of the many works on the seventeenth century and the growth of professional armies, see Gunther E. Rothenberg, *Maurice of Nassau, Gustavus Adolphus, Raimondo Montecuccoli, and the "Military Revolution" of the Seventeenth Century*, *in* MAKERS OF MODERN STRATEGY, *supra* note 84, at 32–63.

102. George J. Neimanis, *Militia vs. The Standing Army in the History of Economic Thought from Adam Smith to Friedrich Engels*, 44 J. MIL. AFF. 28–32 (1980). On the making of the Seventeenth Century Prussian Army, see R.R. Palmer, *Frederick the Great, Guibert, Bulow: From Dynastic to National War*, *in* MAKERS OF MODERN STRATEGY, *supra* note 84, at 68–98.

103. Militia Act of 2 May 1792, ch. 33, 1 Stat. 264 (repealed 1903).

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."[104] This act initially proved unpopular as the Senate had introduced a version that enabled a president to call up the militia to defeat an insurrection, and the House of Representatives, perhaps mindful of the fear of military authority residing solely in the executive, added the qualifier that a federal court would have to first decide an insurrection existed.[105] This meant that a federal judge would have to agree with an executive determination that an insurrection existed of a magnitude necessitating the militia's federalization. Additionally, the May 2 act had a "sunset" provision in that it expired after three years.[106] The second Militia Act, passed on May 8, 1792, enabled the conscription of all white males between the ages of 18 and 45 into the state militias.[107]

Three years later, on February 28, 1795, Congress, at the request of President Washington, passed another militia act, which gave greater power for a president to call the state militias into service in that there was no "sunset" provision and the judicial certification requirement was removed.[108] Although Thomas Jefferson had been reticent to create a standing army at the time of the Constitution's drafting, after his presidency, he noted to Madison in 1813 that the state militias were, without further training and discipline, nothing more than a crowd.[109]

On April 18, 1814, in the midst of the war, Congress passed "an Act, in addition to the Act, entitled 'An Act for Calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions, and to repeal the act now in force for those purposes.'"[110] The act of April 18 reaffirmed that courts-martial of militia soldiers could only be composed of militia officers and had to be conducted under the Articles of War.[111] This requirement existed regardless of whether the militia

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104. *Id.*

105. KOHN, *supra* note 66, at 134. On the unpopularity of this act, including opposition by its initial sponsor, see Wiener, *supra* note 97, at 187.

106. KOHN, *supra* note 66, at 134.

107. Militia Act of 8 May 1792, ch. 33, 1 Stat. 271 (repealed 1903).

108. *Compare* Militia Act of 1795, ch. 36, § 2, 1 Stat. 424, *with* Militia Act of 2 May 1792, ch. 28, § 2, 1 Stat. 264. On Washington's involvement, see, for example, EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 161 (3d ed. 1948).

109. Robert L. Kerby, *The Militia System and the State Militias in the War of 1812*, 73 IND. MAG. HIST. 102, 115 (1977).

110. THIRTEENTH CONGRESS, PUBLIC STATUTES AT LARGE OF THE UNITED STATES OF AMERICA 134 (RICHARD PETERS ed., 1850).

111. *Id.* § 1.

campaigned in conjunction with the regular army or on its own.[112] But, in an addition to the 1795 law that it augmented, the 1814 act also specifically mandated the prosecution of delinquents in courts-martial.[113] However, under the Act, the term "delinquent" only applied to citizens called into militia service after a presidential summons to duty.[114] In short, the 1814 law created courts-martial under federal law when a militia soldier failed to comply with a presidential order. But a state could conduct its own courts-martial under state law if a soldier became a delinquent under federal law, either when the militia soldier was already in federal service or when the president, independent of a governor, had ordered the militia to come into federal service. In a somewhat confusing scenario, a state court-martial and a federal court-martial might have the same officers sitting in judgment of an accused soldier, but the state court-martial would operate under state law rather than the Articles of War.

There is a final point to make on the laws governing the militia and the issue of state review. The Constitution's Supremacy Clause might appear to vitiate the possibility of a state trial judge or court of appeal from issuing a writ of habeas against a federal officer who had a militia soldier or a regular army soldier in custody.[115] After all, in *McCulloch v. Maryland*, the Court determined that a state had no authority to tax a federal institution, because if it did, the state could usurp the power of Congress, elevating the state over the federal government.[116] But in a very broad interpretation of the Constitution's Suspension Clause, state judges issued habeas writs on federal officials to free militia soldiers as well as regular army soldiers from confinements imposed by federal courts-martial.[117] When *Mott* came to the Court, neither Justice Story nor any

112. *Id.*

113. *Id.*

114. *Id.* § 3.

115. *See* U.S. CONST. art. VI, cl. 2, which reads:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

116. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

117. *See, e.g.*, Commonwealth v. Cushing, 11 Mass. 67 (1814); Rathbun v. Martin, 20 Johns. 343 (N.Y. Sup. Ct. 1823); State v. Dimick, 12 N.H. 194 (1841); *Ex parte* Anderson, 16 Iowa 595 (1864); *see also* Eric M. Freedman, *The Suspension Clause in the Ratification Debates*, 44 BUFF. L. REV. 451, 452 (1996) (noting that while the Suspension Clause may have originally enabled state habeas review of persons held in federal custody, in the middle of the nineteenth century, the Court rejected this idea with "vigor").

other justice appeared concerned with a legal system in which a state court could encroach into the commander in chief's authority to fully maintain a military. Perhaps because the *Mott* Court was close in time to the Constitution's creation, there was an understanding, as Professor Saikrishna Prakash has articulated, that the presidency was intentionally subject to structural weaknesses rendering it "imbecilic," even in crisis times; it was acceptable that a state court might issue a habeas writ against a military commander holding an alleged spy in custody.[118]

II. THE WAR OF 1812 AND THE MILITIA AS A LEGAL TEST OF THE NATIONAL WILL

According to Professor John Whiteclay Chambers, when the United States finally went to war with Britain in 1812, James Madison's Democratic-Republican administration demonstrated the difficulty of mobilizing a governmentally weak and regionally divided country for a major war.[119] Aside from large-scale political opposition to the war in the Northeastern United States, calls for militia service disrupted the agricultural economy of the country and were particularly hard on smaller farms. Thus, it is possible that Jacob E. Mott, the centerpiece of the Court's opinion, is placeable into the category of a citizen who believed he had to choose between financial loss and serving in a war, instead of a citizen morally opposed to the war.[120] Furthermore, one year prior to the conflict, Governor Tompkins penned to a friend that New York's militia had a delinquency problem.[121] In short, it was unsurprising that from the start of the conflict, state militia forces did not uniformly rush to the nation's defense, and even those that did proved problematic. Some militia units refused to serve under federal command, and others argued that their

118. Prakash, *supra* note 44, at 1399.

119. JOHN WHITECLAY CHAMBERS, TO RAISE AN ARMY: THE DRAFT COMES TO MODERN AMERICA 32 (1987).

120. *See* RICHARD V. BARBUTO, NEW YORK'S WAR OF 1812: POLITICS, SOCIETY, AND COMBAT 153 (2021) (noting that Congress foreclosed the ability to sell wheat to Canada) [hereinafter BARBUTO, NEW YORK'S WAR OF 1812]; Brooke Hunter, *Wheat, War, and the American Economy During the Age of Revolution*, 62 WM. & MARY. Q. 505, 526 (2005) (noting that wheat farmers had an improved economy because of export to Europe during the Napoleonic wars but that this improvement could have been jeopardized by a war with Britain).

121. Letter from Daniel Tomkins to William Paulding (Dec. 30, 1811), *in* 2 PUBLIC PAPERS OF DANIEL D. TOMPKINS, 1807-1817, at 390 (1902).

militia status necessitated a refusal to participate in a military invasion into Canada.[122]

When, as noted below, New York's governor called the state militia into service in 1814, hundreds if not thousands of men refused to comply. The governor's actions were not only predicated on Madison's requisition of militia forces, but they also occurred in response to a threatened British invasion from Canada.[123] In the first two years of the war, much of Britain's military might was focused on fighting Napoleon. In the summer of 1814, some of Britain's hardened soldiers, who had spent years fighting the French in Spain, Egypt, and other areas, were shipped to Canada, and this force represented the gravest threat to the United States.[124] Almost contemporaneously, a British raid into Chesapeake Bay resulted in the brief capture and arson of Washington, D.C.[125] Writing about his experiences with the New York militia, with almost 45 years to ponder them, General Winfield Scott characterized militia soldiers as "vermin who no sooner found themselves in sight of the enemy than they discovered that . . . [they] could not be constitutionally marched into a foreign country."[126]

The militia had, to an extent, been reliable in suppressing insurrections in the Early Republic, but there were danger signs for Madison in launching the country into an unpopular war. On March 7, 1799, a Pennsylvania citizen named John Fries led a group of armed citizens dressed in French revolutionary garb to force the release of fellow citizens jailed for refusing to comply with a national tax.[127] In theory, some, if not all, of the men involved in the rebellion who disclaimed the federal tax law could be called into the militia.[128] A greater danger to the Constitution

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122. Samuel J. Watson, *James Monroe and American Military Policy: A Lifetime of Connection and Growing Advocacy for a Standing Army*, 128 VA. MAG. HIST. & BIOGRAPHY 2, 17 (2000).

123. Harvey Strum, *New York Militia and the Opposition to the War of 1812*, 101 N.Y. HIST. 114–32 (2020).

124. ROBERT S. QUIMBY, THE UNITED STATES ARMY IN THE WAR OF 1812, at 505–06, 655 (1997).

125. *Id.* at 690–99.

126. WINFIELD SCOTT, 1 MEMOIRS OF LIEUT.-GENERAL WINFIELD SCOTT 63 (1864).

127. Paul Douglas Newman, *The Federalists' Cold War: The Fries Rebellion, National Security, and the State, 1790–1800* 67 PA. HIST. 63, 67–68 (2000).

128. *See* PA. CONST. art. VI, § 2 (1790), which reads:

> The freemen of this commonwealth shall be armed and disciplined for its defence. Those who conscientiously scruple to bear arms, shall not be compelled to do so; but shall pay an equivalent for personal service. The

occurred in the Whiskey Rebellion (1791–1794), in which citizens protested a federal tax on manufacturing distilled spirits and thwarted federal attempts to collect the tax with threats of violence.[129] After Supreme Court Justice James Wilson certified that an insurrection existed beyond the control of the courts, President Washington ordered 15,000 militia to come under federal control and suppress the rebellion.[130] Not only was Pennsylvania's governor reluctant to use his state's militia to suppress the uprising, some of the men participating in the insurrection were amenable to militia service.[131]

In 1809, the Court issued *United States v. Peters*, informing the Pennsylvania legislature and governor that a state government could not unilaterally annul the decision of a United States District Court judge.[132] Arising out of a long-standing admiralty claim that began prior to the adoption of the Constitution, a mariner named Gideon Olmstead prevailed over Pennsylvania. But the state governor, Simon Snyder—a member of Madison's own party—refused to pay and ordered the state militia to prevent a United States marshal from serving the Court's writ.[133] The militia's commander and eight of his soldiers were prosecuted in federal court, but Madison desired peace between the federal government and the states, if not within his own party, and pardoned the nine militia soldiers.[134]

> militia officers shall be appointed in such manner, and for such time, as shall be directed by law.

129. WILLIAM HOGELAND, THE WHISKEY REBELLION: GEORGE WASHINGTON, ALEXANDER HAMILTON AND THE FRONTIER REBELS WHO CHALLENGED AMERICA'S NEWFOUND SOVEREIGNTY 67–70 (2006); Bennett M. Rich, *Washington and the Whiskey Insurrection*, 65 PA. MAG. HIST. & BIOGRAPHY 334, 335 (1941).

130. Richard H. Kohn, *The Washington Administration's Decision to Crush the Whiskey Rebellion*, 59 J. AM. HIST. 567, 579 (1972).

131. *Id.*

132. United States v. Peters, 9 U.S. 115 (1809). It is noteworthy that Chief Justice Marshal, in authoring the opinion, emplaced into it the following:

> If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery; and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals.

Id. at 136.

133. WILENTZ, *supra* note 60, at 140. For a more detailed background on the Olmstead affair, see Kenneth W. Tracey, *The Olmstead Case, 1778–1809*, 10 W. POL. Q. 675 (1957); Gary D. Rowe, *Constitutionalism in the Streets*, 78 S. CAL. L. Rev. 401, 410 (2005).

134. WILENTZ, *supra* note 60, at 140.

A. The War of 1812 and Its Opponents

Professor Wood's observation that the War of 1812 was "the strangest" in American History is appropriate for several reasons. With the prodding of Speaker of the House Henry Clay in early June 1812, Madison sought a declaration of war from Congress.[135] On June 18, the Senate voted to declare war 19–3 and the House 79–49.[136] This was hardly a unanimous legislative mandate for war, and Madison's own Democratic-Republican Party had congressional defectors.[137] Indeed, a number of northern "malcontent" Republicans believed that Madison's and Jefferson's foreign policies opposing Britain favored the South.[138] Professor Sean Wilentz points out, in his magisterial *The Rise of American Democracy: Jefferson to Lincoln*, that Madison's presidency did not unify his party, which had split between an older generation willing to work with the Federalists and a younger generation geared for war with Britain.[139] For a variety of reasons ranging from commercial interests to religious opposition, Northeastern Federalists uniformly voted against going to war.[140] The election of 1812—Madison's reelection campaign—was a referendum on the war in which De Witt Clinton, his Federalist-Democratic-Republican fusion opponent, carried New York, Massachusetts, New Jersey,

135. *See, e.g.*, MICHAEL BESCHLOSS, PRESIDENTS OF WAR: THE EPIC STORY, FROM 1807 TO MODERN TIMES 61 (2019).

