

## **FOREWORD:**

### **MARTIN V. MOTT AND THE ESTABLISHMENT OF EXECUTIVE EMERGENCY AUTHORITY**

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#### **Abstract:**

*In August of 1814, a New York farmer named Jacob E. Mott refused to rendezvous with the militia pursuant to the orders of Governor Daniel D. Tompkins as commanded by President James Madison. In 1818, Mott was court martialed and fined ninety-six dollars. One year later, Mott brought an action in replevin in the New York state courts to recover chattel taken from him by a deputy marshal in lieu of the ninety-six dollars. Both the New York trial and appellate courts sided with Mott. In a unanimous opinion authored by Justice Joseph Story, the Supreme Court of the United States reversed and held the marshal's avowry sufficient. Justice Story's opinion reiterated the authority of the federal executive, and began a line of cases that culminated in our modern approach to unilateral executive emergency powers.*

#### **Disciplines:**

*Law, executive powers, emergency powers, constitutional history, the Marshall Court.*

The Congress shall have power ... to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.<sup>1</sup>

The executive Power shall be vested in a President of the United States of America.<sup>2</sup>

The President shall be commander in chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States.<sup>3</sup>

Justice Joseph Story's opinion in *Martin v. Mott*<sup>4</sup> addressed a case exemplary of the very transition occasioned by the War of 1812. The case was a veritable microcosm of themes defining American civilization during the early nineteenth century. The factual cause of *Martin*

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<sup>1</sup> U.S. CONST. art. I, § 8.

<sup>2</sup> U.S. CONST. art. II, § 1.

<sup>3</sup> U.S. CONST. art. II, § 2.

<sup>4</sup> 25 U.S. 19 (1827).

*v. Mott* hints at the partisan-induced fractures of pre-war America, and Justice Story's opinion alludes to an (albeit, briefly) unified and increasingly militarized global power. Part I of this paper examines the fractured political world that gave birth to *Martin v. Mott*, with a focus on the War of 1812. Part II discusses the major players in the case, including the parties and their counsel. Part III analyzes the factual and procedural underpinnings of the case, the Court's reasoning, and the decision's enduring significance.

At first glance, *Martin v. Mott* seems to involve a yeoman farmer defying the powerful will of the political establishment. Indeed, the factual basis of the case revolves around New York farmer Jacob E. Mott's refusal to rendezvous with the militia and thereby enter into the service of his country.<sup>5</sup> To characterize *Mott* as a mere dispute over chattel is to unrealistically isolate the case from the various social and political forces pervading life in early nineteenth century America. The War of 1812 was a fantastically unpopular conflict which the young country was incredibly unprepared for.<sup>6</sup> Furthermore, the militia system was itself a political battlefield, with state governments contesting the constitutional basis for federal control.<sup>7</sup> In short, the case occurred during a time of national crisis. The lasting legacy of *Mott* reflects the environment from whence it arose.

## I. THE WAR OF 1812

### a. *Catalysts and Causes*

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<sup>5</sup> *Id.*

<sup>6</sup> See generally WHAT SO PROUDLY WE HAILED: ESSAYS ON THE CONTEMPORARY MEANING OF THE WAR OF 1812 (Pietro S. Nivola & Peter J. Kastor eds., 2012).

<sup>7</sup> C. EDWARD SKEEN, CITIZEN SOLDIERS IN THE WAR OF 1812, at 141 (1999).

Several nuisances particularly aggravated Americans in the years preceding the War of 1812, including impressment and British provocations on the frontier.<sup>8</sup> These factors were further flamed by a war hawk Congress.<sup>9</sup>

Foremost among many Americans' grievances with their former colonial rulers was the practice of impressment.<sup>10</sup> A favored practice of the Royal Navy, impressment involved stopping American ships and forcing any able-bodied man into prolonged service for Her Majesty.<sup>11</sup> Although legally impressed recruits had to be English subjects, the crown adhered to the mantra of "once an Englishman, always an Englishman."<sup>12</sup> As such, many young Americans found themselves forced into the Royal Navy.<sup>13</sup> In 1807, then Secretary of State James Madison lambasted the practice as "anomalous in principle, grievous in practice, and abominable in abuse" and demanded it be ceased.<sup>14</sup> The British foreign secretary derisively responded that the "[p]retension advanced by Mr. Madison that the American Flag should protect every Individual sailing under it ... is too extravagant to require any serious Refutation."<sup>15</sup>

Impressments continued, as did flagrant British disregard for American neutrality. Indeed, war almost commenced in the spring of 1807 when HMS *Leopard* stopped, fired on, and then searched USS *Chesapeake* for British deserters.<sup>16</sup> Even staunch anti-war Federalists such as

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<sup>8</sup> Pietro S. Nivola, *The "Party War" of 1812: Yesterday's Lessons for Today's Partisan Politics*, in *WHAT SO PROUDLY WE HAILED: ESSAYS ON THE CONTEMPORARY MEANING OF THE WAR OF 1812*, at 18 (Pietro S. Nivola & Peter J. Kastor eds., 2012).

<sup>9</sup> *Id.*

<sup>10</sup> WALTER R. BORNEMAN, *1812: THE WAR THAT FORGED A NATION* 19 (2005).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 20.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> JOHN A. GARRATY, *THE AMERICAN NATION: A HISTORY OF THE UNITED STATES 189–90* (1966).

<sup>16</sup> BORNEMAN, *supra* note 10, at 21–23.

John Adams decried the incident: “[n]o nation ... can be Independent which suffers her Citizens to be stolen from her at the discretion of the Naval or military officers of another.”<sup>17</sup> In response, President Thomas Jefferson enacted an economic embargo and banned British ships from American ports—the first in a series of experimental economic sanctions..<sup>18</sup>

While impressment rankled Americans, it was not the sole cause of the War of 1812. Some saw war as an opportunity, perhaps through annexation of Canada, to weaken British support for Native Americans who threatened American settlements in the northwest.<sup>19</sup> Indeed, a myriad of reasons underlie what was a truly peculiar conflagration. Virginia’s John Taylor described the War of 1812 as “a metaphysical war, a war not for conquest, not for defense, not for sport ... a war for honour, like that of the Greeks against Troy” but nonetheless, a war that might “terminate in the destruction of the last experiment ... in free government.”<sup>20</sup>

b. *The Declaration of War*

On June 18, 1812, the United States declared war on Great Britain.<sup>21</sup> America was indisputably and laughably unprepared. Indeed, a mere three days prior to the declaration of war, John Adams mockingly described the American Navy as “so Lilliputian ... that Gulliver might bury it in the deep by making water on it.”<sup>22</sup> In this light, the timing of the decision was

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<sup>17</sup> PIERRE BERTON, *THE INVASION OF CANADA, 1812-1813*, at 37 (1980).

<sup>18</sup> Nivola, *supra* note 8, at 9.

<sup>19</sup> *Id.* at 12.

<sup>20</sup> NORMAN K. RISJORD, *THE OLD REPUBLICANS: SOUTHERN CONSERVATISM IN THE AGE OF JEFFERSON* 145 (1965).

<sup>21</sup> GORDON S. WOOD, *EMPIRE OF LIBERTY* 674 (2009).

<sup>22</sup> Stephen Budiansky, *The War of 1812 and the Rise of American Military Power*, in *WHAT SO PROUDLY WE HAILED: ESSAYS ON THE CONTEMPORARY MEANING OF THE WAR OF 1812*, at 36, 36 (Pietro S. Nivola & Peter J. Kastor eds., 2012) (quoting Letter from John Adams to John Adams Smith, June 15, 1812, Microfilms of the Adams Papers (Boston: Massachusetts Historical Society: 1954-59), reel 118).

especially questionable—particularly as the alleged American grievances were not new.<sup>23</sup> The United States Navy, comprised of fewer than twenty warships and 3,600 seamen, was tasked with fighting the mightiest naval superpower in the world.<sup>24</sup> With over 1000 warships—ninety of which were already stationed in and around North American waters—and 145,000 sailors and marines, the Royal Navy was as large as the rest of the world’s navies combined.<sup>25</sup> American chances were no more favorable on land. At the start of the conflict, the United States Army amounted to 7,000 individuals; Britain boasted a force of a quarter million.<sup>26</sup>

Besides the extreme disparity in fighting forces, the American declaration of war is even more perplexing given that the British neither expected nor wanted war.<sup>27</sup> In fact, the British government repealed the official orders-in-council authorizing the seizure of American ships and the impressment of American sailors almost simultaneously with the American declaration of war; that said, the British reserved the authority of impressing sailors in light of the struggle against the Napoleonic Empire.<sup>28</sup> Britain’s minister to Washington, Augustus Foster, had been striving to avoid a military conflict. Prior to the declaration of war, Foster wooed congressional Republicans with promises of friendship and a hefty entertainment expense account.<sup>29</sup> Following the declaration of war, Foster, still confident that war would be avoided, informed London that it was merely an American bluff.<sup>30</sup>

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<sup>23</sup> For example, impressment had been a practice of the Royal Navy since 1803. *Id.* at 37.

<sup>24</sup> *Id.* at 38

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> WOOD, *supra* note 21, at 660.

<sup>28</sup> *Id.*

<sup>29</sup> BRADFORD PERKINS, PROLOGUE TO WAR: ENGLAND AND THE UNITED STATES, 1805-1812, at 274, 279, 353–54, 395–96 (1968).