136. *See, e.g.*, Jasper M. Trautsch, "*Mr. Madison's War" or the Dynamic of Early American Nationalism?* 10 EARLY AM. STUD. 630, 659 (2012); J.C.A. STAGG, THE WAR OF 1812: CONFLICT FOR A CONTINENT 18 (2012).

137. DONALD HICKEY, THE WAR OF 1812: A SHORT HISTORY 16–17 (2012); ROBERT REMINI, HENRY CLAY: STATESMAN FOR THE UNION 92–93 (1991) [hereinafter REMINI, HENRY CLAY].

138. J.C.A. Stagg, *James Madison and the "Malcontents": The Political Origins of the War of 1812*, 33 WM. & MARY Q. 557, 561 (1976).

139. WILENTZ, *supra* note 60, at 156. For reviews of Wilentz's book, see Gordon S. Wood, *Book Review: The Rise of American Democracy: Jefferson to Lincoln*, N.Y. TIMES, Nov. 13, 2005 ("nothing less than monumental"). The term "magisterial" denotes that Wilentz's book earned the 2006 Bancroft Award as being the leading scholarly work in American History. For a counter-view, see Michael Holt, *Reviewed Work: The Rise of American Democracy: Jefferson to Lincoln by Sean Wilentz*, 93 J. AM. HIST. 491 (2006) (lauding Wilentz's research but taking exception to a number of misinterpreted events).

140. Lawrence Delbert Cress, *"Cool and Serious Reflection": Federalist Attitudes toward War in 1812*, 7 J. EARLY REPUBLIC 123, 123–27 (1987); KEVIN R.C. GUTZMAN, JAMES MADISON AND THE MAKING OF AMERICA 316–18 (2012).

Connecticut, Rhode Island, Delaware, Massachusetts, and a part of Maryland.[141]

Not all of the opposition to Madison translated to opposition to the war, and some of it simply arose as a matter of constitutional interpretation regarding the limits of the militia. Earlier in January 1812, Congress voted to increase the size of the regular army from 10,000 to 35,000 soldiers and to add an additional 50,000 volunteers to serve short-term enlistments in the federal army, with the possibility of calling 100,000 militia into federal service for a six-month period should the need arise.[142] However, as "war clouds loomed," there was dissension in Congress over the name "militia of the United States," and both Federalist and Republican legislators insisted that the name would be "the militia of the several states until called into the Service of the United States." [143]

Shortly after the declaration of war against Britain, the War Department ordered an invasion into Canada.[144] American forces numbered between 5,000 and 6,000 on the Canadian border in New York, but 2,600 of the soldiers were part of New York's militia. Commanded by General Stephen Van Rennselaer, a New Yorker of substantial means, New York's militiamen faced a British force of 1,500 soldiers.[145] Hundreds of militia soldiers insisted that they were prohibited from fighting the British in Canada and refused to invade, leaving the regular army to be defeated by the British.[146] Whether the militia soldiers opposed the war on the basis of political ideology or viewed themselves as constitutionally constrained is difficult to know, but because of large-scale opposition to the war, particularly in the northern states, mass refusals to serve can be suspected as being influenced by political ideology.

The war went badly for the first two years. If Madison and the war's supporters believed that because Britain was in a life-or-death struggle with Napoleon, a successful invasion of Canada and defeat of Britain were

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141. Phillip J. Lampi, *The Federalist Party Resurgence, 1808-1816: Evidence from the New Nation Votes Database*, 33 J. EARLY REPUBLIC 255, 265–66 (2013).

142. Act of 11 January 1812, Cong. 12, sess. 1, ch. 14, § 16; *see also* WOOD, *supra* note 53, at 672; WESLEY TURNER, BRITISH GENERALS IN THE WAR OF 1812: HIGH COMMAND IN THE CANADAS 4–5 (1999); REMINI, HENRY CLAY, *supra* note 137, at 84–89.

143. 12 ANNALS OF CONG. 1004 (1812).

144. *See* David Druzec, *Failure at Queenstown Heights: The Politics of Citizenship and Federal Power During the War of 1812*, 94 N.Y. HIST. 205, 209 (2013).

145. ALAN PESKIN, WINFIELD SCOTT AND THE PROFESSION OF ARMS 23–26 (2003).

146. SKEEN, *supra* note 91, at 97–99.

likely, they were mistaken. The invasion of Canada failed on August 16, 1812, when British forces took the offensive and captured Fort Detroit in the Michigan Territory.[147] General William Hull, an aged veteran of the Revolutionary War, surrendered his forces to the British, which led to Hull's court-martial and death sentence.[148] In Eastern Canada, another American invasion was defeated by the British in October at the Battle of Queenstown Heights outside of Ontario.[149] The Royal Navy blockaded Chesapeake Bay as well as ports in the Southern United States. Although there were minor American victories, at the end of 1813, the British captured Fort Niagara.

By the beginning of 1814, the United States' war effort became so disjointed and worrisome that Congress considered creating a national conscription program, but opponents of conscription, led by Representative Daniel Webster, successfully prevented it from becoming law.[150] Webster and his allies insisted that conscription was unconstitutional and that an enlarged standing army, as opposed to a militia, would enable the creation of a dictatorship.[151] Writing two decades after the war, Theodore Dwight, a former Federalist member of Congress, insisted that Secretary of War James Monroe's call for a national conscription program was an attempt to create a despotic power that would erode the constitutional guarantees of a limited government, and this was a factor leading up to the Hartford Convention—a Federalist response to the War.[152] In June, British forces occupied parts of northern Maine, and on August 31, Governor General George Prevost, in command of 10,000 British soldiers, began an invasion of New York.[153] In July 1814, American forces fought the British to a standstill at "Lundy's Lane" but withdrew from the area around Niagara, leaving New York open to an invasion.[154] In August, the British briefly captured Washington, D.C., and had control of a part of Massachusetts, which later became Maine.[155] At

147. *Id.*

148. DONALD HICKEY, THE WAR OF 1812: A FORGOTTEN CONFLICT 82–83 (2012) [hereinafter HICKEY, THE WAR OF 1812].

149. *Id.*

150. ROBERT REMINI, DANIEL WEBSTER: THE MAN AND HIS TIME 127–29 (1997).

151. *Id.*

152. THEODORE DWIGHT, HISTORY OF THE HARTFORD CONVENTION: WITH A REVIEW OF THE POLICY OF THE UNITED STATES GOVERNMENT WHICH LED TO THE WAR OF 1812, at 323–24 (1833).

153. *Id.* at 201.

154. *Id.* at 189.

155. WILENTZ, *supra* note 60, at 161.

the end of 1814, the United States Government was almost bankrupt and the Treasury Department defaulted on the national debt by suspending specie payments.[156]

Military defeats were one matter for Madison to contend with as commander in chief. The factionalism within the United States did not dissipate during the war. When the war began, Massachusetts Governor Caleb Strong called "for sympathy with the nation in which we are descended."[157] The Massachusetts Supreme Judicial Court, in an advisory opinion, issued a document of legal hostility to the war.[158] In essence, the state's justices advised that it was the governor's authority to determine whether an emergency existed sufficient to call forth the militia.[159] The *Mott* Court would address this very point and answer in opposition. Along with Strong, the governors of Connecticut and Rhode Island refused to comply with militia requisition orders from the federal government or to permit their militia forces to leave their states.[160] Federalists dominated all three of the state governments.

Federalist disgust with the war led to a convention in Hartford, Connecticut, in December 1815 in which secession from the United States was discussed.[161] While the convention resulted in the downfall of the Federalist Party, because by the time of its conclusion, peace had been achieved with Britain, it did come as a shock to the federal government that three state governments had discussed amending the Constitution, issuing a demand that Madison resign from office, and seeking a separate peace with Britain.[162] But peace with Britain and a resounding military victory over the British in New Orleans resulted in the end of a Federalist rebirth.[163]

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156. HICKEY, THE WAR OF 1812, *supra* note 148, at 231–33.

157. *Id.* at 162.

158. 1 AMERICAN STATE PAPERS: DOCUMENTS, LEGISLATIVE AND EXECUTIVE, OF THE CONGRESS OF THE UNITED STATES, MILITARY AFFAIRS 323, 324; A Letter from the Governor of the Commonwealth of Massachusetts to the Justices of the Supreme Judicial Court, with the answer of the Justices, 8 Mass. 548 (1812).

159. *Id.*

160. HICKEY, THE WAR OF 1812, *supra* note 148, at 265; Donald Hickey, *New England's Defense Problem and the Genesis of the Hartford Convention*, 50 NEW ENG. Q. 587, 590 (1977) [hereinafter Hickey, *New England's Defense Problem*].

161. WILENTZ, *supra* note 60, at 164–65.

162. *See* Hickey, *New England's Defense Problem*, *supra* note 160, at 600–04; Matthew Mason, *"Nothing is Better Calculated to Excite Divisions": Federalist Agitation Against Slave Representation During the War of 1812*, 75 NEW ENG. Q. 531, 545 (2002); Cress, *supra* note 140, at 123–27.

163. WILENTZ, *supra* note 60, at 165–74.

B. The Condition of the New York Militia

By the time Martin's appeal was decided, the New York authority most responsible for his court-martial had served as New York's governor and then Vice President of the United States for eight years. Born in Scarsdale, New York, in 1774, Daniel D. Tompkins attended Columbia University, practiced as lawyer, and served as a justice on New York's Supreme Judicial Court.[164] In 1807, Tompkins defeated fellow Democratic-Republican Morgan Lewis to become New York's fourth governor.[165] Tompkins had also earlier helped draft the state's constitution, including its militia laws.[166] One historian has noted that in defeating Lewis, Tompkins presaged Andrew Jackson as a politician who understood the importance of appearing as "one of the people."[167] However, in 1808, the state senate elections resulted in a Federalist victory over the Republicans, presenting a split government.[168] In 1812, the Federalists prevailed once more in the legislative elections specifically because of opposition to war with Britain, but by the end of 1813, the Republicans had regained control of the legislature.[169] This voting pattern reveals to the modern scholar that there was political dissension against the war, which manifested in the state's politics but that the state's voters had flexible views on the war, if for no other reason than that the electorate, between 1807 and 1813, thrice elected Tompkins.

There is perhaps a small irony that the general who convened Mott's court-martial, Morgan Lewis, was an "old-line" or "aristocrat" Republican who had earlier defeated Aaron Burr in the race for governor and also was a political opponent of both Tompkins and Madison.[170] Born in New York City in 1754, Lewis attended Princeton University in 1773, studied law

164. Gaspare J. Saladino, *Daniel D. Tompkins*, *in* VICE PRESIDENTS: A BIOGRAPHICAL DICTIONARY 52, 55–56 (L. Edward Purcell ed., 3d ed. 1998).

165. *Id.*

166. *See, e.g.*, Robert V. Remini, *New York and the Presidential Election of 1816*, 31 N.Y. HIST. 308, 310 (1950).

167. Harvey Strum, *Property Qualifications and Voting Behavior in New York, 1807-1916*, 1 J. EARLY REPUBLIC 347, 348 (1981).

168. *Id.* at 351.

169. *Id.* at 354.

170. *Id.* at 350–54. One historian has described the lack of cohesion in New York's pre-War of 1812 Republican party as "primarily a coalition of family factions, which tended to fracture repeatedly along the lines of its component parts." *See* Michael Wallace, *Changing Concepts of Party in the United States: New York, 1815-1828*, 74 AM. HIST. REV. 453, 456 (1968).

under John Jay, and took up arms against Britain in 1775.[171] One year later, he was promoted to the rank of colonel and commanded militia forces against Britain at the Battle of Ticonderoga.[172] Following the United States' independence from Britain, Lewis served in the New York Assembly and as a state supreme court judge, state attorney general, governor, and United States senator.[173] In 1813, Tompkins commissioned Lewis as a major general of the state militia.[174] Shortly thereafter, Madison appointed Lewis as commander of the Third Military District, an area comprising New York and New Jersey.[175] According to one military historian, by the War of 1812, Lewis was "old by the standards of the day" and "feeble."[176]

Lewis spent much of 1813 in Sag Harbor on Lake Ontario, preparing defenses against a possible British invasion from Canada.[177] Early in his command, Lewis was constrained by the state judiciary. On July 21, 1813, a commissioner of the Supreme Court of Judicature ordered Lewis and a naval officer to produce Samuel Stacy, a suspected spy.[178] When Lewis demurred, Chief Justice James Kent scolded Lewis for his "insufficient" if not contemptuous response to the commissioner and reminded the general that the military was not above the law.[179] "If ever a case called for the most prompt interposition of the court to enforce obedience to its process, this is one," Kent concluded. "A military commander is here assuming criminal jurisdiction over a private citizen, is holding him in the closest confinement, and contemning the civil authority of the State."[180]

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171. *See* BARBUTO, NEW YORK'S WAR OF 1812, *supra* note 120, at 10; *see also* JOHN S. JENKINS, LIVES OF THE GOVERNORS OF THE STATE OF NEW YORK 137–51 (1851).

172. *Id.*

173. *Id.*

174. 2 JULIA DELAFIELD, BIOGRAPHIES OF FRANCIS LEWIS AND MORGAN LEWIS 83 (1877).

175. 2 R.S. GUERNSEY, NEW YORK CITY AND VICINITY IN THE WAR OF 1812, at 90 (1895). Lewis had served in several campaigns prior to his appointment.

176. QUIMBY, *supra* note 124, at 310.

177. Gary M. Gibson, *Militia, Mud, and Misery: Sacketts Harbor During the War of 1812*, 94 N.Y. HIST. 241 (2013).

178. *In re* Stacy, 10 Johns. 328 (N.Y. Sup. Ct. 1813).

179. *Id.* at 334.

180. *Id.* It should be noted that even if Lewis wanted to ignore Justice Kent, he was thwarted from doing so, as both Secretary of War Armstrong and President Madison agreed with Kent. *See, e.g.*, Ingrid Brunk Wuerth, *The President's Power to Detain Enemy Combatants: Modern Lessons from Mr. Madison's Forgotten War*, 98 NW. U. L. REV. 1567, 1583 (2004).

Shortly after Lewis assumed command, he convened a court-martial against three deserters, which resulted in guilty verdicts and death sentences.[181] The public executions of two of the three soldiers did not have the deterrent effect that Lewis had hoped for, as desertions continued to plague his force.[182] On July 28, 1814, he requested that Tompkins order citizens into the militia and to proceed north to Sag Harbor after perceiving a growing threat from Canada.[183] One month later, on August 29, Lewis implored Tompkins to order militia into service for the defense of New York City as well.[184]

Lewis's consternation over the condition of New York should be studied against the conduct of the state militia during the war. On March 24, 1814, the Adjutant General of the Third District—the senior officer responsible for conveying War Department orders—reported to Tompkins that nine officers would be placed on permanent duty at Governor's Island in New York City to sit as a semi-permanent, or "standing," court-martial for the purpose of trying deserters and delinquents.[185] The next day, the adjutant general detailed a memorandum for the standing court-martial.[186] The memorandum reminded the officers assigned to the duty of finding soldiers guilty or not guilty of failing to report to duty or desertion that the

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181. Gibson, *supra* note 177, at 241. Professor Gibson noted that two of the three soldiers were executed by hanging and one soldier was given a reprieve.

182. *Id.*

183. Letter from Morgan Lewis to Daniel Tompkins (July 28, 1814) (on file with the National Archives). Lewis's correspondence stated:

> The President has determined that the militia in service at Sag Harbor shall be continued for six months under the Act of the 18 April last. About fifty of them have, since this determination, insisted that in the ranks of the corps have become much thinned from other causes. I must therefore request your Excellency to order an immediate draft from the militia.

184. Letter from Morgan Lewis to Daniel Tompkins (Aug. 29, 1814) (on file with the National Archives). Lewis's correspondence stated:

> Believing that the City of New York is menaced with invasion, and that the surest means of averting such a calamity is to be prepared for it, I take the liberty of calling on your excellency for an additional military force to consist of nine thousand four hundred and fifty Infantry and one thousand and fifty Artillerists of which latter as large a proportion as possible should be of light artillery, a squadron of horse would also be desirable.

185. Adjutant General Report to Daniel Tompkins (Mar. 24, 1814) (on file with the National Archives).

186. Adjutant General Report to Daniel Tompkins (Mar. 25, 1814) (on file with the National Archives).

evidence against each soldier had to be reflected "in a distinct specification of the respective charges."[187] In other words, while the standing court-martial could assess the guilt or innocence of dozens if not hundreds of soldiers, each accused soldier had to be assessed by the trial as an individual and not be found guilty en masse. Yet militia soldiers were court-martialed en masse.

As early as April 1814, the Third Military District's militia forces were depleted well below their normal strength. For instance, one of the companies in Mott's regiment only had two of its four officers present for duty, one of four sergeants, and only 61 of the 100 privates accounted for.[188] Thirteen privates were absent from duty and, of the others, several were already deemed as military prisoners.[189] By the end of July, one company could only account for 52 of its 100 privates and another counted as present only 55 of its 100 privates.[190] On April 28, 1814, the adjutant general recorded that in one day on Governor's Island, 14 privates were found guilty of failing to muster.[191] Perhaps most surprisingly, the court-martial determined that "the unfortunate men incurred the penalty of death."[192] The court-martial also decided that a Sergeant Whitlock was likewise found guilty but recommended leniency, and in conformance with this recommendation, Morgan pardoned him.[193]

The standing court-martial continued to address desertions and failures to muster throughout the summer of 1815. On July 3, 1814, the adjutant general recorded over 30 desertion cases from the prior day.[194] Typical of this reporting was the case of John Barrow, where an entry reads, "private in the company of the 41st Regiment – Charge and specification of desertion, pleaded 'guilty,'" and the court-martial confirmed the plea of the prisoner and sentenced him "to be shot to death."[195] Likewise, William Jones, a private in the Corps of Artillery, pled

187. *Id.*

188. Company Returns for July 30 Received by the Inspector General of the Third Military District (on file with the National Archives).

189. *Id.*

190. *Id.*

191. *Id.* These privates were Matthew Caldwell, James Kerwin, James McClary, William Hutson, James Van Glout, John Chamberlain, Daniel Perry, John Cadogan, John Harper Montgomery, John Hicks, John Martin, George King, Samuel Carter, and Walter Clark. *Id.*

192. *Id.*

193. *Id.*

194. Adjutant General Report to Daniel Tompkins (July 3, 1814) (on file with the National Archives).

195. *Id.*

"not guilty" but was found guilty and sentenced "to be shot to death."[196] Perhaps reflecting the seriousness of the numbers of desertions and failures to muster, Private McCortland was found guilty of being drunk on duty and asleep at his post and sentenced to 15 days of solitary confinement. Another private named George Homister was convicted of using abusive language toward his superior officers but was only sentenced to be fed bread and water for 30 days as well as to forfeit half of his pay.[197] In all, over 40 soldiers were prosecuted on July 3 before a single court-martial.

On July 29, the standing court-martial listed 39 militia soldiers convicted of either desertion or failure-to-muster offenses. While six of the soldiers were sentenced to be "shot to death," most of the others—such as John Brown—were sentenced to hard labor for six months and a forfeiture of half pay during the duration of the sentence.[198] On the other hand, the entry for Thomas Brown of the "41st Regiment of Infantry" notates an acquittal, which is the first such notation for 1814.[199] Yet, on August 3, the court-martial, in addition to determining that over a dozen soldiers were guilty of desertion, sentenced John Williams, "private in 32 Infantry," to "be hung by the neck until dead" for deserting his post.[200] The same court-martial determined that the appropriate penalty for Jacob Sanders, a private in the 42nd Infantry who impersonated an officer, was to be confined for same amount of time as his impersonation.[201]

On September 24, 1814, Lewis ordered a new standing general court-martial to prosecute all citizens who failed to muster into militia duty.[202] A review of the Third Military District's records, specifically the inspector

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196. *Id.*

197. *Id.*

198. Adjutant General Report to Daniel Tompkins (July 29, 1814) (on file with the National Archives).

199. *Id.*

200. Adjutant General Report to Daniel Tompkins (Aug 3, 1814) (on file with the National Archives).

201. *Id.*

202. Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827). The court-martial order applicable to Mott as enumerated in the Court's opinion reads:

> Adjutant General's Office, 3d M. D. New-York, 24th September, 1814. General Orders. A General Court Martial, under the act of Congress of the 28th of February, 1795, for the trial of those of the militia of the State of New-York, ordered into the service of the United States, in the third military district, who have failed to rendezvous pursuant to orders, will convene on Monday, the 26th instant, at Harmony Hall, and will consist of the following members. . . .

Id.

general's orderly books, now located in the United States National Archives and Records Administration in Washington, D.C., evidence that Mott was hardly alone as a "delinquent," and certainly the numbers of deserters alone attest to a mass depletion in the ranks. On October 2, 1814, the standing court-martial determined that 41 militia soldiers had deserted. None of the sentences resulted in a death penalty. Some, such as Nathaniel Field, were merely sentenced to be discharged with a loss of pay and a fine.[203] Others, such as John Yeoman, were sentenced to "hard labor" and a "stoppage of whiskey and half pay."[204] There is another primary source for determining the effect of delinquents on the militia's ability to fight. The Records of the U.S. Army Commands, Third Military District's Company Returns evidence that during the period January 1 to December 31, 1814, no company—the basic military formation of roughly 40 to 100 soldiers—was close to full strength.[205] Mott's company, which appears to be typical, listed that 17 privates were absent and unaccounted for while 48 were present for duty. One of the two lieutenants was in prison as were three privates.[206]

During this time, it was clear that New York was in crisis as an invasion from Canada briefly materialized. On August 31, Brigadier General Mound informed Tompkins that the northern city of Clinton, New York, had fallen to the British and that General Macomb had ordered him to call out the local militia in its entirety.[207] On September 1, Macomb reported to Tompkins that Lewis had, in fact, ordered the militia north and his forces were proceeding to Lake Champlain in the hopes of repulsing the British.[208] Five days later, Tompkins learned that Plattsburgh had also fallen to the British.[209] But at the end of the month, New York's and the

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203. Adjutant General Report to Daniel Tompkins (July 29, 1814) (on file with the National Archives).

204. *Id.*

205. Company Returns Received by the Inspector General (1814) (on file with the National Archives).

206. *Id.*

207. Letter from Brig. Gen Mound to Daniel Tompkins (Aug. 31, 1814) (on file with the National Archives).

208. Letter from Alexander Macomb to Daniel Tompkins (Sept. 1, 1814) (on file with the National Archives). Macomb's letter evidences desperation:

> The Army has advanced in force as far as the Village of Champlain and is now encamped on the north side of the Churzy River in number of about five-thousand under the command of Lieut. Col. Brisban, it is said they have a much larger force. . . . Every effort is making to receive him. Major General Morgan has called out the militia en-masse.

209. Letter from Benjamin Mooer to Daniel Tompkins (Sept. 6, 1814) (on file with the National Archives). Mooer's letter stated, "I feel it my duty although

nation's fortunes had turned, and the British began a retreat into Canada. As one officer noted to Tompkins, "The militia of New York have redeemed their character, they behaved gallantly. General Davis was killed and General Porter slightly wounded."[210]

Given the widespread delinquency and desertion, it is not difficult to fathom why mass courts-martial were ordered. In spite of the widespread delinquency, by the end of September, there were 17,000 militia soldiers activated and defending New York City.[211] There were rumors that a British force of 6,000 soldiers with the support of the Royal Navy were readying for an invasion of Long Island, though this never materialized.[212] And interestingly, on October 14, 1814, Secretary of War James Monroe replaced Lewis with Tompkins in command of the Third Military District.[213] Tompkins had no prior military experience, and the move appears to have been for political reasons.[214] Some of Tompkins's earliest actions as the Third Military District's commanding officer included the ordering of a standing court-martial, which adjudged several militia soldiers as guilty of absence without leave.[215]

On February 16, 1815, the district's adjutant general issued a sweeping court-martial order which dealt with 57 militia soldiers charged with desertion at Sag Harbor alone.[216] All of the militiamen convicted under this order were sentenced to fines ranging from eight dollars to ninety dollars.[217] However, in the event that a militia soldier was unable to pay a fine, they would be considered "delinquent" and be required to "serve in prison one month for every five dollars of fine imposed."[218] Mott was listed among the hundreds of delinquents from the Third Military District as of 1815.[219]

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painful to give your Excellency the earliest information of the enemy's entering Plattsburgh with a large force at about 11 O Clock." *Id.*

210. Letter from Jacob Brom to Daniel Tompkins (Sept. 20, 1814) (on file with the National Archives).

211. QUIMBY, *supra* note 124, at 725.

212. *Id.*

213. *Id.*; *see also* Letter from James Monroe to Daniel Tompkins (Oct. 14, 1814), *in* 1 PUBLIC PAPERS OF DANIEL D. TOMPKINS, GOVERNOR OF NEW YORK 699–700 (1898).

214. QUIMBY, *supra* note 124.

215. PUBLIC PAPERS OF DANIEL D. TOMPKINS, *supra* note 213, at 708–13.

216. General Orders, Adjutant General Office New York (Feb. 16, 1815) (on file with the National Archives).

217. *Id.*

218. *Id.* In the same court-martial, 29 other militia soldiers were acquitted.

219. List of Deserters, Records of the Adjutant General Third Military District, (on file with the National Archives).

III. COURTS AND SOLDIERS IN THE EARLY REPUBLIC THROUGH THE WAR OF 1812

In 1815, Chief Justice John Marshall in *Meade v. Deputy Marshal* conducted the first federal judicial review of a state militia court-martial to arise from the war.[220] On March 24, 1813, Virginia's governor James Barbour ordered the state militia to muster, and William Meade failed to comply. In late 1813, a court-martial composed of militia officers convicted Meade for a delinquency but did so under the Articles of War, the body of law for the regular army and federalized militia.[221] Meade's court-martial predated the Act of April 18, 1814, a point that Marshall stressed before concluding that, because Virginia had no laws permitting the trial of delinquents under the Articles of War by court-martial, the state court-martial did not have jurisdiction.[222] Further, Marshall noted that Meade's court-martial had proceeded without providing notice to Meade, and without notice, the court-martial had no jurisdiction.[223] Put another way, military courts, like civilian criminal trials, had to be conducted with due process or be jurisdictionally forfeit.

Although it is true that in 1810, the Supreme Court of Judicature of New York determined in *Capron v. Austin* that courts-martial had to be

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220. Meade v. Dep. Marshal, 16 F. Cas. 1291 (C.C.D. Va. 1815) (No. 9,372).

221. *Id.*

222. *Id.* at 1293.

223. *Id.* There are only a few citations to *Meade*. *See* Richard D. Rosen, *Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial*, 108 MIL. L. REV. 5, 23 (1985). Rosen penned, "[w]ithout articulating any basis for review, Chief Justice Marshall found that the court-martial had failed to comply with state law and had proceeded without any notice to the petitioner." However, Marshall did obliquely state a standard of review in his analysis on "notice." See, for example, Suzanna Sherry, *The Founders Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1171 n.189 (1987), noting that in *Meade*:

> Marshall, in invalidating the court-martial relied on three independent grounds: "(1) in the absence of Congressional delegation, courts martial are under federal, not state, control; (2) even if properly under state control, the court martial acted improperly under Virginia law; and (3) even if Congressional action had authorized the action (imposing a fine on a private not actually in service) despite state law, the court had proceeded without notice. The first two issues were purely statutory."