<sup>30</sup> *Id.*

The vote for the war in Congress was both very divided and, at first glance, rather puzzling.<sup>31</sup> Those who voted in favor of war were predominantly from the South and West—regions largely unaffected by Britain’s maritime malfeasance; those against the war were mostly from New England—a part of the country that bore the brunt of British abuses.<sup>32</sup> Historians have posited many explanations for the perplexing plethora of Western and Southern support for the war: the young, bellicose “War Hawks” of the Twelfth Congress; a desire to expand into new territory; low grain prices.<sup>33</sup> Regardless, one certainty persists: opinion of the war remained divided along party lines, with Republicans in support and Federalists ardently opposed.

c. *On the Danger of Factions: the Republican vs. Federalist Divide*

i. *Pre-war Partisan Politics*

For the first several decades of the nineteenth century, the American political order centered around two parties: Republicans and Federalists. The Republican Party, rooted in the wisdom of Jefferson and Madison, viewed themselves as guardians of the American experiment.<sup>34</sup> Ever wary of the corroding influence of the British crown, as well as the ascendancy of the Federalists, Republicans advocated popular rule and a relatively weak federal authority.

In juxtaposition, Federalists adopted a somewhat more elitist attitude. Noted Republican James Madison claimed that Federalists considered the people to be “stupid, suspicious, licentious” and prone to “leaving the care of their liberties to their wiser rulers.”<sup>35</sup> Furthermore,

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<sup>31</sup> In the House of Representatives, the vote was seventy-nine to forty-nine. In the Senate the vote was nineteen to thirteen. WOOD, *supra* note 21.

<sup>32</sup> WOOD, *supra* note 21, at 661.

<sup>33</sup> *Id.*

<sup>34</sup> WHAT SO PROUDLY WE HAILED, *supra* note 6, at xvi.

<sup>35</sup> 4 GAILLARD HUNT, THE WRITINGS OF JAMES MADISON, at 120 (1906).

whereas Republicans tended to favor an agrarian economy and remained apprehensive of an advanced economy—particularly one that might require trade with Britain—Federalists harbored no such reservations.<sup>36</sup> Federalists viewed trade as a mutually profitable endeavor and favored economic development under a strong national government.<sup>37</sup>

Republican idealism contributed to the unpreparedness of American forces at the start of the War of 1812. Republicans deeply distrusted standing armies as threats to individual liberty. In true Republican form, Madison wrote that of “all the enemies to public liberty war is, perhaps, the most to be dreaded. War is the parent of armies; from these proceed debts and taxes; and armies, debts, and taxes are the known instruments for bringing the many under the domination of the few.”<sup>38</sup> Senator John Taylor of Virginia succinctly claimed armies “squander money, and extend corruption.”<sup>39</sup> Republican opposition to standing armies certainly did not derive from any opposition to war or violence. In a letter to Madison, Jefferson himself mused that opponents of the War of 1812 should be either tarred and feathered or hanged.<sup>40</sup> There was some irony in a party premised on support of the yeoman agrarian and dubious of a strong central authority calling for a national show of force seemingly to protect American commercial expansion.<sup>41</sup>

#### d. *Opinions of the War of 1812: Republican Fervor and Federalist Opposition*

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<sup>36</sup> NIVOLA, *supra* note 8, at 13.

<sup>37</sup> For example, in a deal excoriated by Republicans, the Jay Treaty of 1794 called for a national bank, tariffs, and trade with Britain. *Id.* at 14.

<sup>38</sup> JAMES MADISON, IV LETTERS AND OTHER WRITINGS OF JAMES MADISON 491–92 (1865).

<sup>39</sup> Nivola, *supra* note 8, at 31 (quoting Risjord, *supra* note 20, at 109).

<sup>40</sup> Thomas Jefferson to James Madison, June 29, 1812, Madison Papers, Library of Congress, Washington ([memory.loc.gov/ammem/collections/Madison\\_papers/](http://memory.loc.gov/ammem/collections/Madison_papers/)).

<sup>41</sup> Consider the Republican congressman from Tennessee, George Washington Campbell, who in 1806 not only opposed American naval might to protect commerce but characterized the commerce itself as evil: “It would have been well for us if the American flag had never floated on the ocean ... to waft to this country the luxuries and vices of European nations, that effeminate and corrupt our people.” ANNALS OF CONGRESS, 9 Cong., 1 sess. (Mar. 11, 1806), 706–07.

i. *America's Most Unpopular War*

Partisan divide permeated the political world of 1812. In Congress, Federalists vehemently declined to support the war. In *An Address of Members of the House of Representatives...on the Subject of War with Great Britain*, House Federalists attacked Republican attempts to silence opposition to the war as “toward tyranny” and so egregious that “principles more hostile...to...Representative liberty, cannot easily be conceived.”<sup>42</sup> In response, Republicans argued that rather than question the war, “every patriot’s heart must unite in its support.”<sup>43</sup>

An economic downturn further fueled the flames of partisanship. By 1814 the economy had soured and trade was near nonexistent.<sup>44</sup> Due to ever-increasing expenses and lack of revenue, the public debt skyrocketed. Eventually, the United States Treasury defaulted.<sup>45</sup> Indeed, Mott’s refusal to rendezvous occurred at the height of the young country’s economic difficulties, a period characterized as “...the lowest ebb in the financial history of the United

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<sup>42</sup> AN ADDRESS OF MEMBERS OF THE HOUSE OF REPRESENTATIVES OF THE CONGRESS OF THE UNITED STATES, TO THEIR CONSTITUENTS, ON THE SUBJECT OF THE WAR WITH GREAT BRITAIN, <http://www.archive.org/stream/addressofmembers00sulluoft#page/n5/mode/2up> (Last Accessed 10:13, October 16, 2016).

<sup>43</sup> *Washington National Intelligencer* (June 27, 1812), [http://infoweb.newsbank.com/iw-search/we/HistArchive/HistArchive?d\\_viewref=doc&p\\_docnum=-1&p\\_nbid=S60U5BVVMTM2ODIwMzQ4OS4yMjI2NTQ6MT0xND0xNDMuMjI5LjI0MC43OA&f\\_docref=v2:1022477FF1D68B80@EANX-1038CEF095498890@2383057-1038CEF0A6558FB2@0&toc=true&p\\_docref=v2:1022477FF1D68B80@EANX-1038CEF095498890@2383057-1038CEF0A6558FB2@0](http://infoweb.newsbank.com/iw-search/we/HistArchive/HistArchive?d_viewref=doc&p_docnum=-1&p_nbid=S60U5BVVMTM2ODIwMzQ4OS4yMjI2NTQ6MT0xND0xNDMuMjI5LjI0MC43OA&f_docref=v2:1022477FF1D68B80@EANX-1038CEF095498890@2383057-1038CEF0A6558FB2@0&toc=true&p_docref=v2:1022477FF1D68B80@EANX-1038CEF095498890@2383057-1038CEF0A6558FB2@0) (Last Accessed 00:49, May 2, 2013).

<sup>44</sup> In 1814, exports had fallen to \$7 million from \$131 million in 1807. Similarly, imports fell from \$138 million in 1807 to \$13 million by 1814. Nivola, *supra* note 8, at 18.

<sup>45</sup> *Id.*

States.”<sup>46</sup> The young country was deeply politically divided and economically unstable. In some cities, mobs erupted in violence.

*ii. Republican Rage: Baltimore Edition*

One such city was Baltimore. A profoundly pro-war Republican city, the Baltimore riots underscored the deeply partisan fissure over the unpopular war. Anti-Federalist demonstrations were a common occurrence in Baltimore and frequently included prominent Republican city officials. Given the extremely anti-Federalist atmosphere in Baltimore, many Federalists “considered Baltimore a dangerous example of democracy--the ‘headquarters of mobocracy’”<sup>47</sup>

Following the declaration of war, the vitriolic and ardently Federalist newspaper the *Federal Republic* announced its opposition to the war. The paper scathingly labeled the war “unnecessary, inexpedient, and...bearing...marks of undisguised foreign influence.”<sup>48</sup> The paper proceeded to pronounce that “we mean to use every constitutional argument and every legal means to render as odious and suspicious to the American people, as they deserve to be, the patrons and contrivers of this highly impolitic and destructive war.”<sup>49</sup> On June 22, the paper’s offices were decimated by an angry mob. Onlookers stood by and “contributed nothing to the

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<sup>46</sup> HARRY L. COLES, *THE WAR OF 1812*, at 238 (1965) (noting that “summer and fall of 1814 ...marked the lowest ebb in the financial history of the United States”).

<sup>47</sup> DONALD R. HICKEY, *THE WAR OF 1812: A FORGOTTEN CONFLICT*, at 52 (Bicentennial ed. 2012) (quoting *THE WEEKLY REGISTER*, VOL 3, at 47 (Hezekiah Niles ed., Sept. 19, 1812)).

<sup>48</sup> *Baltimore Federal Republican*, (June 20th 1812), reprinted in *THE WEEKLY REGISTER*, VOL 2, at 379 (Hezekiah Niles ed., Aug. 8, 1812)

<http://babel.hathitrust.org/cgi/pt?id=hvd.32044092547975;view=1up;seq=7> (Last Accessed 11:13, Oct. 19, 2016).