However, this is in error as to the first point; courts-martial were never the exclusive province of the federal government. State constitutions permitted state militia to be court-martialed in state trials. *See, e.g.*, People v. Hazard, 4 Hill. 207 (N.Y. Sup. Ct. 1843); Rawson v. Brown, 18 Me. 216 (1841). Both *Hazard* and *Brown* arose from state courts-martial.

conducted with the same notice requirements of state criminal trials, *Meade* might be the earliest instance in which the federal judiciary determined that notice was a fundamental right of citizens subject to the military law regardless of whether that law was federal or state.[224] In addition to understanding *Mott* in the context of *Meade*—that is, militia soldiers were vested with certain due process rights—it is noteworthy that until 1871, when the Court issued *Tarble's Case*, state courts granted habeas to prisoners held in military custody.[225] Following *Tarble's Case*, only the federal courts possessed the jurisdiction to review courts-martial on appeal, and federal review became much narrower than state review.[226]

This is not to argue that the state courts sought to undermine the federal war effort or became a tool to do so. (Justice Stephen A. Field, in authoring *Tarble's Case*, insisted that state courts and state governments undermined the war effort during the Civil War).[227] But there were important state and federal constitutional-rights challenges to come before the courts, such as religious faith and accompanying statutory exemptions from mandatory militia service. For instance, in early 1817, the Supreme Court of Tennessee issued *Durham v. United States*, in which the justices determined that the state court-martial of William Durham—a Quaker—had to be quashed because the court-martial ignored the statutory exemption of Durham from service.[228] The Kentucky Supreme Court issued a similar decision in *White v. McBride*, in which the justices held that a court-martial had no jurisdiction over conscientious objectors.[229] In 1814, New York's Supreme Court of Judicature recognized that Quakers were exempt from militia service, but when an officer relying on a muster roll—military records of personnel assignments—arrested a citizen for

224. Capron v. Austin, 7 Johns. 96 (N.Y. Sup. Ct. 1810).

225. Tarble's Case, 80 U.S. 397 (1871). On this point, see *In re* Carlton, 7 Cow. 471 (N.Y. Sup. Ct. 1827); Rosen, *supra* note 223, at 26–27; s*ee also* Edward A. Hartnett, *The Constitutional Puzzle of Habeas Corpus*, 46 B.C. L. REV. 251, 265 (2005) (noting that there is no shortage of scholars who consider *Tarble* unsound).

226. *See, e.g.*, *In re* Grimley, 137 U.S. 147 (1890); *In re* Morrisey, 137 U.S. 157 (1890); KASTENBERG, *supra* note 62, at 55.

227. *Tarble*, 80 U.S. at 408.

228. Durham v. United States, 5 Tenn. 54 (1817). The Tennessee Attorney General apparently argued that the federal law did not exempt Durham, and therefore the court-martial was valid. The state supreme court determined that the court-martial was a state function and therefore subject to state law, including exemptions.

229. White v. McBride, 7 Ky. 61 (1815). Kentucky's justices found *Wise v. Withers* dispositive to this issue.

delinquency and the citizen later claimed a religious exemption, the officer was immune from suit.[230]

A. Houston v. Moore*: Pennsylvania Precedes Jacob Mott*

Professor Wilentz penned that "Pennsylvania saved Madison's presidency" in regard to the 1812 election.[231] In 1818, the Pennsylvania Supreme Court granted a further review of Duffield's challenge to the jurisdiction of a state court-martial, although by this time Justice Jasper Yeates had died.[232] Like Jacob Mott, Edward Duffield sued John Smith, a federal marshal, for trespass, assault, and false imprisonment.[233] On April 7, 1813, Governor Simon Snyder ordered 1,000 militia men to muster for inspection in case they were needed to repel a British invasion near the mouth of the Delaware River.[234] President Madison had issued a requisition for 14,000 militia men on April 15, 1812, but rescinded it by the time the governor issued the order for the 1,000 militia men, of which Edward Duffield was a part.[235] It appears from the state supreme court's decision that Duffield actually neglected to muster twice: once in regard to Madison's requisition in 1812 and again in 1813 in regard to the governor's order.[236] After being notified of court-martial charges against him, Duffield "voluntarily, and without any restraint, appeared on the 15th February 1814, submitted himself to the jurisdiction of the court, not denying his disobedience of orders, but acknowledging and confessing the same . . . ."[237] This was the very submission to the court-martial that troubled Yeates four years earlier.

In *Duffield v. Smith (II)*, the state court, in a decision authored by Chief Justice William Tilghman, determined that because there was no state law creating a crime for disobedience to the president's orders, a state court, including a state militia court-martial convened under the governor's

230. Vanderbilt v. Downing, 11 Johns. 83 (N.Y. Sup. Ct. 1814).
231. WILENTZ, *supra* note 60, at 158.
232. Duffield v. Smith, 3 Serg. & Rawle 590 (Pa. 1818).
233. *Id.* Duffield also sued a militia captain and judge advocate. *Id*.
234. *Id.*
235. *Id.* Governor Snyder was a proponent of war with Britain and an enthusiastic backer of Madison. In the words of one historian, "While Pennsylvania was not the only state to favor war with Great Britain, few were as willing to support the war effort in terms of military mobilization." John. C. Fredriksen, *The Pittsburgh Blues and the War of 1812: The Memoir of Private Nathaniel Vernon*, 56 PA. HIST. 196 (1989).
236. *Duffield*, 3 Serg. & Rawle at 591–92.
237. *Id.*

direct authority, had no jurisdiction over Duffield.[238] However, Tilghman made it clear that, in his view, if the states were free to determine that the federal government had no jurisdiction over "delinquents," the Constitution would be "a dead letter."[239] Tilghman reasoned that just as it was a constitutional imperative for the president to have sole discretion to declare an emergency and the declaration not be subject to interpretation of state governors, any court-martial which adjudged militia soldiers who violated a president's order had to be adjudged under the Articles of War, constrained, of course, by the 1795 Militia Act's safeguard of having militia soldiers adjudged only by militia officers.[240]

The Pennsylvania Supreme Court's decision to void Duffield's court-martial and enable his trespass suit to proceed against the marshal, militia captain, and judge advocate is explainable in light of three other decisions. Chief Justice Marshall's order in *Meade* made it clear that due process existed in courts-martial. In an earlier decision, titled "*Bolton*," Justice Tilghman noted that there was no state law authorizing the court-martial of militia soldiers who refused to heed the orders of a president, and therefore the court-martial had no jurisdiction over that conduct.[241] However, after the state court issued *Bolton*, Pennsylvania's legislature made it a criminal offense to disobey the president. In *Houston v. Moore*, the state's justices determined that this offense was valid as a state law, and therefore a state court-martial possessed jurisdiction over such a refusal.[242] *Houston*, as discussed further below, deserves greater attention for its impact on *Mott*, if not the shaping of the nation's military law.

A note on Tilghman contextualizes Story's approach to military law and executive authority. Born in Maryland in 1756, Tilghman studied law and was elected as a state legislator. In this capacity, he served as a delegate to that state's constitutional convention and voted to ratify the proposed federal constitution.[243] Tilghman moved to Philadelphia shortly after the United States came into being.[244] In 1801 President John Adams appointed him to the circuit court, and after the circuit was disbanded,

238. *Id.* at 593.

239. *Id.*

240. *Id.* at 595. Tilghman's decision notably stated: "If the governor had the direction of the courts-martial, he might find it easy to thwart the views of the president. When the sentence is given, to whom is it to be submitted for approbation?"

241. *Id.* at 598.

242. Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820).

243. *See* 2 FRANK M. EASTMAN, COURTS AND LAWYERS OF PENNSYLVANIA: A HISTORY 1623-1923, at 396 (1922).

244. *Id.*

Tilghman became the presiding judge for the Pennsylvania Court of Common Pleas. Then, in 1806, he became chief justice of the state supreme court, where he remained until 1827.[245] Another point on both Tilghman and *Houston* is important. In 1814 Pennsylvania's legislature enacted a law to prevent the obstruction of the national war effort in the courts.[246] The act compelled the collection of fines from delinquents but provided a safeguard to prevent the double payment of fines.[247] The act also made it a misdemeanor to issue a writ or grant certiorari to remove the proceedings or sentences of a federal militia court-martial into state court.[248]

On April 3, 1815, Daniel Moore, a deputy marshal in Pennsylvania, entered into Robert Houston's mercantile store and seized a number of goods in lieu of a $96 fine[249] that a state court-martial had assessed against him for failure to comply with a muster order.[250] Houston sought to challenge the property seizure in a state court, and, in addition to Moore, he named Molton C. Rogers, General John Dicks, and Nathaniel W. Sample in his civil suit.[251] Rogers had served as judge advocate on Moore's court-martial, and Sample as the inspector general who convened Houston's court-martial.[252] General John Dicks served as the presiding officer on the court-martial that fined Houston after finding him guilty.[253]

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245. *Id.*; *see also* HORACE BINNEY, AN EULOGIUM UPON THE HON. WILLIAM TILGHMAN, LATE CHIEF JUSTICE OF PENNSYLVANIA 7–14 (1827).

246. Act of Assembly of 28th March 1814 (Pa. 1814).

247. *Id.* § 21.

248. *Id.* § 25.

249. Moore v. Houston, 3 Serg. & Rawle 169, 170 (Pa. 1817). It might appear that the items seized, two "broadcloths," were of a lesser burden to Houston than the loss of a mare was to Mott. *See Moore*, 3 Serg. & Rawle at 170, *microformed on* U.S. Supreme Court Records and Briefs, No. 881, F-21. One other problem with the seizure of Houston's property was that as Houston was the co-owner of a mercantile store, the property seized may have been jointly owned. *See* "Oath of Mr. Jacob Gossler," *Id.* at F-30.

250. *Id.* Governor Simon Snyder ordered the Pennsylvania court-martial convened on December 22, 1814. The court-martial lasted from February 13 until February 25, 1815, and prosecuted dozens of citizens liable for failure to comply with a muster order.

251. *Moore*, 3 Serg. & Rawle at 170.

252. *Id.* Rogers would later serve as Pennsylvania's "Secretary of the Commonwealth," in the Pennsylvania Senate as a Democrat, and as an associate justice on the state supreme court. *See* Stanley I. Kutler, *Pennsylvania Courts, The Abolition Act, and Negro Rights*, 30 PA. HIST. 14, 23 (1963).

253. In 1776, Dicks was listed as a private in militia company. *See* 2 WILLIAM LYNCH MONTGOMERY, PENNSYLVANIA ARCHIVES 602, 604 (1906). During the

The facts leading to the court-martial were similar to those leading to Mott's. Governor Simon Snyder issued a callup of militia on August 26, 1814, and on February 25, 1815, the court-martial found that Houston had failed to muster into service. Houston pled not guilty, and he objected to the jurisdiction of the court-martial.[254] He lost on both issues. A civil trial, however, concluded that Moore did not have the authority to seize Houston's property because the court-martial did not possess jurisdiction.[255]

The Pennsylvania Supreme Court, in a decision authored by Tilghman, framed the issue as whether the state legislature had the power to create state courts-martial for state citizens who failed to muster into the militia pursuant to a president's order.[256] Tilghman noted that if the Pennsylvania legislature were to have created courts-martial over their militia when the militia was already called into federal service without the governor's cooperation, then the state court-martial would necessarily run afoul of the Constitution because it would usurp an exclusive federal power.[257] Yet, if the state legislature were to enact a law authorizing state courts-martial jurisdiction over militia prior to the militia being called into federal service, the court-martial would be valid and indeed be in aid of Congress' authority.[258] But, of course a state court-martial would maintain jurisdiction over a citizen called into service by a governor whenever the call occurred. Tilghman then concluded that the Pennsylvania legislature, in conferring state court-martial jurisdiction over delinquents, had merely created a law in aid of the federal government, and therefore the state law was not repugnant to the Constitution.[259] Justice John Bannister Gibson, in his concurrence, appears only to have departed from Tilghman on the

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War for Independence, he was promoted to sergeant. On Dicks, see also WILLIAM P. CLARKE, OFFICIAL HISTORY OF THE MILITIA AND THE NATIONAL GUARD OF THE STATES OF PENNSYLVANIA 181 (1909). John Dicks became the commanding officer of a brigade in the Fourth Division in 1814.

254. *Moore*, 3 Serg. & Rawle at 171.

255. *Id.* at 175.

256. *Id.* at 177. Tilghman noted that Houston presented a different challenge than what had been argued in *Bolton*. That is, in *Bolton*, the state legislature had not enacted a law enabling courts-martial to prosecute citizens who failed to comply with a presidential order to muster.

257. *Id.* at 178–80. Tilghman stated, "The power of the several states to govern their own militia is not derived from the constitution of the United States. They had it before the adoption of that constitution, and possess it still, except where it has been restricted, or yielded to the United States." *Id.* at 178.

258. *Id.*

259. *Id.* at 183.

basis of whether a militia soldier who failed to object to the jurisdiction of the court-martial later waived a challenge on appeal.[260]

On May 17, 1817, the Pennsylvania Supreme Court issued its decision. Less than three years later, the United States Supreme Court reversed the state supreme court in *Houston v. Moore*.[261] Pennsylvania was represented by one of its congressmen, Senator Charles Jared Ingersoll, along with "M.C. Rogers."[262] This was the same Rogers named in the suit, and by the time of the appeal, Rogers had become the Secretary of the Commonwealth of Pennsylvania.[263] Houston cited *Meade* in arguing to the Court that without a specific grant of authority from Congress to the states, the use of a state court-martial to vindicate the power of a president was unconstitutional.[264] In other words, Houston argued that only the federal government could court-martial him once the president ordered the militia into service. Nowhere in the state's argument was there a claim that a state judge lacked the authority to issue a habeas writ on a federal officer.