<sup>49</sup> *Id.*

protection of the rights guaranteed to the citizens by our form of government.”<sup>50</sup> In Baltimore, neither the ideals of the Revolution, nor its heroes, were safe from the tyranny of the mob.<sup>51</sup>

### *iii. Federalist Opposition: New York Style*

While Baltimore was home to deeply Republican pro-war sentiment, New York, where Mr. Mott lived, was quite the opposite. As with much of the country, the War of 1812 divided New York. In the 1812 elections, Republican fears materialized when Federalist majorities were elected both to the state assembly and to Congress.<sup>52</sup> In preparation for war, Congress had passed a ninety-day trade embargo.<sup>53</sup> The embargo caused panic in New York as the states surplus grain was all shipped abroad.<sup>54</sup> Ships hurriedly loaded and left port before the law was

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<sup>50</sup> *Report of the Committee of Grievances and Courts of Justice of the House of Delegates of Maryland on the Subject of the Recent Mobs and Riots in the City of Baltimore, Together with the Depositions Taken Before the Committee* (1813), reprinted in EARLY AMERICAN IMPRINTS, SERIES 2: SHAW-SHOEMAKER, 1801-1819 [http://infoweb.newsbank.com/iw-search/we/Evans?p\\_action=doc&p\\_theme=eai&p\\_topdoc=1&p\\_docnum=1&p\\_sort=YMD\\_date:D&p\\_product=SHAW&p\\_text\\_direct-0=u433=\(%2029064%20\)|u433ad=\(%2029064%20\)&p\\_nbid=X52C4DPHMTM2ODIwMzM1Ny4zODc4MTE6MToxNDoxNDMuMjI5LjI0MC43OA&p\\_docref=](http://infoweb.newsbank.com/iw-search/we/Evans?p_action=doc&p_theme=eai&p_topdoc=1&p_docnum=1&p_sort=YMD_date:D&p_product=SHAW&p_text_direct-0=u433=(%2029064%20)|u433ad=(%2029064%20)&p_nbid=X52C4DPHMTM2ODIwMzM1Ny4zODc4MTE6MToxNDoxNDMuMjI5LjI0MC43OA&p_docref=) (Last Accessed 00:57, May 2, 2013).

<sup>51</sup> Even Revolutionary War heroes were not safe. The eulogy of General Lingan would note the terrible irony in having a man who had valiantly fought for the Revolutionary cause die "under the appellation of a *Tory*." George Washington Park Custis, *An Address Occasioned by the Death of General Lingan, who was Murdered by the Mob at Baltimore* (1812), reprinted in EARLY AMERICAN IMPRINTS, SERIES 2, SHAW-SHOEMAKER, 1801-1819 [http://infoweb.newsbank.com/iw-search/we/Evans?p\\_action=doc&p\\_theme=eai&p\\_topdoc=1&p\\_docnum=1&p\\_sort=YMD\\_date:D&p\\_product=SHAW&p\\_text\\_direct-0=u433=\(%2025199%20\)|u433ad=\(%2025199%20\)&p\\_nbid=J54P4FCJMTM2ODIwNDY4Ni400TIxMDQ6MToxNDoxNDMuMjI5LjI0MC43OA&p\\_docref=](http://infoweb.newsbank.com/iw-search/we/Evans?p_action=doc&p_theme=eai&p_topdoc=1&p_docnum=1&p_sort=YMD_date:D&p_product=SHAW&p_text_direct-0=u433=(%2025199%20)|u433ad=(%2025199%20)&p_nbid=J54P4FCJMTM2ODIwNDY4Ni400TIxMDQ6MToxNDoxNDMuMjI5LjI0MC43OA&p_docref=) (Last Accessed 1:04, May 2, 2013).

<sup>52</sup> Harvey Strum, *New York Federalists and Opposition to the War of 1812*, 142 *WORLD AFFAIRS* 169, 170 (Winter 1980).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

fully implemented.<sup>55</sup> The embargo was a Federalist talking point during the elections and helped garner them an eight seat majority in the state assembly.<sup>56</sup> Besides the unpopular economic impact of the embargo, Federalists were also wary of the Republican desire to conquer Canada, noting that war would cause “ruin and disgrace and its only acquisition the ... cold, inhospitable provinces of Canada and Nova Scotia.”<sup>57</sup> Some New York Federalists even suggested that New York and New England should secede from the Union if the Republicans declared war.<sup>58</sup>

The declaration of war provoked a largely panicked reaction in New York. Citizens in the northern part of the state largely absconded from the region due to fears of attacks by Canadian Indians. While Federalists in frontier counties volunteered to serve in the militia, those in the Hudson and Mohawk valleys flatly refused.<sup>59</sup> In a political calculation designed to mitigate Federalist opposition, pro-war Republican Governor Daniel Tompkins appointed a prominent New York Federalist, Stephen Van Rensselaer, commander of the militia.<sup>60</sup>

Even under Van Rensselaer’s command the militia proved recalcitrant. When Van Rensselaer attempted to summon the Chautauqua County militia it refused to be summoned as

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* (quoting *Buffalo Gazette*, 22 April 1812).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 172.

<sup>60</sup> *Id.* (Major General Stephen Van Rensselaer was a rich and powerful Federalist commonly referred to as “the last of the patroons.” HICKEY, *supra* note 47, at 85. Born in New York City on November 1, 1764, Van Rensselaer served in both houses of the New York state legislature, and was elected lieutenant governor before serving as Major General during the war of 1812. BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS: STEPHEN VAN RENSSELAER III, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=V000056> (Last Accessed 10:23, December 20, 2016). He would go on to found Rensselaer Polytechnic Institute in 1824 and represent New York in Congress from 1822-29. *Id.* He died in Albany in 1839. *Id.*).

“no valuable end would be answered by the intended draft.”<sup>61</sup> Other efforts failed because far too few militiamen would rendezvous. In one instance, General Wade Hampton ordered his force of 1,500 to attack Montreal and discovered only twenty-five men willing to go. The rest simply made the long trek back to Albany.<sup>62</sup> During another battle, 1,200 militiamen refused to cross the Niagara River to relieve troops pinned down by British forces.<sup>63</sup> New York militiamen were obstinately opposed to the War.

The insubordination of the New York militia was exacerbated by lack of food, gear, and shelter during the winter. In some cases, insubordination became mutiny. One officer reported that “[o]ne hundred and thirty ... stacked their arms and marched off ... out of a Brigade only part of a regiment is left.”<sup>64</sup> In other instances, insubordination crossed from mutiny to pillaging fellow Americans. In the winter of 1813-1814, as British troops ravaged Buffalo, the hastily fleeing militia reportedly robbed the similarly fleeing civilians.<sup>65</sup> Western New York was largely deserted. In later refusing to rendezvous, Jacob Mott followed a distinguished line of New York militiamen.

As seen in *Mott*, Governor Tompkins established tribunals specifically to punish those who refused to serve in the militia.<sup>66</sup> That said, New Yorkers remained obstinately opposed to military service. New York Assemblyman Roswell Hopkins of St. Lawrence County—a frontier county even by modern standards—observed that his constituents generally refused to enter

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<sup>61</sup> *Id.* (quoting Letter from Chautauqua County Militia to Major General Stephen Van Rensselaer (September 12, 1812), *reprinted in* Ebenezer Foote Notebook (on file with the Chautauqua County Historical Society)).

<sup>62</sup> *Id.* at 178–79.

<sup>63</sup> *Id.* at 172.

<sup>64</sup> *Id.* (citing *Canandaigua Ontario Repository*, October 13, 1812; *Goshen Orange County Patriot*, October 27, 1812)

<sup>65</sup> *Id.* at 179.

<sup>66</sup> *Martin v. Mott*, 25 U.S. 19, 21 (1827).

military service, “peaceably if they can, but forcibly if they must.”<sup>67</sup> In a letter to Daniel Webster, Thomas Oakley (later the attorney for the plaintiff in *Martin v. Mott*) recounted how in 1813 when Governor Tompkins ordered out the militia, many of the able-bodied men of Dutchess County fled to Connecticut and thereby avoided service.<sup>68</sup> In fact, of the 5,000 requested by the governor via the militia draft, only 1,500 responded.<sup>69</sup> Republicans blamed their Federalist counterparts, who were themselves quick to note that neither Federalists nor Republicans heeded duty’s call.<sup>70</sup> In short, New York offered an exquisite example of partisan fissure over the War of 1812.

The political tensions of 1812 seized New York civic life as well. Shortly after the declaration of war, New York Federalists began to fear rumors of Republican violence. The news of the Baltimore riots spread north and some speculated there was an administration plan to silence anti-war Federalists. Only New York City Mayor Dewitt Clinton’s assurances ameliorated Federalist concern.<sup>71</sup> Clinton’s motives were not altogether altruistic. Clinton desired Federalist support as he campaigned for president and in August of 1812 met with prominent Federalist leaders to that end.<sup>72</sup> Reassured, the Federalists continued to hold numerous anti-war rallies through New York and denounced the conflict as ceding the country to the French.<sup>73</sup> Federalists were further infuriated by news that the President had rejected a British

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<sup>67</sup> Strum, *supra* note 52, at 178 (quoting *Albany Gazette*, February 1, 1813).

<sup>68</sup> Letter from Thomas Oakley to Daniel Webster, (September 8, 1813) (on file with the Library of Congress).

<sup>69</sup> Strum, *supra* note 52, at 178.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 173.

<sup>73</sup> Among the rumors circulating in Federalist circles was one wherein Napoleon planned to send 10,000 troops to the United States. *Id.*

armistice offer.<sup>74</sup> In the 1812 election, Republicans won eight seats while anti-war Federalists took nineteen seats in New York's congressional delegation.<sup>75</sup>

In 1813 the state of New York politics continued to be defined by partisan gridlock. Governor Tompkins asked the legislature for funds to create a voluntary corps (deemed more reliable than the militia), as well as for money to pay the state's share of the federal war tax. While the Republican Senate approved the provisions, they failed in the Federalist assembly.<sup>76</sup> During the 1813 campaign for governor and state legislature, Federalists lauded the governors of Connecticut and Massachusetts for defiance of presidential requests to draft a militia to be used in federal service.<sup>77</sup> Several reports of confrontations between citizens and soldiers were circulated by the Federalist press as evidence that the real war was being perpetrated against American citizens.<sup>78</sup> The Federalist press took this opportunity to incorporate an element of nativism into the campaign and characterized the war as an effort to protect British residents while noting that Governor Tompkins had appointed numerous Irish-Americans to public office.<sup>79</sup> The argument was made that the governor was subservient to a Southern Republican president who cared little for the troubles of the North.<sup>80</sup> Governor Tompkins ultimately won reelection—but barely.<sup>81</sup> Indicative of the contested nature of New York politics, Governor Tompkins' margin of victory was a mere 3,606 votes.<sup>82</sup>

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<sup>74</sup> Such news only furthered Federalist conspiracy theories in which an alliance with the French was a natural conclusion. *Id.*

<sup>75</sup> *Id.* at 174.