The Court gave its opinion on February 16, 1820, but this is somewhat misleading because Justice Bushrod Washington earlier issued a ruling in his circuit-rider capacity, which later became the Court's opinion.[265] Washington's ruling limited the appeal to the singular question of whether Pennsylvania's legislative act enabling courts-martial of delinquent citizens when the delinquency occurred in response to a presidential order

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260. *Id.* at 189 (Gibson, J., concurring).

261. Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820).

262. On Ingersoll, see Irwin F. Greenberg, *Charles Ingersoll: The Aristocrat as Copperhead*, 93 PA. MAG. HIST. & BIOGRAPHY 190, 191 (1969) (noting that Ingersoll came from a Federalist family but embraced Jeffersonian ideology). Ingersoll had also served as the state's attorney general.

263. *Moore*, 18 U.S. (5 Wheat.) 1. On Rogers, see GENERAL CATALOGUE OF THE COLLEGE OF NEW JERSEY 118 (1908) (noting that Rogers died in 1863 and had also served as a justice on the Pennsylvania Supreme Court); *see also Molton Cropper Rogers: Biography*, PA. STATE SENATE, https://www.legis.state.pa.us/cfdocs/legis/BiosHistory/MemBio.cfm?ID=4339&body=S [https://perma.cc/7ZHD-2PH9].

264. Houston's brief rhetorically asked the Court and then answered:

> Is it possible that Congress meant to give power to a State Court, without naming the Court, or granting the power in express terms? The exercise of this jurisdiction by a State Court Martial would either oust the United States' Courts of their jurisdiction, or might subject the alleged delinquents to be twice tried and punished for the same offence. If the State Court could try them, the Governor of the State could pardon them for an offence committed against the laws of the United States.

Moore, 18 U.S. at 3.

265. *Id.* at 15.

was repugnant to the Constitution.[266] In order to answer this question, he first conducted an overview of the relationship between the state governments and their militias to the federal government. The Constitution, he noted, empowered Congress to call the militia into federal service as well as to organize, arm, and discipline them.[267] However, it was left to the state governments to train and discipline the militia according to standards set by Congress when not in the federal service. [268] At the time of the appeal, Congress provided that delinquents were to be tried in courts-martial staffed by militia only and subject to fines or imprisonment if the fines were not paid.[269] Finally, Washington found it important to note that in the Act of 8 May 1792, while Congress set forth the qualifications for militia service and the minimum standards for arming the militia, it was left to the state legislatures to organize their respective militias into military units and create disciplinary rules to govern these units.[270] To Washington, as a result of interlocking authorities, both a state and the federal government maintained jurisdiction over militia soldiers. Whether Washington and the other justices approved of this system of governance, he made it clear that the Court would not deviate from or alter it.[271]

Justice William Johnson in his concurrence noted that the issue before the Court was difficult to define and expressed uncertainty as to whether the Court had jurisdiction.[272] This was because if Pennsylvania had prosecuted Houston under its own laws, it was doubtful that there was a federal question contained in the appeal.[273] Moreover, Houston's suit was rooted in a property tort, a matter ordinarily reserved to the states. But Johnson and the majority of the Court determined that the appeal presented a question of whether the state had exceeded its jurisdiction and whether the federal army had exclusive jurisdiction over courts-martial when the militia were called into service.

Johnson observed that militia soldiers owed duties of fealty to both their state and the federal government, and therefore they were subject to the "coercive regulations of both governments."[274] However, it became a

266. *Id.*
267. *Id.* at 16.
268. *Id.*
269. *Id.*
270. *Id.*
271. *Id.* at 15. Washington noted, "This system may not be formed with as much wisdom as, in the opinion of some, it might have been, or as time and experience may hereafter suggest."
272. *Id.* at 32 (Johnson, J., concurring).
273. *Id.*
274. *Id.* at 34.

matter of timing as to when, if at all, the federal government could exercise jurisdiction over a militia soldier in that it could not do so until the militia solider became a part of the federal army when the president or Congress called the state militia into federal service.[275] Whatever the weaknesses in this system, Johnson intimated that it was not for the Court to effectuate any change.[276] Put another way, until a president issued a requisition for militia, the state retained jurisdiction, and this jurisdiction continued until the emergency passed.[277]

As to the argument that if a state possessed an independent military power, it might use this power against the federal government, and therefore the states were preempted by the federal government in the realm of militia discipline, Johnson countered that the Court was not confronted with such a problem. Instead, Houston's court-martial occurred while Pennsylvania was cooperating with the federal government and not opposed to it.[278] Johnson was, however, careful to note that simply because a state governor was the commanding officer of his militia, this did not mean that the governors were subordinate to a president.[279]

Story dissented from Washington's opinion and Johnson's concurrence on the basis that Houston's appeal presented only one question to the Court: whether Pennsylvania's Act of March 28, 1814, can make it a crime for a citizen amenable to militia service to fail or refuse a president's order to muster.[280] Story conceded that the question itself was of both "great importance and delicacy."[281] He insisted that once a president, following Congress' grant of authority, called the militia into federal service, the federal government gained exclusive jurisdiction over federal military crimes. Thus, once Madison had called forth the militia into federal service, the state court-martial was repugnant to the Constitution. If the states were permitted to court-martial their militia once called into federal service, he warned, then the president would lose

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275. *Id.*

276. *Id.* at 36.

277. *Id.* at 37.

> But the possession of this power, or even the passing of laws in the exercise of it, does not preclude the general government from leaning upon the state authority, if they think proper, for the purpose of calling the militia into service. They may command or request; and in the case before us, they obviously confined themselves to the latter mode.

Id.

278. *Id.*

279. *Id.* at 46.

280. *Id.* at 48 (Story, J., dissenting).

281. *Id.*

control over the militia. Governors could pardon offenders, state supreme courts could overturn convictions, and jeopardy would attach.[282] Because of this, the president would be unable to pardon a soldier convicted in a state militia and then be deprived of the services of the militia soldier. This would cause a loss of commander in chief control over the military, and therefore the state laws were repugnant to the Constitution.[283]

Story assured the nation that he did not intend to add to the federal government "one jot of power" beyond its constitutional authority.[284] Yet that is what his dissent would have accomplished had it been in the majority, because it would have divested state courts of a potential broad oversight of courts-martial and removed the power of a governor to pardon a class of convicted offenders. In her 2019 dissent in *Gamble v. United States*, Justice Ruth Ginsburg posited that Story was seeking to protect citizens, but in reality, this was not the case at all.[285] Indeed, Story's view of *Houston* is encapsulated in his statement on a president being the sole arbiter on whether an emergency has arisen: "This question was much agitated during the late war with Great Britain, although it is well known, that it had been practically settled by the government, in the year 1794, to belong exclusively to the president." [286]

B. New York and Other State Judicial Decisions on Militia in Wartime

During the War of 1812 and its immediate aftermath, state appellate courts did publish decisions defining the parameters of court-martial jurisdiction. In *Johnson v. Hunt*, New York's Supreme Court of Judicature determined that a statutory exemption from militia service for mail carriers did not include a single-time contractor employed to transport military express mail.[287] New York's state courts-martial not only adjudicated military crimes, but they could also function as trial courts to resolve disputes and award damages. In 1813, the New York judiciary decided in *Ferris v. Armstrong* that a captain who relied on a muster roll to arrest a delinquent was absolved of wrongdoing, and therefore the private could

282. *Id.* at 72–73.
283. *Id.*
284. *Id.*
285. Gamble v. United States, 139 S. Ct. 1960, 1990–92 (2019) (Ginsburg, J., dissenting).
286. STORY, *supra* note 30, at 91–92.
287. Johnson v. Hunt, 13 Johns. 186 (N.Y. Sup. Ct. 1816). One might surmise from this decision that New York's appellate judges were reticent to interfere with the governor's full commander in chief authority.

not recover monetary damages for the arrest.[288] Private Armstrong had, in fact, been validly discharged from his regiment at the time of the arrest in 1809. However, the discharge certificate had not been penned into the muster rolls of his regiment, and therefore it appeared as though he was delinquent.[289] Perhaps the most interesting aspect of this decision is that while the judiciary absolved Captain Ferris of wrongdoing, it maintained in place a system of accountability that served as a check on military tyranny. It was not until 1950 that the Court, in *Feres v. United States*, precluded civil lawsuits against military officers as well as against the military itself in general matters.[290] Yet, if the New York judiciary maintained the ability to permit lawsuits against militia officers as a check against tyranny, it also determined in *McConnell v. Hampton* in 1815 that judges would have to guard against "unreasonable damages."[291]

While the state's judges might be called upon to check military tyranny, the Supreme Court of Judicature, in *Schuneman v. Diblee*, determined that once a militia soldier was lawfully convicted in a court-martial, the judiciary had to be reticent to permit suits against officers on the basis of prison conditions.[292] The facts that gave rise to *Schuneman* included a small-scale mutiny in which several militia soldiers refused to comply with a colonel's orders and were sentenced by a lawfully constituted court-martial to prison.[293] As there were no available soldiers to serve as guards, the commanding officer determined that all of the available soldiers were needed to guard the fort.[294] As a result, one soldier awaiting court-martial was "tied" to a cannon at the fort after refusing to do military duties.[295] A civil trial found in favor of the soldier over the officer, but the justices reversed this finding and award on the basis that a

288. Ferris v. Armstrong, 10 Johns. 100 (N.Y. Sup. Ct. 1813).

289. *Id.*

290. Feres v. United States, 340 U.S. 135 (1950). *Feres* arose from three medical malpractice claims, not allegations of abuse of authority. *Id.* at 137. The Court noted, "The relationship between the Government and members of its armed forces is 'distinctively federal in character.'" *Id.* at 143 (citing to United States v. Standard Oil Co., 332 U.S. 301 (1947)).

291. McConnell v. Hampton, 12 Johns. 234 (N.Y. Sup. Ct. 1815). In *McConnell*, however, the lawsuit arose from a civilian who may have been falsely accused of working for the British and imprisoned. *Id*. at 236.

292. Schuneman v. Diblee, 14 Johns. 235 (N.Y. Sup. Ct. 1817).

293. *Id.*

294. *Id.* Also known as Fort Gansvort, this structure was a part of Manhattan's fortification system. *See* BARBUTO, NEW YORK'S WAR OF 1812, *supra* note 120, at 26.

295. *Schuneman*, 14 Johns. 235.

soldier who was otherwise required to do military duties could not prevail in a civil court after he refused to do such duties.[296]

In 1815, the Supreme Court of Judicature, in *Smith v. Shaw*, upheld a civil action against a military officer who detained a citizen accused of being a spy during the threatened British invasion months earlier.[297] The defendant officer argued that because martial law had been imposed at the time of the arrest, the detention was lawful. However, Judge Smith Thompson—later appointed to the Supreme Court by President James Monroe—determined that because Smith, as a civilian, was not amendable to court-martial jurisdiction, he was wrongly detained by the military. Therefore, the trespass action against Shaw was lawful.[298] Judge Thompson's conclusory statement in upholding the action against Smith was illustrative of a fear of military tyranny. Even though he conceded that Shaw's actions did not appear "harsh and oppressive," Thompson observed that "[i]f the defendant was justifiable in doing what he did, every citizen of the United States would, in time of war, be equally exposed to a like exercise of military power and authority."[299] Yet Thompson also authored *Hampton*, in which he cautioned that unjust enrichment was not a means to curb tyrannical military authority.

Prior to the Court determining Martin's appeal, the Supreme Court of Judicature issued three decisions on court-martial jurisdiction over militiamen who refused to muster into duty. In *Vanderheyden v. Young*, the New York Supreme Court of Judicature determined that the law solely vested a president with the determination of declaring an emergency.[300] Like *Mott*, the appeal arose in *Vanderheyden* as a result of a citizen who refused to muster into duty, was convicted in a court-martial, and then filed a civil suit to recover property seized by a marshal.[301] Vanderheyden argued that the marshal had a burden of proving that there was an emergency of a nature that it was necessary for a president to declare an emergency.[302] Authored by Justice Ambrose Spencer, the state's appellate judges responded that to "countenance such a construction of the Act would be monstrous" because militia officers and martials would cease doing their duty to order citizens into their respective militia units or to

296. *Id.*
297. Smith v. Shaw, 12 Johns. 257 (N.Y. Sup. Ct. 1815).
298. *Id.* at 266.
299. Judge Thompson prefaced his statement with the caveat, "The conduct of the defendant in this case does not appear to have been harsh and oppressive. But it is the principle involved in it, which renders the question important." *Id.*
300. Vanderheyden v. Young, 11 Johns. 150 (N.Y. Sup. Ct. 1814).
301. *Id.* at 158.
302. *Id.*

conduct courts-martial for fear that they would be subject to civil actions.[303] However, because it appeared that Vanderheyden was no longer subject to court-martial jurisdiction, as he had been mustered out of the militia, the seizure of his property was unlawful.[304] *Vanderheyden* occurred in an ongoing conflict, but it was to prove influential in two other New York decisions.

In 1821, the Supreme Court of Judicature determined in *Mills v. Martin* that because a court-martial was a court of limited jurisdiction, the party seeking justice under the Articles of War had to prove to the court-martial that it possessed jurisdiction over a militia soldier, even when the party was the state.[305] But there was a more stunning aspect to the decision. Justice Jonas Platt,[306] in authoring the decision, determined that a state citizen called into the militia could not be amenable to federal military jurisdiction until the militia soldier swore an oath and accepted federal pay.[307] Two years later, in *Rathbun v. Martin*, the Supreme Court of Judicature determined once more that a militia soldier who refused to muster into federal service was not amenable to an army court-martial.[308] Like in *Mott*, the appeal arose as a challenge to the state's replevin action against Rathbun and two other militia soldiers, Robert S. Livingston and J. F. Bartlett.[309]

IV. *MARTIN V. MOTT*

The Marshall Court, as named for its Chief Justice John Marshall, began with his appointment to the Court in 1801 by President John Adams.[310] Although a detailed biography of each justice would necessarily deter from a study of *Mott* and create an enlarged word count, it is helpful

303. *Id.*

304. *Id.*

305. Mills v. Martin, 18 Johns. 7 (N.Y. Sup. Ct. 1821).

306. Prior to his judicial service, Platt served in Congress and was a Federalist. *See, e.g.*, JOHN STILLWELL JENKINS, HISTORY OF POLITICAL PARTIES IN THE STATE OF NEW-YORK 169 (1846). Platt was also a general in the state militia and had unsuccessfully sought the governor's office in 1810.