<sup>76</sup> *Id.* at 179.

<sup>77</sup> *Id.* at 175.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> RAY W. IRWIN, DANIEL D. TOMPKINS: GOVERNOR OF NEW YORK AND VICE PRESIDENT OF THE UNITED STATES 169 (The New York Historical Society, 1968).

<sup>81</sup> *Id.* at 170.

<sup>82</sup> *Id.*

During the 1814 congressional and state legislature campaigns, Federalists continued to rage against the war. Federalists blamed Republicans for the British destruction of the Niagara Frontier and claimed that in the burned towns the sound of Native “war whoops awakens the sleep of the Cradle.”<sup>83</sup> Not to be outdone, Republicans excoriated Federalists for opposition to the war effort. Ultimately, the British destruction of Buffalo and the Niagara Frontier greatly contributed to a dominant Republican electoral showing: following the 1814 elections, Federalists held a mere six seats.<sup>84</sup> Despite the blowout, tensions continued to simmer. Gouverneur Morris nearly provoked a riot by deriding Republicans for hating England, “the land of our ... forefathers”<sup>85</sup> and Federalists maintained that to “resist oppression is a duty to God.”<sup>86</sup>

Politics was far from the only area of New York life gripped by the partisan clash over the war. Federalists were not averse to trading with the British. Convoys of goods were regularly sent across the Canadian border, some stretching over a mile.<sup>87</sup> A customs collector in St. Lawrence County even admitted that his men—as well as some of the soldiers stationed there—frequently traded with the British.<sup>88</sup> In June of 1814, the largest British force ever assembled in North America arrived in Canada. As Governor-General of Canada and commander in chief of His Majesty’s forces in Canada, General Sir George Prevost was tasked with providing for the vast host. The General noted that “[t]wo-thirds of the army...are supplied with beef by American contractors, principally of Vermont and New York.”<sup>89</sup> Unsurprisingly, American leaders (military and otherwise) were enraged by the sustenance delivered the enemy.

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<sup>83</sup> Strum, *supra* note 52, at 179 (quoting *New York Examiner*, January-April 1814).

<sup>84</sup> *Id.* at 180.

<sup>85</sup> *Id.* (quoting Diary, 20, 29 June 1814, Reel 2, Gouverneur Morris Papers, Library of Congress).

<sup>86</sup> *Id.* (quoting William Buell, *Oration . . . Fourth of July, 1814* (New York, 1814).

<sup>87</sup> *Id.* at 177.

<sup>88</sup> *Id.*

<sup>89</sup> HICKEY, *supra* note 47, at 190.

Republican Elisha Jenkins even suggested that all livestock and produce within twenty miles of the Canadian border between Lake Champlain and Lake Ontario be confiscated.<sup>90</sup> Major

General George Izard forwarded a report of the smuggling to the War Department and added:

This confirms a fact not only disgraceful to our countrymen but seriously detrimental to the public interest. From the St. Lawrence to the ocean an open disregard prevails for the laws prohibiting intercourse with the enemy... On the eastern side of Lake Champlain the high roads are insufficient for the cattle pouring into Canada. Like herds of buffaloes they press through the forests, making paths for themselves. Were it not for these supplies, the British forces in Canada would soon be suffering from famine.<sup>91</sup>

Such disdain was not confined to letters. The military occasionally clashed with civilian smugglers. In one instance, a cohort of troops sent to imprison a smuggler instead found their Lieutenant jailed by local authorities.<sup>92</sup> In another, customs officers and pro-war Republicans clashed with the Sheriff and anti-war Federalists over smuggled goods.<sup>93</sup> Ultimately, the Federalists retained possession of the goods.<sup>94</sup> Northern New Yorkers obdurately resisted any impediment of trade with the British.

In late August of 1814, news arrived in New York of the British blaze in Washington, D.C. Federalists and Republicans temporarily united and constructed temporary fortifications around New York City. Even former anti-war advocates appealed to the citizenry to unite under the cause of American independence.<sup>95</sup> In October, news of Britain's proffered peace terms reached New York. The terms included an Indian buffer state in the Ohio Valley and the forfeiture of large swaths of Minnesota and Maine.<sup>96</sup> The demands enraged Republicans and

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<sup>90</sup> Strum, *supra* note 52, at 181.

<sup>91</sup> BORNEMAN, *supra* note 10, at 201–02.

<sup>92</sup> Strum, *supra* note 52, at 177.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 180.

<sup>96</sup> *Id.* at 180–81.

many Federalists as well. The Federalist editor Paraclete Potter noted that “[a]ll agree...they [British peace terms] cannot be accepted.”<sup>97</sup>

That said, such patriotism was fleeting. Northern New Yorkers continued to smuggle goods to the enemy and militiamen obeyed only when ordered to defend New York City.<sup>98</sup> General Jacob Brown noted that New Yorkers were largely opposed (much like Mr. Mott) to “exert themselves at a distance from their Farms.”<sup>99</sup> When congressional Republicans attempted to solve their military problems through the draft, the bill failed.<sup>100</sup> When New York state Republicans successfully passed a measure that made it more difficult to avoid the draft, any semblance of unity derived from the aftermath of the burning of Washington evaporated. Several thousand Federalists in Oneida County angrily protested the measure and Ontario County Federalists promised to resist enactment of the measure “even at the risk of our lives.”<sup>101</sup> In short, Mr. Mott’s refusal to rendezvous was less an isolated act of daring resistance than adhering to an established norm.

## II. THE PLAYERS

A cursory analysis of *Martin v. Mott*, might mistakenly identify the core of the case as a yeoman farmer defying the powerful will of the political establishment. As the hyper-partisan quality of the era indicates, Mott exemplified a reoccurring theme in New York. Given the fractured political arena, the prominent players in *Martin v. Mott* warrant closer analysis.

### a. Governor Daniel D. Tompkins

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<sup>97</sup> *Id.* at 181.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 182.

<sup>101</sup> *Id.* at 182.

The man to whom President James Madison issued his request for militiamen was Governor Daniel D. Tompkins of New York. A New Yorker by birth, Tompkins would later become Vice President of the United States.<sup>102</sup> As a young man at Columbia University, Tompkins became concerned with American politics. Tompkins' political views evoked the libertarian political theories of Montesquieu:

1. "The design of Government is to insure the tranquillity [sic] of the members of the community." 2. It is extremely unlikely that this design may be carried out in an elective monarchy, and it is impossible in an hereditary one, chiefly because of the tendencies of monarchical governments to engage in warfare, to support luxury and debauchery, to display favoritism, and to give loose rein to arbitrary, corrupt, or innately incompetent officials. 3. Republican government, which emerged later historically than the monarchical form, is open to fewer criticisms than monarchy. 4. A vigilant people, possession a republican government, frequent free elections, and the right to make political changes, may readily safeguard the liberty, equality, and happiness to which they are naturally entitled. 5. The "true spirit of equality," in a political as opposed to natural sense, is something far removed from that "*extreme equality*" designed "to reduce all to a promiscuous level" politically and socially. It consists, rather, in a recognition "that all citizens for whose benefits laws are enacted have an equal right to a share in forming them and an equal right to their protection and of benefits arising from them."<sup>103</sup>

By the time Tompkins left Columbia in 1795, he was already planning a career in politics.<sup>104</sup> With both a well-connected father and a powerful, Republican father-in-law, Tompkins was well situated for civic involvement, which he commenced wholeheartedly during the campaign of 1800.<sup>105</sup>

At the turn of the century, New York politics was a microcosm of the forces at play on the national stage. During the 1790s, Federalists under the leadership of New Yorker Alexander Hamilton struggled against the forces of Jeffersonian Republicanism. In New York, allies of

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<sup>102</sup> IRWIN, *supra* note 80, at 1.

<sup>103</sup> Ray W. Irwin & Edna L. Jacobsen eds., *A COLUMBIA COLLEGE STUDENT IN THE EIGHTEENTH CENTURY: ESSAYS BY DANIEL D. TOMPKINS* 1–2, 31–37 (New York, 1940).

<sup>104</sup> IRWIN, *supra* note 80, at 27.

<sup>105</sup> *Id.* at 28.

Governor George Clinton (supported to a degree by Jefferson) wrestled with the Federalists John Jay and Hamilton.<sup>106</sup> By the presidential election of 1800, it was clear that Republicans needed to carry New York. Seventy electoral votes were required to win the presidency and Republicans could count on sixty-one. It was therefore imperative that Republicans carry New York and its twelve electoral votes.<sup>107</sup> Due in large part to the exhaustive efforts of New Yorker Aaron Burr, Republicans achieved overwhelming victory at the ballot box—both in New York and nationally. Burr’s efforts were matched only by his protégé, young Tompkins. Tompkins went so far as to jointly purchase property with thirty other enterprising young Republicans and thereby was able to vote—a suggestion that likely came from Burr himself.<sup>108</sup> As only one-tenth of the men in New York owned enough property to vote, the scheme was exceedingly useful.