307. *Id.* at 22. Although it may have been "stunning" for its time, by World War II, the national draft laws did not permit the extension of court-martial jurisdiction over citizens who refused to comply with an induction order, and such jurisdiction only began after the citizen swore an oath and accepted pay. *See, e.g.*, Billings v. Truesdell, 321 U.S. 542, 548–49 (1944).

308. Rathbun v. Martin, 20 Johns. 343 (N.Y. Sup. Ct. 1823).

309. *Id.* at 344.

310. George L. Haskins, *Law and Politics in the Early Years of the Marshall Court*, 130 U. PENN. L. REV. 1, 2 (1981).

to acknowledge that by 1827, the justices appointed by the two Federalist presidents were Marshall and Washington.[311] There is a historic consensus that Marshall was a "giant" in terms of shaping the nation's laws.[312] From 1811 until his death in 1829, Washington, a nephew of President Washington, was the senior associate justice on the Court.[313] He has been referred to as a friend and ally of both Marshall and Story, but has been called "insignificant" in the development of the nation's laws.[314] Another of the justices, Gabriel Duvall was the "most insignificant of justices."[315] Because *Mott* was issued on February 7, 1827, but had been at the Court for the prior two years, it is difficult to know whether Thomas Todd, who left the court in 1826, or Robert Trimble, who succeeded him, had a role in the shaping of the opinion.[316] The record of the proceedings is bereft of any evidence of either taking part. But before delving into the traverse of the appeal through its decision, it is important to comment on Justice Joseph Story, the author of the opinion, and Justice Smith Thompson, who had served on New York's Supreme Court of Judicature and participated in New York's state constitutional convention.

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311. Herbert A. Johnson, *Bushrod Washington*, 62 VAND. L. REV. 449, 451 (2009).

312. *See, e.g.*, R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT xvi (2007); JOHN SIMON, WHAT KIND OF NATION: THOMAS JEFFERSON, JOHN MARSHALL, AND THE EPIC STRUGGLE TO CREATE A UNITED STATES 294–301 (2012); Michael Gerhardt, *The Lives of John Marshall*, 43 WM. & MARY L. REV. 1399 (2002).

313. Johnson, *supra* note 311, at 458–59.

314. David A. Faber, *Justice Bushrod Washington and the Age of Discovery in American Law*, 102 W. VA. L. REV. 725, 737 (2000) (seeking to correct this characterization).

315. David P. Currie, *The Most Insignificant Justice: A Preliminary Inquiry*, 50 U. CHI. L. REV. 466, 469-69 (1983) ("To encumber the highest bench for a quarter of a century without leaving any deeper imprint than Duvall did is the mark of a very special judge.").

316. Thomas Todd has also been suggested for the mantle of "most insignificant justice." *See* G. Edward White, *Neglected Justices: Discounting for History*, 62 VAND. L. REV. 319, 320 (2009). However, Todd was entrusted to author several of the Court's "western land cases," which had a political importance at the time, and Todd's son served on General William Henry Harrison's staff during the War of 1812. *See* Thomas Todd, *Letters of Thomas Todd of Kentucky to his son at college*, 22 WM. & MARY Q. 20 (1913).

A. Biographic Note: Story and Thompson

In the midst of the War of 1812, Story dissented in *Brown v. United States* in which the majority held that, even in wartime, a president could not constitutionally seize a British citizen's property without a specific legislative authorization to do so.[317] In *United States v. Bainbridge*, a decision issued in his circuit capacity role, Story also expressed that Congress had the constitutional authority to permit the enlistment of minors into the Navy.[318] Story, who had no military service of his own, conceded that parents who placed children into the military contrary to child's desire would operate against the law; but because the skills and discipline required of sailors were best developed over long years of service, it would be appropriate to permit the enlistment of minors.[319] Yet Story was hardly alone in his judicial views on minors being congressionally authorized to enlist into the army or navy with parental or guardian permission.[320]

There can be little doubt that Story is one of the leading justices to have shaped constitutional law.[321] Born in Marblehead, Massachusetts in 1779, he attended Harvard University and experienced the War of 1812 as well as the conduct of the state militia and the Hartford Convention.[322] Prior to his appointment to the Court, he was a leading legal scholar, and he had a brief sojourn into the legislative branch. On January 18, 1808, Congressman Jacob Crowninshield died, and in November of that year, Story served a 30-day stint as a member of the House of

317. Brown v. United States, 12 U.S. (8 Cranch) 109, 129–53 (1814) (Story, J., dissenting).

318. United States v. Bainbridge, 24 F. Cas. 946 (C.C. Mass. 1816) (No. 14, 497).

319. *Id*. at 949–50.

320. *See, e.g.*, Commonwealth v. Barker, 5 Binn. 423 (Pa. 1813). Justices Tilghman and Yeates directed that a minor be remanded to military authority after a "master" consented to his enlistment. And, in *Commonwealth ex rel. Menges v. Camac*, 1 Serg. & Rawle 87 (Pa. 1814), the Pennsylvania Supreme Court, in a decision authored by Tilghman with Yeates joining, held that a minor who enlisted without his parents' permission (but later obtained such permission) and deserted was subject to court-martial jurisdiction.

321. *See, e.g.*, Bernard Schwartz, *Supreme Court Superstars: The Ten Greatest Justices*, 31 TULSA L.J. 93 (1995); 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 697 (1922).

322. On Story's experience with the War of 1812, see NEWMYER, *supra* note 18, at 84. Newmyer noted that Story was disgusted with the "obstructionism" in his home state of Massachusetts.

Representatives.[323] During that time, he urged that President Jefferson's embargo against Britain was justifiable under both international and constitutional law.[324] Massachusetts Federalists, who generally supported Britain over France, argued that without a declaration of war, a president could not order an embargo.[325] However, Story also argued to Congress that the embargo did not serve the good of the nation.[326] Madison, against Jefferson's advice, nominated Story to the Court on November 15, 1811.[327] Gerald T. Dunne has called Story a "war hawk" counterpart to Clay and Calhoun.[328]

One of Story's biographers noted that by the outbreak of the war, the justice "harbored deep reservations about the democratic trend in America."[329] Story would, in the years after *Mott* was issued, decry Andrew Jackson's presidency and the expansion of unpropertied white males into the nation's franchise and professions.[330] In 1818, Story wrote to a peer that the nation was in danger of being ruined by "intestine divisions."[331] Story's concern about a fractured people makes sense on several levels. One only need recall the conduct of Connecticut's governor or the Massachusetts government's and judiciary's opposition to the war.

Interestingly, Story once articulated an opinion on Smith Thompson and Daniel Tompkins in the same letter.[332] "Of Thompson and Tompkins I cannot say much, because they interfered very little in the business of the Court," Story began. "The former has a reputation of industry and soundness. The latter is too young on the bench to have entitled himself great consideration."[333] Story's letter was written in 1807, well before

323. Gerald T. Dunne, *Joseph Story: The Germinal Years*, 75 HARV. L. REV. 707, 737 (1962).

324. *Id.* at 740.

325. *Id.*

326. *Id.* at 739.

327. Morgan Dowd, *Joseph Story and the Politics of Appointment*, 9 AM. J. LEGAL HIST. 265, 279–80 (1965). According to Dowd, Jefferson worried that Story would not uphold Jeffersonian Republicanism. On Jefferson's displeasure with Story's appointment, see also Gerald T. Dunne, *Joseph Story: 1812 Overture*, 77 HARV. L. REV. 240, 241 (1963).

328. *Id.*

329. MCCLELLAN, *supra* note 26, at 44.

330. WILENTZ, *supra* note 60, at 396–97.

331. *Id.*

332. Letter from Joseph Story to Samuel P.P. Fay (May 18, 1807), *in* JOSEPH STORY, 1 LIFE AND LETTERS OF JOSEPH STORY, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, AND DANE PROFESSOR OF LAW AT HARVARD UNIVERSITY 143 (William W. Story ed., 2000).

333. *Id.*

Madison appointed him to the Court, and was an observation on the workings of New York's Supreme Court of Judicature.[334]

Justice Smith Thompson, as previously noted, served on the New York Supreme Court of Judicature between 1802 and 1818.[335] Born in 1762, he attended the College of New Jersey—the predecessor name for Princeton University—where he "read law"; he was elected to the New York Assembly in 1800 and was a delegate to the state constitutional convention the next year.[336] Thus, at the time of *Mott*, he had a first-hand understanding of the state laws that enveloped each cause of action. Perhaps equally important, in 1819, President James Monroe appointed him Secretary of the Navy.[337] Thompson remained politically ambitious as evidenced by his attempts, while on the Court, to gain the Democratic-Republican Party nomination in 1824 and to become New York's governor in 1828.[338] In 1820, Martin Van Buren "hatched a plan" to have Thompson run as Monroe's vice president.[339] Thompson's biographer noted that he had an adherence to the Tenth Amendment that neither Marshall nor Story shared.[340]

B. The Court-Martial of Jacob Mott

On September 24, 1814, Major General Morgan Lewis, the Third Military District's commanding officer, ordered a general court-martial to prosecute all citizens who failed to muster into militia duty.[341] A review of the Third Military District's records, specifically the inspector general's orderly books, now located in the United States National Archives and Records Administration in Washington, D.C., evidence that Mott was hardly alone as a "delinquent." The 1795 Militia Act required 13 officers

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334. *Id.*

335. Donald Malcolm Roper, Mr. Justice Thompson and the Constitution, at 44–80 (July 1963) (Ph.D. dissertation, Indiana University) (ProQuest).

336. *Id*. at 6.

337. *Id*. at 24.

338. *Id.*

339. *Id.*

340. *Id.* at 70.

341. Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827). The order reads:

> Adjutant General's Office, 3d M. D. New-York, 24th September, 1814. General Orders. A General Court Martial, under the act of Congress of the 28th of February, 1795, for the trial of those of the militia of the State of New-York, ordered into the service of the United States, in the third military district, who have failed to rendezvous pursuant to orders, will convene on Monday, the 26th instant, at Harmony Hall, and will consist of the following members . . .

to sit in judgment of an accused—the term for a military defendant—but the requirement was malleable if the commanding officer who convened the court-martial could not assign 13 officers because of military requirements. Morgan, having made this determination, assigned six officers to the court-martial.[342] Courts-martial did not have an independent trial judge overseeing the fairness of the proceedings. Instead, the judge advocate had a duty to prosecute soldiers, advise the court-martial, and protect the rights of the accused soldier, including securing witnesses and evidence.[343] This triangle of duties might appear to be ethically unsound, but as judge advocates were also officers, there was an expectation that all three duties would be met.[344]

Mott's court-martial did not convene until May 30, 1818, and the officers found him guilty of refusing to enter into the service of the United States after being ordered to do so.[345] The judge advocate assigned to prosecute his trial was Samuel R. Betts, a militia captain, a member of Congress, and a Democratic-Republican.[346] Mott was further fined $96 and, if unable to pay, to serve one year in prison.[347] Because he did not have the means of paying the fine, the deputy marshal, Michael Martin, seized Mott's mare.[348] In a seizure of property in instances when a debtor ignored the duty to pay a just debt, the defendant who pled the lawfulness of the seizure was known as an *avowant* and the pleading to the court an *avowry*.[349]

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342. *Id.*

343. WINTHROP, *supra* note 41, at 190–96.

344. JOSHUA E. KASTENBERG, THE BLACKSTONE OF MILITARY LAW: COLONEL WILLIAM WINTHROP 239–44 (2009).

345. *Mott*, 25 U.S. (12 Wheat.) 19, *microformed on* U.S. Supreme Court Records and Briefs, Reel 72, F-274 (National Archives).

346. *Id.* at F-270. On Betts, see DAVID MCADAM, 2 HISTORY OF THE BENCH AND BAR OF NEW YORK 43–44 (1897).

347. *Mott*, 25 U.S. (12 Wheat.) 19, *microformed on* U.S. Supreme Court Records and Briefs, Reel 72, F-274 (National Archives).

348. *See generally* 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES BEFORE THE ADOPTION OF THE CONSTITUTION 110–21, §§ 1199–1216 (Thomas M. Cooley ed., 4th ed. 1873).

349. *See, e.g.*, PHINEAS PEMBARTON MORRIS, A PRACTICAL TREATISE ON THE LAW OF REPLEVIN IN THE UNITED STATES 121 (1849).