Having demonstrated considerable political acumen, Tompkins was chosen to represent New York City in the 1801 convention to revise the state Constitution.<sup>109</sup> Tompkins’ role at the convention would do much to further his promising political career. The Convention sought to fix the number of state senators at thirty-two and assemblymen at one hundred, forcing the Federalist minority to vacate eight senator seats.<sup>110</sup> To Tompkins, it seemed unfair to deprive senators of their seats absent an elective process and so he crafted and submitted a plan to Chief Justice Smith Thompson for each party to vacate four seats by ballot.<sup>111</sup> The plan was proposed and adopted by the Convention.<sup>112</sup> Tompkins’ plan caught the attention of Alexander Hamilton, and inspired Hamilton to support Tompkins when Tompkins later sought appointment as a

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<sup>106</sup> *Id.* at 33.

<sup>107</sup> *Id.* at 43.

<sup>108</sup> *Id.* at 44.

<sup>109</sup> *Id.* at 48.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 49.

<sup>112</sup> *Id.*

justice of the Supreme Court of New York.<sup>113</sup> Tompkins was elected to the state assembly in 1803 and appointed to the Supreme Court of New York in 1804 in a move praised by both Republican and Federalist members of the bar.<sup>114</sup> Tompkins himself enjoyed the court so much that when elected to Congress in 1804 he resigned so as to continue serving on the New York Supreme Court.<sup>115</sup> He similarly declined appointment to the United States District Court in New York.<sup>116</sup> Tompkins' rise from property-less attorney to justice of the Supreme Court of New York was remarkably rapid.<sup>117</sup> He was elected Governor in 1807.<sup>118</sup>

Letters from Tompkins' tenure as governor reveal a staunch Republican who, partially through his support of Jefferson's embargo, did much to ameliorate the party's internal divide between North and South. In one letter, Tompkins expounded on his views of the militia, stating that the "constitution and laws enjoin it as a duty on every person liable to perform Militia duty...the consequence of the neglect [of the militia] will be most prejudicial to the Inhabitants of the most exposed points of the State."<sup>119</sup> Tompkins was acutely aware of the utter chaos that defined New York's militia system, as well as the importance of the militia to public safety. In his first address before the state legislature in 1808, Tompkins asked for amendments to the existing militia legislation, and urged cooperation with federal efforts to protect New York.<sup>120</sup>

The address was far from Tompkins' last act of leadership with regard to the militia. He served as a liaison between the state legislature and the War Department and was intimately

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 50.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 52.

<sup>118</sup> *Id.* at 55–56 (Tompkins defeated Morgan Lewis 35,074 to 30,989—a majority of 4,085 votes.).

<sup>119</sup> *Id.* at 61–62 (quoting *The Moorsfield Antiquarian*, I (May 1937), 53–67).

<sup>120</sup> *Id.* at 130.

involved in planning the construction of federal fortifications around New York.<sup>121</sup> Indeed, Tompkins' support of Jefferson, even in the face of an increasingly popular Federalist party in New York, was unwavering and duly appreciated.<sup>122</sup> After an 1810 address before the legislature wherein Tompkins outlined America's relations with Europe, the Federalist assembly denounced both the address and President Madison's foreign and fiscal policies.<sup>123</sup> Governor Tompkins issued a forceful reply in defense of the President that same day.<sup>124</sup> Tompkins would frequently feud with the Federalist dominated assembly as he advocated for stronger war policy.<sup>125</sup>

Given Governor Tompkins attempts to reform the mess that was the New York militia, his support for active courts-martial is hardly surprising. That said, Tompkins oft-reiterated his wish that the proceedings be just and avoid excessively punitive sentences for those with valid excuses. In an 1813 letter to General James Wilkinson, Governor Tompkins observed that:

The impunity of those of the Militia who neglected to rendezvous, or who put the laws at defiance in 1812, has had a most injurious effect, & has afforded a subject of great murmuring to those who under great hardships endured the service which the good of their Country exacted from them. I hope that cause of complaint will not exist during this Campaign, but that you will cause a Court to be organized forthwith for the trial of Militia delinquents. Without being instructed especially upon that subject, the Judge Advocate perhaps will, as in my opinion he ought, counsel & advise the Court, that sickness of family, extreme poverty, infirmity of body or other circumstances which would have made it distressing for a Militiaman to leave home, constitutes an equitable & reasonable excuse; & that the arm of Justice should fall heavily upon those only who are

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<sup>121</sup> *Id.* at 131–32.

<sup>122</sup> *Id.* at 134 n.28 (noting that Secretary of War William Eustis was especially laudatory, stating: “The prompt and patriotic disposition manifested by your Excellency to co-operate with the General Government, in such measures as the public defense and safety may require, is highly favorable to the character of the first magistrate of a powerful state.” W. Eustis to Tompkins, April 24, 1809, D.D. Tompkins MSS, Box 10, pkg. 1, NYSL); *see also id.* at 134 n.28 (citing Jefferson to Tompkins, February 24, 1809)).

<sup>123</sup> *Id.* at 135–36.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 137–38, 167.

able bodied & comfortable in point of propriety, & who shrink from duty through negligence, perverseness, cowardice, or contempt of the laws.<sup>126</sup>

Although opposed to insubordination, Governor Tompkins understood that not all militiamen were similarly situated.

b. *The Parties: Michael Martin and Jacob E. Mott*

The parties before the Supreme Court were Michael Martin and Jacob E. Mott.<sup>127</sup> Exceedingly little is known about either individual. Records from the New York trial court, indicate that the plaintiff in error, Martin, was a gentleman from the town of Red Hook in Dutchess County.<sup>128</sup> In the avowry to the New York Supreme Court defending his appropriation of Mott's property, Martin explained that on August 6, 1818, the marshal for the Southern District of New York, Thomas Morris, Esq., appointed Martin his lawful deputy.<sup>129</sup> In that capacity, it was Martin's duty to serve and execute the orders of the courts martial.<sup>130</sup> The defendant in error, Mott, was a farmer who hailed from the town of Clinton, also in Dutchess County.<sup>131</sup> As the case clearly encapsulated a larger struggle over Federal-State relations and political partisanship, both parties were represented by distinguished counsel.

c. *The Lawyers*

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<sup>126</sup> DANIEL D. TOMPKINS, III PUBLIC PAPERS OF DANIEL D. TOMPKINS, 1807-1817, at 384 (Hugh Hastings ed., 1898-1902) (quoting Tompkins to J. Wilkinson, August 31, 1813).

<sup>127</sup> *Martin v. Mott*, 25 U.S. 19, 20 (1827).

<sup>128</sup> *Martin v. Mott*, 25 U.S. 19 (1827) (No. 1286), *microformed* on U.S. Supreme Court Records and Briefs, Reel 72 (National Archives).

<sup>129</sup> *Id.* An avowry is a common law pleading—a response to a replevin action acknowledging that one has taken property, together with a justification for that taking. *Avowry*, BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>130</sup> *Mott*, 25 U.S. at 23.

<sup>131</sup> *See supra* note 128, *Mott*, *microformed* on Reel 72 (National Archives).

i. *Counsel for the Plaintiff in Error: Mr. Coxe and Attorney General William Wirt.*

When *Martin v. Mott* arrived in the Supreme Court on February 9, 1824, Mr. Martin was represented by an attorney named George Shufeldt.<sup>132</sup> Little is known about Mr. Shufeldt other than that he was admitted to the bar in 1816, was subsequently admitted as a counselor and solicitor at chancery in 1819, and was registered and practiced in Red Hook, Dutchess County, New York.<sup>133</sup> It appears that Mr. Martin, also a resident of Red Hook, merely contacted a local attorney. Regardless, by the time the case reached the Supreme Court of the United States, Mr. Martin certainly had the benefit of high-powered representation.

Before the Supreme Court Mr. Martin was represented by two experienced lawyers. The first, Mr. Coxe, is something of a mystery. Mr. Coxe's co-counsel was none other than the acting United States Attorney General, William Wirt. A former member of the Virginia House of Delegates, Mr. Wirt first achieved distinction when President Thomas Jefferson appointed him prosecutor in the 1807 treason trial of Aaron Burr.<sup>134</sup> Wirt previously collaborated with Mr. D.B. Ogden (Mott's attorney), as Wirt (along with Daniel Webster) represented Thomas Gibbons in *Gibbons v. Ogden*<sup>135</sup>, a case where Mr. Ogden made an opening statement. In fact, Wirt figured prominently in four of the Marshall Court's most consequential decisions.<sup>136</sup> Besides

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<sup>132</sup> *United States Supreme Court Minutes and Docket*, 1384

[http://virtualarchive.us/nara\\_supreme\\_court/m216\\_1/html/nara\\_m216\\_1-0704.html](http://virtualarchive.us/nara_supreme_court/m216_1/html/nara_m216_1-0704.html) (Last Accessed 17:15, November 20, 2016).

<sup>133</sup> ROGER SHERMAN SKINNER, *THE NEW YORK STATE REGISTER, FOR THE YEAR OF OUR LORD, 1830*, at 165 (1830),

<https://books.google.com/books?id=6o0UAAAAYAAJ&lpg=PA152&dq=attorney%20shufeldt%201827&pg=PA165#v=onepage&q&f=false> (Last Accessed 17:16, November 20, 2016).

<sup>134</sup> J.F.B., *William Wirt*, 16 AM. L. REG. 65, 73 (1867).

<sup>135</sup> *Gibbons v. Ogden*, 22 U.S. 1 (1824).

<sup>136</sup> H.H. Hagan, *William Wirt*, 8 GEO. L.J. 12, 23 (1919-1920) (noting that the only momentous Marshall Court case in which Wirt was not a player was *Marbury v. Madison*).

*Gibbons*, Wirt (again, with Webster) opposed Maryland's attempt to tax the Bank of the United States in *McCulloch v. Maryland*<sup>137</sup>; in *Dartmouth College v. Woodward*<sup>138</sup>, Wirt lost (this time *against* Webster); in *Cohens v. Virginia*<sup>139</sup> Wirt played a minor role in defining the appellate jurisdiction of the Supreme Court.

When Wirt retired from his post as Attorney General, he moved to Baltimore where he had an established legal practice. In 1832 due to a dearth of opposition to Jeffersonian Republicans (then called Democrats), Wirt ran as the Anti-Masonic candidate for president; he received the electoral votes solely of Vermont.<sup>140</sup> In general, Wirt seemed to prefer arguing in favor of the power of the Federal Government and his position in *Martin v. Mott* reflects that tendency.<sup>141</sup>

ii. *Thomas J. Oakley*

When *Martin v. Mott* was filed in the Supreme Court in 1824, Mott was represented by Thomas J. Oakley, an accomplished public figure in New York.<sup>142</sup> Oakley too had argued in *Gibbons*, albeit unsuccessfully. Oakley had been elected to Congress as an ardent anti-war Federalist from the Poughkeepsie District in 1813.<sup>143</sup> Although against the war, colleagues remembered him as a cool, collected individual gifted with immense foresight and intellectual

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<sup>137</sup> *McCulloch v. Maryland*, 17 U.S. 316 (1819).

<sup>138</sup> *Dartmouth College v. Woodward*, 17 U.S. 518 (1819).

<sup>139</sup> *Cohens v. Virginia*, 19 U.S. 264 (1821).

<sup>140</sup> Hagan, *William Wirt*, 8 *Geo. L.J.* at 21–22.

<sup>141</sup> See, e.g., *McCulloch v. Maryland*, *Cohens v. Virginia*, *Gibbons v. Ogden*.

<sup>142</sup> *United States Supreme Court Minutes and Docket*, *supra* note 132.

<sup>143</sup> *The Late Thomas J. Oakley*, *N.Y. TIMES* (June 13, 1857),

[http://query.nytimes.com/mem/archive-free/pdf?\\_r=1&res=9405E3D71F3DEE34BC4B52DFB366838C649FDE](http://query.nytimes.com/mem/archive-free/pdf?_r=1&res=9405E3D71F3DEE34BC4B52DFB366838C649FDE) (Last Accessed 10:20, November 13, 2016).

proress.<sup>144</sup> Following his death in 1857, former New York Republican congressman and peer, Judge Jabez Delano Hammond, eulogized Oakley:

“As a clear, ingenious, and logical, though sometimes sophisticated reasoner, he has appeared to me unrivaled in our legislative halls at Albany...his perfect self-command peculiarly fit him for a party leader in a legislative assembly. In Congress he differed from the over-zealous Eastern Federalists. He wished, at least, to manifest an apparent disposition to furnish supplies to Government, in carrying on the war, and to confine his opposition to the *manner* in which the war was carried on. Mr. Clayton, an old and sagacious Virginia politician, told me, in 1816, that, had the Federal members of Congress, during the war, put themselves exclusively under the management of Oakley, and implicitly followed his lead, in his judgment the Administration would have been prostrated.”<sup>145</sup>

Oakley stayed in Congress until 1815 when he went to the State Assembly. In 1819, Oakley replaced a young Martin Van Buren as New York State Attorney General. Although evidence suggests Oakley’s forceful Federalist views somewhat softened with age, his decision not to argue *Martin v. Mott* was likely due to a successful 1827 campaign for Congress rather than any philosophical misgivings.<sup>146</sup>

### iii. *Mr. D.B. Ogden*

In place of Oakley, Mott’s 1827 defense was made by Mr. David Bayard Ogden.<sup>147</sup> Mr. Ogden was born on October 31, 1775 in Morrisania, New York.<sup>148</sup> An eminently qualified attorney, Chief Justice Roger Taney referred to Ogden as the “Sledge Hammer of the Court” due to the directness and simplicity of his arguments.<sup>149</sup> In *Gibbons v. Ogden*, Mr. Ogden made

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<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Martin v. Mott*, 25 U.S. 19, 28 (1827).

<sup>148</sup> THE NEW JERSEY HISTORICAL SOCIETY: MANUSCRIPT GROUP 897 DAVID BAYARD OGDEN, LAWYER, [http://www.jerseyhistory.org/findingaid.php?aid=0897#Biographical Note](http://www.jerseyhistory.org/findingaid.php?aid=0897#Biographical%20Note): (Last Accessed 11:44, December 20, 2016).

<sup>149</sup> WILLIAM OGDEN WHEELER, *THE OGDEN FAMILY IN AMERICA, ELIZABETHTOWN BRANCH, AND THEIR ENGLISH ANCESTRY* (Lawrence Van Alstyne & Rev. Charles Burr Ogden eds., 1907).

opening statements on behalf of the Appellant.<sup>150</sup> Renowned American attorneys Daniel Webster and Henry Clay were amongst Ogden’s peers.<sup>151</sup> In January of 1814—that is, at the time of Mott’s defiance—Mr. Ogden served New York in the still Federalist-dominated state assembly.<sup>152</sup> Furthermore, Mr. D.B. Ogden’s voting record indicates that he was generally in accord with Mr. Stephen Van Rensselaer—a famed Federalist.<sup>153</sup> Mr. Ogden was therefore likely a Federalist and exceptionally familiar with the problem-plagued militia—in short, a man sympathetic to Mr. Mott’s plight.

d. *Justice Joseph Story*

Of the many legal architects who graced the early American bench, the legacy of Justice Joseph Story is surpassed solely by his friend and mentor Chief Justice John Marshall.<sup>154</sup> Justice Story’s contributions to American jurisprudence—particularly with regard to constitutional

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<sup>150</sup> *Gibbons v. Ogden*, 19 U.S. 448, 449 (1821).

<sup>151</sup> *WHEELER*, *supra* note 149, at 194.

<sup>152</sup> *See* JOURNAL OF THE SENATE OF THE STATE OF NEW YORK: AT THEIR THIRTY-SEVENTH SESSION, *BEGUN AND HELD AT THE CITY OF ALBANY, THE TWENTY-FIFTH DAY OF JANUARY, 1814* (1814)

<https://books.google.com/books?id=8vVBAQAAMAAJ&lpg=PA301&dq=mr.%20d.b.%20ogden&pg=PA1#v=onepage&q&f=false>. The 1814 elections would not begin until April in New York and so the assembly remained in Federalist control. That said, the 1814 elections were a disaster for New York Federalists. The Federalist majority in the state assembly transformed into a thirty-seat Republican majority. Strum, *supra* note 52, at 180 (Last Accessed 16:44, November 20, 2016).

<sup>153</sup> *Id.*

<sup>154</sup> JOSEPH STORY, *I 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*, at iii (Thomas M. Cooley ed., 4th ed. 1873) (dedicating the book to Chief Justice John Marshall and theorizing that “[p]osterity will assuredly confirm, by its deliberate award, what the present age has approved as an act of undisputed justice. Your expositions of constitutional law enjoy a rare and extraordinary authority.... They are destined to enlighten, instruct, and convince future generations, and can scarcely perish but with the memory of the Constitution itself”).

interpretation and the powers of the national government—were gargantuan.<sup>155</sup> His *Commentaries on the Constitution of the United States* is a seminal work of American constitutional law.<sup>156</sup>

One of eighteen children, Justice Story hailed from Marblehead, Massachusetts.<sup>157</sup> The youngest justice ever to sit on the Supreme Court, Justice Story fervently supported the central canons of the Federalist Party.<sup>158</sup> In one of his earliest, yet arguably most well known opinions, Justice Story articulated an ardently nationalist understanding of judicial power in *Martin v. Hunter’s Lessee*.<sup>159</sup> The Court advanced the purview of federal courts to review the decisions of state courts in all cases concerning the United States Constitution.<sup>160</sup> According to Justice Story, the Supreme Court provided necessary oversight of state tribunals’ constitutional jurisprudence.<sup>161</sup> Justice Story clearly favored a and a strong national authority.

By 1833 when Justice Story authored *Commentaries on the Constitution of the United States*, his views reflected those articulated in *Mott*.<sup>162</sup> In his *Commentaries*, Justice Story noted

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<sup>155</sup> See, e.g., *id.*

<sup>156</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, at xv (Thomas M. Cooley, ed., 2d. ed. 1871) (relating that it is the editor’s opinion that “upon the subject of the federal constitution, no work yet supersedes the elaborate treatise of Mr. Justice Story”).

<sup>157</sup> R. Kent Newmyer, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 10 (G. Edward White ed., 1985).

<sup>158</sup> Gerald T. Dunne, *Joseph Story: The Great Term*, 79 HARV. L. REV. 877, 880 (1966) (noting Justice Story’s “enthusiastic advocacy of a standing army, a world-ranging navy, an activist federal judiciary, a comprehensive navigation act, a national newspaper, federal notaries, and a national system of bankruptcy”).

<sup>159</sup> 14 U.S. 304 (1816).

<sup>160</sup> *Id.* at 378–80.

<sup>161</sup> *Id.* at 378.

<sup>162</sup> 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). Indeed, Cooley provides frequent citations to *Martin v. Mott*, *Houston v. Moore*, *Vanderheyden v. Young*, *The Federalist*, No. 29, and *Luther v. Borden*. See *id.*, at 116–20 §§ 1208–1214.

the need for a well regulated militia and articulated some apprehension of standing armies.<sup>163</sup> Although appreciative of the role of the militia, Story noted that the Federal Government had only called it out twice, the War of 1812 being one such occasion.<sup>164</sup> In all other instances, the states had retained control.<sup>165</sup> Still, Story proceeded to reiterate the central tenets of *Mott*—namely that the Militia Act of 1795 was constitutional and had delegated exclusive discretionary power to the President to act in the case of national emergency.<sup>166</sup> Justice Story clearly considered his holding in *Mott* an indispensable defense of the American system of ordered liberty. Through his *Commentaries*, *Mott* has persevered as an integral aspect of American constitutional jurisprudence.