C. State Proceedings in Martin v. Mott

The Supreme Court of Judicature's records prior to 1847 were destroyed, but a partial copy of the state judicial proceedings in *Mott* are preserved in the National Archives and Records Administration.[350] On January 17, 1823, New York's lieutenant governor, Erastus Root, forwarded to the United States Supreme Court the record of the state's Court for the Trial of Impeachments and the Correction of Records, the state's highest court at the time.[351] On December 19, 1822, New York's Chancellor James Kent forwarded the Supreme Court of Judicature's rulings to the state's higher court.[352]

From the available information that had been transmitted to the Court, it can be discerned that Mott first took up his replevin action with a local court of common pleas. That court, on October 13, 1819, agreed that Martin's seizure of his mare was premised on a deficient record from the court-martial.[353] Martin appeared before the Court of Common Pleas as well as on appeal with little more than the orders convening the standing court-martial and a certificate of Mott's conviction and sentence, signed by General Gerard Steddiford, the president of the court-martial.[354] Archibald Smith, a recent graduate of the Litchfield Law School, represented Mott before the Supreme Court of Judicature.[355] George A. Schufeldt represented Martin, and he also represented Martin in *Mills v.*

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350. "DUELY & CONSTANTLY KEPT": A HISTORY OF THE NEW YORK SUPREME COURT, 1691-1847 AND AN INVENTORY OF ITS RECORDS (ALBANY, UTICA, AND GENEVA OFFICES), 1797-1847 (1991) https://history.nycourts.gov/wp-content/uploads/2018/11/History_Supreme-Court-Duely-Constantly-Kept.pdf [https://perma.cc/85KG-ZC9E].

351. *Mott*, 25 U.S. (12 Wheat.) 19, *microformed on* U.S. Supreme Court Records and Briefs, Reel 72, F-255 (National Archives). Root had thrice served in Congress as a Democratic-Republican and was a major general in the state's militia. *See* 3 JAMES WILSON, THE MEMORIAL HISTORY OF THE CITY OF NEW-YORK FROM ITS FIRST SETTLEMENT TO THE YEAR 1892, at 631 (1892).

352. *Mott*, 25 U.S. (12 Wheat.) 19, *microformed on* U.S. Supreme Court Records and Briefs, Reel 72, F-259 (National Archives). On Kent, see David W. Raack, *"To Preserve the Best Fruits": The Legal Thought of Chancellor James Kent*, 33 J. AM. LEGAL HIST. 320–321 (1989) (Kent, along with Marshall and Story, was considered to be one of the most influential figures in early American legal history).

353. *Mott*, 25 U.S. (12 Wheat.) 19, *microformed on* U.S. Supreme Court Records and Briefs, Reel 72, F-261 (National Archives).

354. *Id.* at F-277.

355. Anon, THE LITCHFIELD LAW SCHOOL, 16 (1900 reprint).

Martin and *Rathbun v. Martin*.[356] The Supreme Court of Judicature met in Albany in August 1821, with Justice Ambrose Spencer presiding.[357] Spencer, like Tompkins and Lewis, was a Democratic-Republican, had served as a presidential elector in 1808, and had been the state's attorney general prior to his placement on the appellate court.[358]

On a total of 19 bases, the Supreme Court of Judicature sided with Mott in upholding the court of common pleas, or at least the somewhat ambiguous ruling appeared to base its decision on cumulative errors without specifying which errors.[359] Martin, New York's justices noted, had premised his seizure on the results of a federal court-martial that had failed to cite with specificity, in terms of jurisdiction, the crimes that Mott had been found guilty of. The justices agreed that Tompkins had ordered the militia into service as a result of Madison's requisition.[360] Yet there was no record of this presented in Martin's avowry. Additionally, the court-martial failed to conform to the Articles of War in that there were fewer than 13 officers serving on the court and no attested statement by Lewis as to why this had occurred.[361]

The Sixty-Fourth Article of War required a minimum of 5 officers and a maximum of 13, and the number could only be reduced below 13 if maintaining the 13 would be of "manifest injury to the service."[362] In 1819, Attorney General William Wirt issued an opinion stating that unless a court-martial explained why manifest injury to the army would occur if a court-martial were required to possess 13 officers, the court-martial would not be considered to have possessed jurisdiction.[363] Ironically, Wirt would represent Martin before the Court. The justices also noted that because the standing court-martial had been "continued" since its inception until Mott's court-martial four years (and four successive orders) later, the officers serving on the court-martial had been replaced at least four

356. In *Mills*, Schufeldt aligned with Martin Van Buren, a New York legislator growing in popularity, but in *Mott*, he was alone.

357. *Mott*, 25 U.S. (12 Wheat.) 19, *microformed on* U.S. Supreme Court Records and Briefs, Reel 72, F-261 (National Archives).

358. JOEL MUNSELL, MEMORIAL OF AMBROSE SPENCER 29–42 (1849).

359. *Mott*, 25 U.S. (12 Wheat.) 19, *microformed on* U.S. Supreme Court Records and Briefs, Reel 72, F-261 (National Archives).

360. *Id.* at F-265.

361. *Id.*; *but see* WINTHROP, *supra* note 41. The Court in *Mott* later characterized the issue of reduced numbers as being within a commanding officer's discretion and not reviewable by the courts. *See Mott*, 25 U.S. (12 Wheat.) at 35.

362. WINTHROP, *supra* note 41, at 981.

363. 1 Op. Att'y Gen. 296, 299–300 (1819).

times.[364] The implication in this observation was that the court-martial had failed to maintain an adequate record of proof of its compliance with the law.

The Supreme Court of Judicature found it problematic that in just being presented with a certificate in the avowry, no independent proof had been presented that Madison had adjudged that there "was an invasion or imminent danger of invasion," that Tompkin's order had been in response to Madison's requisition, or even that an actual order existed commanding the militia to "rendezvous."[365] Moreover, Martin did not provide evidence that Tompkins had even issued an order for the militia to muster or rendezvous into federal service or that such an order, if it even existed, specifically applied to Mott. Furthermore, while Martin claimed that Mott had been convicted of violating two of Tompkins's orders, he could not, or did not, produce a court-martial record showing what the orders were.[366] In other words, Mott was not placed on notice as to what he had been convicted of.

Further, because the court-martial had occurred in a time of peace, the justices were highly critical of the fact that there were less than 13 officers sitting in judgment.[367] And there was no proof that the five officers who actually served on the court-martial were on duty at the time of their service.[368] Another matter that troubled the justices was the fact that there was an absence of orders from the record.[369] The justices also intimated that it was unclear in the record of proceedings whether either Lewis or Tompkins was the senior ranking officer in the Third Military District.[370] Even the certificate signed by Steddiford did not, the justices noted, list which officers served on Mott's court-martial.[371]

The justices concluded their ruling with the admonition that "after mature deliberation," it appeared "the avowry of the said defendant" was "not sufficient" and awarded $146.40 to Mott. At no time did New York's justices determine that it was unconstitutional to court-martial a delinquent. Instead, they refused to apply a doctrine of regularity to the proceedings. That is, Martin lost his avowry in the courts because his counsel may have assumed that the bare certificate of the court-martial

364. *Mott*, 25 U.S. (12 Wheat.) 19, *microformed on* U.S. Supreme Court Records and Briefs, Reel 72, F-269–72 (National Archives).

365. *Id.* at F-277.

366. *Id.* at F-279.

367. *Id.* at F-281.

368. *Id.*

369. *Id.*

370. *Id.* at F-282.

371. *Id.* at F-283.

conviction and sentence would be enough to defend against replevin at the Court of Common Pleas. But this was not so. In 1958, the Court, in *Harmon v. Brucker*, determined that the military was bound not only by statute, but by its own regulations; and where it departed from either, it could no longer maintain an action against a servicemember. [372]

By the time the Court granted review of Martin's appeal, William Wirt represented Martin. Wirt had served as attorney general in the Adams, Jefferson, Madison, and Quincy Adams administrations.[373] In this capacity, he took part in several of the Marshall Court's consequential opinions.[374] Thomas Oakley, a Federalist member of the House of Representatives, initially represented Mott.[375] However, some time before the Court issued the opinion, Mott's attorney of record became David Bayard Ogden, one of Alexander Hamilton's associates.[376] This fact may have reframed the appeal from a simple farmer who, among thousands, decided that the war was harmful to his personal economic life, to a farmer who joined with a moribund political party, which leading Democrats believed had committed treason.

D. The Opinion

Story began the Court's opinion with a general overview on how Martin's appeal traversed to the Court from New York's Court for the Trial of Impeachments and the Correction of Errors, as well as why the Supreme Court possessed jurisdiction.[377] He determined that the basis for jurisdiction rested in Mott's challenge to the authority of the United States because § 25 of the Judiciary Act of 1789 gave the Court jurisdiction under such circumstances.[378] That section stated, in part, that the Court had jurisdiction over

372. Harmon v. Brucker, 355 U.S. 579 (1958); *see also* Neil Ellis Jr., *Judicial Review of Promotions in the Military*, 98 MIL. L. REV. 129, 135–36 (1982).

373. *See* Michael O. Oberg, *William Wirt and the Trials of Republicanism*, 99 VA. MAG. HIST. & BIOGRAPHY 305–11 (1991).

374. H.H. Hagan, *William Wirt*, 8 GEO. L.J. 12, 23 (1919–1920) (noting that *Marbury v. Madison* might have been the only consequential opinion that Wirt did not take a role in).

375. United States Supreme Court Minutes and Docket, 1384 (microfilm at National Archives).

376. Thomas N. Baker, *"An Attack Well Directed" Aaron Burr Intrigues for the Presidency*, 31 J. EARLY REPUBLIC 533, 561 (2011); On Ogden, see also Christopher L. Doyle, *The Randolph Scandal in Early National Virginia, 1792-1815: New Voices in the "Court of Honour,"* 69 J.S. HIST. 283, 302 n.39 (2003).

377. Martin v. Mott, 25 U.S. (12 Wheat.) 19, 28 (1827).

378. *Id.* at 27 (citing to the Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73).

> a final judgement or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where it is drawn into question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity.[379]

In other words, Congress conferred jurisdiction where a state court issued a ruling that could diminish the federal government's power, even though the United States was not a party.[380] In 1821, in *Cohens v. Virginia*, the Court held that it possessed the jurisdiction to review, under certain conditions, decisions by state courts of appeal arising from criminal convictions.[381]

Story next described Mott's status and under what legal regime he owed fealty. He approached this topic with the characterization that while Mott was a state militia soldier, he failed to enter the service of the United States when the president commanded him to do so. Story recognized that Congress possessed the constitutional power to "call forth" the militia to "execute the Laws of the Union, suppress insurrections, and repel invasions."[382] He also parroted the precise language of Article I that Congress possessed the authority "to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the Service of the United States."[383] He conceded that it was not Congress that directly ordered Mott and thousands of his peers into service, but rather, the 1795 Militia Act delegated to the president the authority to issue such an order, and to this end, Story did not question the validity of the act.[384]

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379. Judiciary Act of 1789, ch. 20, § 20, 1 Stat. 73.

380. See, for example, Kanouse v. Martin, 55 U.S. (14 How.) 23 (1853), in which a New York state court denied a party's motion to remove the litigation to federal court, and the Supreme Court, in a brief decision authored by Chief Justice Taney, without ruling on the substantive question as to whether a federal district court would grant removal, noted that the state court's usurpation of the federal judicial authority to decide whether to remove was precisely the subject-matter jurisdiction permitted by the § 25 of the Judiciary Act.

381. Cohens v. Virginia, 19 U.S. 264 (1821); *see also*, Kevin C. Walsh, *In the Beginning There Was None: Supreme Court Review of State Criminal Prosecutions*, 90 NOTRE DAME L. REV. 1867, 1869–1870 (2015).

382. *Martin*, 25 U.S. at 28.

383. U.S. CONST. art. I, § 1, cl. 16.

384. *Martin*, 25 U.S. at 29. On the constitutionality of the act, Story penned:

> It has not been denied here, that the act of 1795 is within the constitutional authority of Congress, or that Congress may not lawfully provide for cases of imminent danger of invasion, as well as for cases

Story also accepted that presidential authority, and in particular, authority "confided" by Congress to a president, was of a "high and delicate nature."[385] He recognized the framers' caution against a standing army by noting, "A free people are naturally jealous of the exercise of military power; and the power to call the militia into actual service is certainly felt to be one of no ordinary magnitude."[386] From this point, he reassured the nation that presidential power over an expansive army was limited to cases of actual invasion or the imminent threat of invasion.[387] Thus, although a president would remain commander in chief over a standing army—albeit one which was subject to constitutional limitations against its use in the states—a president's commander in chief authority over the expansive army was to be limited to very brief durations.[388] But he also insisted that the best means to repel an invasion was "to provide the requisite force for action before the invader himself has reached the soil."[389]

After establishing the predicate that presidential authority over the expansive military was both constitutional and statutory in nature, and then adding that the best means of defense for the United States to thwart a foreign invasion was a sizeable military force, Story next directed the opinion to the nature of commander in chief authority over the military itself. To that end, he made clear that the decision to determine whether an exigency existed rested solely with the president.[390] Indeed, he foreclosed the possibility of judicial review over whether a foreign invasion was imminent at all, and from that point, he moved the opinion to addressing the nature of military command.[391] "A prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object," he penned. "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 jeopard the public

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> where an invasion has actually taken place. In our opinion there is no ground for a doubt on this point, even if it had been relied on, for the power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion, as the necessary and proper means to effectuate the object.

Id.

385. *Id*.
386. *Id.*
387. *Id.* at 30.
388. *Id.*
389. *Id.* at 29.
390. *Id.* at 30.
391. *Id.* at 31.

interests."[392] Up until this point, Story's presentation of commander in chief power was in establishing a two-fold basis for its existence. That is, this authority existed in the plain text of Article II as well as in those authorities Congress conferred to a president. The harm that a challenge to this authority could cause, he claimed, was that if subordinates took the time to consider whether the president was correct in his assessment of an emergency, they in fact could aid an enemy, even where there was no intent to do so.[393]

From noting the power of the commander in chief to issue orders, Story next discussed the nature of a state militia relationship to the states. He began with Federalist No. 29 for the proposition that once the militia becomes a part of the federal army, its soldiers also become subject to the president's orders.[394] He then added that militia officers who questioned presidential authority were complicit in subversion in the ranks.[395] Jacob Mott, of course, was an enlisted soldier, and Story's line of reasoning, no matter how accurate, did not directly apply to this appeal.