### III. MARTIN V. MOTT

#### a. *The Case*

The Supreme Court record, comfortably ensconced in the recesses of the National Archives, fortunately includes the opinions of the New York courts. The facts found in the trial court record are a slightly more detailed edition of those found in the Supreme Court record. According to the trial court, Governor Tompkins ordered out the militia via two orders on August 4 and 29, 1814.<sup>167</sup> Private Mott subsequently refused to rendezvous.<sup>168</sup> Toward the end of September, 1814, Major General Morgan Lewis convened a court martial.<sup>169</sup> The court

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<sup>163</sup> *Id.* at 110–11, § 1201 (stating that “every argument which is urged, or can be urged against standing armies in time of peace, applies forcibly to the propriety of vesting this power in the national government” and noting that “power over the militia is highly salutary to the public repose”).

<sup>164</sup> *Id.* at 116–17, § 1210.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 118–119, § 1211–1213.

<sup>167</sup> *See supra* note 128, *Mott*, microformed on Reel 72 (National Archives).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

martial was empowered to adjudicate cases through May 13, 1818.<sup>170</sup> As told by the trial court, Mott did not appear before the court martial until May 30, 1818.<sup>171</sup> At his hearing, Mott was fined ninety-six dollars and threatened with one year in prison should he fail to pay.<sup>172</sup>

On August 6, 1818, Michael Martin was appointed a deputy marshal for the Southern District of New York by Thomas Morris, Esq.<sup>173</sup> As deputy marshal, it was Martin's responsibility to execute the orders of the courts martial.<sup>174</sup> On June 4, 1819 (over a year after Mott's initial sentencing and also after the sentence was approved by President Monroe), Martin visited Mott in order to acquire payment of the fine.<sup>175</sup> Rather than take the ninety-six dollars, Martin dispossessed Mott of a brown mare.<sup>176</sup> Mott then brought an action in replevin to recover personal property allegedly wrongfully taken.<sup>177</sup> Unlike other types of legal recovery, replevin seeks return of the actual chattel itself (or *in specie*), as opposed to damages.<sup>178</sup> Although the record never explicitly states that Martin seized the horse in lieu of the ninety-six dollar fine, the resultant law suit suggests that such a substitution occurred.

In the New York Supreme Court, Mott claimed he sustained damage in the value of \$300 due to Martin's appropriation of the brown mare and sought return of the mare *in specie*.<sup>179</sup> As Mott was a farmer, he likely relied on the horse for his livelihood.<sup>180</sup> The court ultimately awarded Mott \$146.34. The judgment was subsequently affirmed by the Court for the Trial of

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<sup>170</sup> *Id.*

<sup>171</sup> *Id.* (offering no reason for Mott's less than punctual appearance).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Replevin*, BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>179</sup> *See supra* note 128, *Mott, microformed* on Reel 72 (National Archives).

<sup>180</sup> *Id.*

Impeachments and Correction of Errors in an opinion which merely reiterated Mott's issues with the avowry.<sup>181</sup> Martin then appealed to the Supreme Court of the United States.

i. *The Jurisdictional Question*

The property law oriented underpinnings of the case explain the jurisdictional decision to try the case in state court. Property law is typically adjudicated on a state by state basis. Given the extreme unpopularity of the War in New York, Mott's counsel likely made a strategic decision to bring the case in a potentially sympathetic state court. Indeed, the New York courts treated the case as a property issue and left the question of Mott's defiance relatively untouched.<sup>182</sup> By the time the case reached the Supreme Court, it encapsulated the disorganization that dominated militia affairs during the War of 1812.

The United States Constitution divides responsibility for the militia.<sup>183</sup> Although the federal government is empowered to use state militias, state governments retain the rights to appoint officers and train the militia according to federally dictated discipline.<sup>184</sup> During the War of 1812, coordination of training was far from uniform and organization of the militia at the state level varied widely.<sup>185</sup> More significantly, there was no "clear definition of the proper relationship of state versus federal authority over the militia in war time."<sup>186</sup> As a result, numerous disputes arose over what power was properly authorized to call the militia into service, pay them, equip them, organize them, and determine their use.<sup>187</sup> In rendering its opinion, the

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<sup>181</sup> *Mott*, 25 U.S. at 23–27 (detailing Mott's extensive list of complaints).

<sup>182</sup> *See supra* note 128, *Mott*, microformed on Reel 72 (National Archives).

<sup>183</sup> U.S. CONST. art. I, § 8

<sup>184</sup> SKEEN, *supra* note 7, at 1.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 1.

<sup>187</sup> *Id.* at 1–2.

Supreme Court took issue with the state courts' opinions and attempted to lend some coherence to the militia system.

b. *The Court's Reasoning*

In *Martin v. Mott*, the Supreme Court overturned the New York court's decision in favor of Mott and remanded.<sup>188</sup> The Court addressed each of Mott's nineteen complaints regarding the deficiency of the avowry.<sup>189</sup> In general, Mott's complaints are divisible into two primary attacks: one concerning the power of the President and the sufficiency of the requisition, the other regarding the jurisdiction of the court martial.<sup>190</sup> The Court noted the constitutional power of Congress over the militia, emphasized the executive power of the President, established the jurisdiction of the court martial, and ultimately concluding the avowry sufficient.<sup>191</sup>

i. *The Court's Analysis of Mott's Complaints Regarding the Executive Power of the President and the Sufficiency of the Requisition*

Writing for the Court, Justice Joseph Story first established the constitutional power of Congress to provide for the militia.<sup>192</sup> The Court noted that the Militia Act of 1795<sup>193</sup> which authorized the President to call out the militia fell well within the constitutional power of Congress.<sup>194</sup> Justice Story described the power confided in the President by Congress to order out the militia as "of a very high and delicate nature."<sup>195</sup> The Court next addressed the nature of

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<sup>188</sup> *Mott*, 25 U.S. at 39.

<sup>189</sup> *Id.* at 28–39.

<sup>190</sup> *Id.* at 23–27.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 28–29.

<sup>193</sup> Law of February 28, 1795, ch. 36, 1 Stat. 424 (repealed in part 1861 and current version at 10 U.S.C. §§ 331–334 (2015));

<sup>194</sup> *Mott*, 25 U.S. at 28–29.

<sup>195</sup> *Id.* at 29.

the President's power to order out the militia. The unanimous opinion related that "[w]e are all of the opinion, that the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons."<sup>196</sup>

The Court grounded its reasoning in the very nature of the President's power to order out the militia. Key to the Court's decision was the fact that national emergencies are precisely the sort of occurrence best handled by a unilateral act of power rather than through a laborious democratic process.<sup>197</sup> The Court construed the President's executive power in a manner designed to ensure the preservation of the Union.<sup>198</sup> Were the President not the sole judge of a national exigency's existence, an emergency could destroy the Union while its very existence was still being debated.<sup>199</sup> In short, to interpret the President's powers in any other way could prove ruinous to the country.<sup>200</sup> Indeed, the Court unanimously held it a sound rule of construction that whenever a statute confers discretionary power on an individual to be exercised by the individual upon his own interpretation of certain facts, the individual is constituted the sole and exclusive judge of the existence of those facts.<sup>201</sup>

The Court greatly downplayed the possibility that the President's power to unilaterally diagnose and address national emergencies would be abused.<sup>202</sup> According to the Court, all powers are susceptible to abuse.<sup>203</sup> The remedy, held the Court, is the American constitutional system.<sup>204</sup> The Court argued that in a free government, the executive must be presumed devoted

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<sup>196</sup> *Id.* at 30.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 31–32.

<sup>202</sup> *Id.* at 32.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

to the public good; furthermore, frequent and free elections as well a watchful Congress “carry with them all the checks which can be useful to guard against usurpation or wanton tyranny.”<sup>205</sup>

To reiterate this point, Justice Story referenced *Vanderheyden v. Young*, a New York Supreme Court case.<sup>206</sup>

The Court further held it not necessary for the President to furnish any evidence in support of his determination of a national emergency.<sup>207</sup> Despite the fact that the plaintiffs in both *Mott* and *Vanderheyden* contended that the President must actually provide evidence, the Court held that the President is presumed to have acted lawfully.<sup>208</sup> Furthermore, the Court rejected Mott’s complaint that the orders of the President were not actually set forth and that the avowant did not actually aver that the President issued any orders.<sup>209</sup> In short, the Court held it unnecessary for there to be an explicit official order; it sufficed that the Governor claimed he acted on the President’s requisition.<sup>210</sup>

ii. *The Court’s Rejection of Mott’s Allegations of the Illegality of the Court Martial Proceedings.*

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<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 32 (citing *Vanderheyden v. Young*, 11 Johns. 150, 150 (1814) (holding that the President of the United States alone is empowered to determine the existence of a national emergency and is alone entitled to call out the militia)). In an interesting historical quirk, the majority opinion in *Vanderheyden* was authored by Judge Ambrose Spencer, a prominent New York Republican and the brother-in-law of Governor Daniel D. Tompkins. IRWIN, *supra* note 80, at 53.

<sup>207</sup> *Id.* at 31 (noting that the evidence upon which the President might base his decision could be of an especially sensitive nature demanding concealment).

<sup>208</sup> *Id.* at 32–33.

<sup>209</sup> *Id.* at 33.

<sup>210</sup> *Id.* (citing *Houston v. Moore* 18 U.S. 1, 16 (1820) (Johnson, J., concurring) (noting that a requisition is a legal order and must be interpreted as such)).