Story acknowledged that there was a possibility that a president would abuse power, though he cautioned that it was unlikely to occur.[396] In those instances, Congress, rather than soldiers, had the authority to redress the abuse of power.[397] So too, Story opined, did the frequency of elections present a means to remove a president.[398] To this end, he lauded the decision of Justice Ambrose Spencer from the New York Supreme Court

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392. *Id.* at 30.

393. *Id*. Here, Story penned: "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." *Id.*

394. *Id*.

395. *Id*. Story wrote:

> If a superior officer has a right to contest the orders of the President upon his own doubts as to the exigency having arisen, it must be equally the right of every inferior officer and soldier; and any act done by any person in furtherance of such orders would subject him to responsibility in a civil suit, in which his defence must finally rest upon his ability to establish the facts by competent proofs. Such a course would be subversive of all discipline, and expose the best disposed officers to the chances of ruinous litigation.

Id.

396. *Id.*

397. *Id.*

398. *Id.*

of Judicature in *Vanderheyden*.[399] As in *Vanderheyden*, Mott argued that presidential authority to order the militia into service was confined by statute, and because Madison failed to state with specificity the basis for the emergency, the avowry itself was defective.[400] But Story responded that when a president exercises a congressionally delegated authority, the exercise is presumed to be lawful.[401] And Story went so far as to posit that the president was entitled to secrecy regarding the decision to declare the immediacy of an emergency and that this authority resided in the 1795 Militia Act.[402]

It took Story and the Court over two-thirds of the opinion to create the predicate of executive authority before Mott's specific defenses against court-martial jurisdiction were considered. In response to Mott's claim that the president never called him into federal service, the Court responded that a presidential requisition for militia forces and a governor's corresponding order for a call-up of militia were, in fact, an inseparable presidential order.[403] In regard to Mott's objections that he was not amenable to court-martial jurisdiction, Story answered that the Militia Act permitted prosecutions for delinquencies to occur.[404] This was not a particularly compelling argument, because several state supreme courts had already operated on the basis that courts-martial of delinquents were

399. *Id*. at 32.
400. *Id.*
401. *Id.* at 33.
402. *Id*. at 31.

> Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts. And, in the present case, we are all of opinion that such is the true construction of the act of 1795.

Id.
403. *Id.* at 33.

> The objection, so far as it proceeds upon a supposed difference between a *requisition* and an *order*, is untenable; for a requisition calling forth the militia is, in legal intendment, an order, and must be so interpreted in this avowry. The majority of the Court understood and acted upon this sense, which is one of the acknowledged senses of the word, in *Houston v. Moore*, 18 U.S. 1 (1820). It was unnecessary to set forth the orders of the President at large; it was quite sufficient to state that the call was in obedience to them.

Id.
404. *Id.* at 34.

permittable.[405] Another of Mott's arguments was that the commanding officer who convened the court-martial had not approved of the sentence of the court-martial.[406] To this point, Story responded that, consistent with the Articles of War, President James Monroe had done so.[407] Mott's final two arguments, that he was not amenable to military jurisdiction in time of peace and that the court-martial had fewer than 13 officers as required by the Articles of War, were also quickly dismissed by the Court.[408]

E. An Abbreviated Aftermath

At the height of the Civil War and in response to the federal draft law, Pennsylvania's supreme court twice reviewed Congress' authority to conscript citizens in *Kneedler v. Lane*.[409] In the first decision, Justice John Read dissented from the majority's position that a state court could declare an act of Congress unconstitutional and then claimed that *Mott* "solemnly overruled" the opinion of the Massachusetts Supreme Judicial Court that the governor, rather than the president, was empowered to declare an emergency.[410] Read observed that the Federalist government officials who opposed the war had "entertained designs of treasonable character."[411] It is worthwhile to note that opponents of the war were often accused of treason, and as late as 1990, one of Madison's biographers hyperbolically penned that shortly after the war commenced "opposition to the war soon reached near-treasonable proportions."[412] Of course, not all historians agree with this characterization. Professor Linda Kerber, who also wrote on this history of the Federalist Party, insisted that during the war,

405. *See, e.g.*, State v. Chambers, 1 N.J.L. 458 (1795); Wilson v. John, 2 Binn. 209 (Pa. 1809); Taylor v. Burris, 16 Ky. 183 (1816); State v. Kirby, 5 N.J.L. 982 (1820).

406. *Mott*, 25 U.S. (12 Wheat.) at 33.

407. *Id.*

408. *Id.*

409. Kneedler v. Lane, 45 Pa. 238 (1863). For a brief history of both opinions, see J.L. Bernstein, *Conscription and the Constitution: The Amazing Case of Kneedler v. Lane*, 53 A.B.A. L.J. 708–712 (1967). *See also* Tyler v. Pomeroy, 90 Mass. 480 (1864).

410. *Kneedler*, 45 Pa. at 284 (Read, J., dissenting).

411. *Id.* at 293.

412. RALPH KETCHAM, JAMES MADISON: A BIOGRAPHY 528 (1990). Professor Ketcham explained: "When Congress adjourned in early June, the Federalist minority published an address to their constituents voicing British arguments on American maritime grievances, justifying votes against the war, and ominously calling on the people to obstruct its prosecution." *Id.*

Federalist political leaders "stayed well within the Constitution."[413] Whether Justice Story or the Court believed Mott was treasonous or simply a misguided citizen is absent from the record.

It is also difficult to know whether a person's beliefs 15 years subsequent to an event were held by the person at the time of the event. In 1842, Captain Alexander Mackenzie on the *U.S.S. Somers* accused a junior officer named Phillip Spencer and two other sailors of mutiny and ordered all three executed.[414] Spencer was the son of Secretary of War John Spencer, and this fact, as well as the avid writing on the subject by James Fenimore Cooper, led to a public outcry and demand for a civil murder trial against Mackenzie.[415] The Navy ultimately court-martialed Mackenzie for cruelty and exceeding his authority, but the court-martial acquitted Mackenzie.[416] Story, according to Charles Sumner, publicly came to Mackenzie's defense.[417] One can surmise, however, that Story's endorsement of Mackenzie's action to summarily execute three sailors was at least partly rooted in his view of the sanctity of a chain of command. After all, Mackenzie held an officers' commission from a president, and this empowered him to control a vessel and its crew. Mackenzie's actions, no matter how barbaric, were permissible under law to preserve his command.

The traverse of *Mott* as a consequential authority through the Civil War was, in fact, narrowly confined to the question of evidentiary proofs in military cases as in assessing presidential authority to declare a crisis.[418] In *Wilkes v. Dinsman* in 1849, the Court determined that a marine who was held onboard a vessel during a distant scientific exploration and punished by his commanding officer had to prove in his civil suit that the

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413. Linda K. Kerber, *"The Federalist Party," in* 1 ARTHUR SCHLESINGER JR., HISTORY OF UNITED STATES POLITICAL PARTIES, 1789-1860 (1973).

414. 1 JONATHAN LURIE, ARMING MILITARY JUSTICE: THE ORIGINS OF THE UNITED STATES COURT OF MILITARY APPEALS, 1775-1950, at 21 (1992).

415. *Id*. On Cooper's role, see, Hugh Egan, *The Mackenzie Court-Martial Trial: Cooper's Secret Correspondence with William H. Norr*is, STUDIES IN THE AMERICAN RENAISSANCE 149–52 (1990).

416. LURIE, *supra* note 414, at 21–22.

417. *Id.*; *see also*, ROBERT A. FERGUSON, PRACTICE EXTENDED: BEYOND LAW AND LITERATURE 231–32 (2016).

418. *See, e.g.*, McTyler v. McDowell, 36 Al. 39, 46 (1860); Reed v. Conway, 20 Mo. 22 (1854). Also relevant is *In re Al-Nashiri*, a decision arising from a captured belligerent's challenge to the status of military judges serving as trial judges in military commissions trials. 791 F.3d 71, 83–84 (D.C. Cir. 2015). There, the Court of Appeals for the District of Columbia determined, in citing to *Mott*, that had the Secretary of Defense removed a judge on the basis of necessity, the court would have granted expansive deference over the removal decision. *Id.*

commanding officer had unlawfully detained him, rather than the commanding officer having to prove that it would not have caused manifest injury to the vessel to permit the Marine to depart.[419] The Naval statute was worded in a manner similar to the Articles of War, requiring 13 officers to serve on a court-martial unless it would cause "injury to the Army."[420] Both Chief Justice Roger Taney and Justice Levi Woodbury mentioned *Mott* in *Luther v. Borden*, but only as an affirmation that a president possesses the authority to call the militia into service.[421] However, during the Dorr Rebellion—the event preceding *Luther*—President John Tyler did not federalize the militia and instead decided to remove the federal government from Rhode Island's rebellion.[422] There is a short mention of *Mott* in *Ex Parte Vallandigham*, in which the Court noted that a president, rather than the judiciary, was the arbiter of what constituted an emergency.[423]

The Court first expanded *Mott* beyond the relationship between a servicemember and a commander in chief or one of his subordinate officers in a footnote in *United States v. Speed*, an opinion arising out of a contract dispute between a hog butcher and the secretary of war.[424] The Court recognized that the hog butcher's contract may have been deleterious to the government's interest, but the officers responsible for entering into it acted within the discretion of the law, and therefore the judiciary would not usurp the contract.[425] In 1886, the Court in *Wales v. Whitney* determined that even when a federal court has the authority to issue a writ of prohibition, it may not do so to stop a court-martial from proceeding, unless the court-martial does not possess jurisdiction over the person being prosecuted.[426] After taking cognizance of several British military decisions, the Court cited to *Mott* for the proposition that in the absence of "positive enactments of law," the officers convening and serving on courts-martial were presumed to have a greater knowledge of military procedures and usages than the courts.[427]

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419. Wilkes v. Dinsman,48 U.S. 89, 130 (1849).
420. *Id*. at 123–25.
421. Luther v. Borden, 48 U.S. 1, 44 (1849).
422. WILENTZ, *supra* note 60, at 539–46.
423. *Ex parte* Vallandigham, 68 U.S. 243, 254 (1863). The limited use of *Mott* in *Vallandigham* is important to recognize because the Court did not find *Mott* as justifying Vallandigham's military trial and imprisonment, but rather that the president is the final decider on whether an emergency has arisen.
424. United States v. Speed, 75 U.S. 77 (1869).
425. *Id*. at 83–84.
426. Wales v. Whitney, 116 U.S. 167, 176 (1886).
427. *Id.* at 179.

Wales appears to be the first instance in which the Court expanded *Mott* beyond its narrow confines of a presidential determination of national emergencies and military orders being immune from immediate judicial review. In 1921, the Court in *Kahn v. Anderson* determined, in citing to *Mott*, that the numbers of officers appointed to a court-martial would not be a matter for appellate review.[428] In 1932, the Court expanded the rule of non-review of presidential declarations of emergency to gubernatorial declarations.[429] Perhaps the Court's three most egregious extensions of *Mott* began in 1940 with *United States v. George S. Bush & Co, Inc.*.[430] The Court cited to *Mott* in upholding Congress' grant to the executive to determine tariff rates, an action that might be entitled to judicial deference but that certainly is not based on a unique commander in chief authority.[431] In 1974, the Court in *Parker v. Levy* stretched *Mott* to find that the Court has broadly approved of the enforcement of military customs.[432] Justice William Rehnquist clearly exaggerated *Mott* to uphold speech and conduct limitations on servicemembers subject to military law, as *Mott* had nothing to do with servicemembers degrading a president or making mutinous statements against the war.

In between these two opinions resides the worst extension of *Mott* to violate the civil rights of citizens. In *Hirabayashi v. United States*, the Court, in an opinion authored by Chief Justice Harlan Stone, cited to *Mott* for the proposition that the judiciary could not inquire into presidential responses to a national emergency.[433] Finally, in 2011, in *General Dynamics v. United States*, the Court utilized *Mott* for the purpose of explaining that at times, the broad arena of national security requires the

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428. Kahn v. Anderson, 255 U.S. 1, 6 (1921). In 1897, the Court in *Swaim v. United States* had likewise determined this to be the case. 165 U.S. 533, 559 (1897).

429. Sterling v. Constantin, 287 U.S. 378, 399–400 (1932).

430. United States v. George S. Bush & Co., Inc., 310 U.S. 371 (1940).

431. *Id.* at 380. In *Hynes v. Grimes Packing Co.*, the Court also cited to *Mott* to uphold a delegation from Congress to the president to withdraw public lands for reservations. 337 U.S. 86, 101 n.18 (1949).

432. Parker v. Levy, 417 U.S. 733, 744 (1974).

433. Hirabayashi v. United States, 320 U.S. 81, 93 (1943). In upholding a curfew imposed with criminal penalties on United States citizens of Japanese descent, the Court, in citing to *Mott*, held:

> Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it.

Id.

acceptance of governmental secrecy.[434] While the Court in *Mott* intimated that presidential decisions might need to be shielded from public view, the specific language that Story used was limited to presidential determinations of "imminent danger of invasion."[435]

CONCLUSION

The Court in *Mott*, it should be remembered, granted an appeal from a state judiciary that had ruled adversely to the federal government, and in reversing the state judiciary, the justices never intimated that the state had unconstitutionally interfered with the federal government. Story and the Court, in fact, accepted that a state judicial official could rule adversely to the federal government, even on military matters. This is hardly a big step to creating a "muscled" commander in chief. *Mott*'s legal history, when taken as a whole, should hardly be used to build a unitary executive. To the contrary, in the midst of an unpopular war, with Federalists being considered to have committed treason, all the Court in *Mott* did was reinforce the authority of officers, as well as the commander in chief, to issue orders free from judicial interference. The judiciary remained free to review an extensive array of other military actions.

434. General Dynamics v. United States, 563 U.S. 478, 484 (2011).
435. Martin v. Mott, 25 U.S. (12 Wheat.) 19, 31 (1827).