Mott made many claims regarding the illegality of the court martial proceedings.<sup>211</sup> The Court began with Mott’s complaint that the court martial was not lawfully constituted and did not have jurisdiction.<sup>212</sup> Mott alleged that as he was never technically employed in the service of the United States (that is, he had refused to enter the service) he was not liable to the Articles of War or to be tried by a court martial.<sup>213</sup> The Court responded that such suggestion was conclusively rebutted by *Houston v. Moore*.<sup>214</sup>

Mott’s next major claim centered on the make-up of the court martial—namely, that it did not have enough officers.<sup>215</sup> The Court noted that the legislation (the Militia Act of 1795) did not specify how many officers were necessary but that the Articles of War did provide for somewhere between five and thirteen officers and left the ultimate decision as to the exact number up to the discretion of the convening officer.<sup>216</sup> The Court further observed that the avowry actually provided a reason as to why there were only six officers and that the demurrer admitted the validity of the reason.<sup>217</sup> In short, Mott’s claim of illegality was without merit.

At this point the Court, having seemingly dispensed with Mott’s claim as to the illegality of the composition of the court martial, could have moved on. However, the opinion continued to further dismantle Mott’s assertion. First, the Court noted that the range of officers provided for

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<sup>211</sup> *Id.* at 33–34.

<sup>212</sup> *Id.* at 33.

<sup>213</sup> *Id.* at 33–34.

<sup>214</sup> *Id.* at 34 (citing *Houston v. Moore* 18 U.S. 1, 42 (1820) (Johnson, J., concurring) (holding that a militiaman who refused to be called in to the service by the President, although not technically employed in the service of the United States, was still subject to the fifth section of the rules and Articles of War—that is, was still liable to be tried by a court martial).

<sup>215</sup> *Id.*

<sup>216</sup> *Compare* Law of February 28, 1795, ch. 36, 1 Stat. 424 (repealed in part 1861 and current version at 10 U.S.C. §§ 331–334 (2015)) *with* Law of April 10, 1806, ch. 20, 2 Stat. 359 (1799–1813); *see also id.*

<sup>217</sup> *Mott*, 25 U.S. at 35 (noting that the avowry assigned a reason as to why a number short of thirteen officers composed the court martial but failing to elucidate what reason was provided).

by the Articles of War was only for the armies of the United States.<sup>218</sup> Second, the Court noted that although the fifth section of the Militia Act of 1795 extended the power of court martials to those not yet in the service of the United States, it merely allowed for the applicability of the Articles of War to those militiamen employed in the service of the United States.<sup>219</sup> That is, although the Militia Act of 1795 extended the power of courts martials to militiamen pre-*rendezvous*, the Articles of War only applied to militiamen post-*rendezvous*. In short, no explicit guidance as to the composition of the courts martial extended to those situations involving individuals like Mott (not yet in the service of the United States but still subject to courts martial pursuant to the fifth section of the Militia Act of 1795). The Articles of War were merely to guide the discretion of the officer convening the court martial.<sup>220</sup> According to the Court, “general usage of the military service, or what may not unfitly be called the customary military law” should govern the appointment and composition of courts martial.<sup>221</sup> In an effort to foreclose all legal recourse to Mott, the Court similarly rejected the applicability of the Act of April 18, 1814 holding the language obviously confined to those already in the actual service of the United States.<sup>222</sup>

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<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 36 (“This language is obviously confined to the militia in the actual service of the United States, and does not extend to such as are drafted and refuse to obey the call. So that the Court are driven back to the act of 1795 as the legitimate source for the ascertainment of the organization and jurisdiction of the Court Martial in the present case. And we are of the opinion, that nothing appears on the face of the avowry to lead to any doubt that it was a legal Court Martial, organized according to the military usage, and entitled to take cognizance of the delinquencies stated in the avowry.”).

The Court similarly rejected Mott’s claim that the fine was not approved by the commanding officer in the manner obligated by the Articles of War.<sup>223</sup> The Court first stated that approval was not necessary because—as they had already established—the Articles of War served as mere guidelines with regard to militiamen not yet in the service.<sup>224</sup> Furthermore, the Court noted that Mott’s punishment had been approved by none other than the President of the United States and as the highest ranking military official, the President’s approval more than sufficed.<sup>225</sup> The Court concluded its line of reasoning by musing that the meaning of the Militia Act of 1795 was by no means lucid, and that the Court could infer that the fines did not demand official approval.<sup>226</sup>

Finally, the Court rejected Mott’s argument that the court martial occurred in times of peace.<sup>227</sup> The Court held that the Militia Act of 1795 extended to times of peace. Indeed, the precise power of the Act authorized the President to call out the militia in times of peace. As penned by Justice Story, “[i]t would be a strained construction of the act, to limit the authority of the Court to the mere time of the existence of a particular exigency...there is no such limitation in the act itself.”<sup>228</sup>

c. *The Enduring Significance of Martin v. Mott*

i. *Groundbreaking Precedent*

In *Martin v. Mott*, the Court employed a broad reading of congressional power under the First Militia Clause, emphasized the constitutionality of the Militia Act of 1795, and advanced

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<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 35.

<sup>225</sup> *Id.* at 36–37.

<sup>226</sup> *Id.* at 37.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 37–38.

the President’s discretionary power to impose martial law.<sup>229</sup> The Court’s unanimous opinion in *Martin v. Mott* has endured as a foundational case of American executive emergency power jurisprudence.<sup>230</sup> Although the opinion in *Mott* explicitly dealt with the authority of the Militia Act and the President, the implied issue was the power to ensure proper execution of the law.<sup>231</sup>

The power to ensure proper execution of the laws would later rear its head in *Luther v. Borden*,<sup>232</sup> an 1849 case similarly cited as a cornerstone case of American executive power case law.<sup>233</sup> *Luther v. Borden* resulted from Dorr’s rebellion, wherein Martin Luther attempted to overthrow the established government of Rhode Island.<sup>234</sup> The pertinent question before the *Luther* Court was whether the Supreme Court of the United States could review President John Tyler’s decision to quell the insurrection under the Guarantee Clause of the Federal Constitution.<sup>235</sup>

The Court held it the duty of Congress to oversee the President’s determination as to the existence of “domestic violence.”<sup>236</sup> However, as noted by Chief Justice Roger Taney in his majority opinion, Congress had delegated its authority to make claims regarding “domestic violence” to the President via the Militia Act of 1795.<sup>237</sup> Echoing Justice Story’s opinion in *Mott*, Chief Justice Taney further noted that “the power of deciding whether the exigency had

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<sup>229</sup> See generally *id.*

<sup>230</sup> Stephen I. Vladeck, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 172 (2004).

<sup>231</sup> *Id.*

<sup>232</sup> *Luther v. Borden*, 48 U.S. 1 (1849).

<sup>233</sup> Vladeck, *Emergency Power and the Militia Acts*, 114 YALE L.J. at 172.

<sup>234</sup> *Luther*, 48 U.S. at 34–38.

<sup>235</sup> *Id.* at 42; U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.”).

<sup>236</sup> *Luther*, 48 U.S. at 43.

<sup>237</sup> *Id.*

arisen upon which the government of the United States is bound to interfere, is given to the President.”<sup>238</sup> In light of the Court’s unanimous opinion in *Mott*, the *Luther* Court held that the President’s power was not subject to review by the courts.<sup>239</sup>

Just as in *Mott*, the *Luther* Court held that the power to decide whether insurrection warranted calling out the militia was exclusively the province of the executive.<sup>240</sup> Both Courts founded the executive authority in the Militia Acts.<sup>241</sup> The Presidents could act as he had because Congress had authorized it.<sup>242</sup> Remarkably, *Luther* espoused the notion that martial law had a constitutional basis.<sup>243</sup> At the time, few seemed aware of the claim.<sup>244</sup>

## ii. *Mott during the Civil War*

The influence of the *Mott* decision on executive emergency powers was again evident during the Civil War.<sup>245</sup> In order to impose martial law, President Lincoln greatly relied on *Ex parte Field*, a case that cited both *Mott* and *Luther* as precedent. As stated in *Field*:

[t]he principle established by these cases [*Mott* and *Luther*] determines, I think, that the president has the power, in the present military exigencies of the country, to proclaim martial law, and, as a necessary consequence thereof, the suspension of the writ of habeas corpus in the case of military arrests. It must be evident to all, that martial law and the privilege of that writ are wholly incompatible with each other.<sup>246</sup>

President Lincoln’s Attorney General, Edward Bates, also cited *Mott* for the proposition that the President could detain and remove rebel combatants from the battle field until the

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<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 44–45; see also *Martin v. Mott* 25 U.S. 19, 30 (1827).

<sup>240</sup> Stephen I. Vladeck, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 174 (2004).

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> George M. Dennison, *Martial Law: The Development of a Theory of Emergency Powers, 1776-1861*, 18 AM. J. LEGAL HIST. 52, 77 (1974).

<sup>244</sup> *Id.* at 76.

<sup>245</sup> DANIEL FARBER, *LINCOLN’S CONSTITUTION* 162–63 (2003).

<sup>246</sup> *Ex parte Field*, 9 F. Cas. 1, 8 (C.C.D. Vt. 1862).

exigency had passed.<sup>247</sup> Attorney General Bates argued that as the President was “the guardian of the Constitution—its preserver, protector and defender,” he was empowered to take whatever actions necessary to protect the United States.<sup>248</sup> *Mott* clearly continued to have enduring influence with regard to executive emergency powers. Attorney General Bates would not be the last to employ such reasoning.<sup>249</sup>

### *iii. The Contemporary Understanding of Mott*

Since Attorney General Bates’ opinion, every Presidential administration has asserted that it is the President’s prerogative under the Constitution to protect American interests and that congressional approval is not necessary.<sup>250</sup> Through Attorney General Bates’ analysis, *Mott* has influenced the contemporary understanding of executive war powers. Much as Justice Story’s opinion held it the sole and exclusive power of the President to diagnose and dispose of national emergencies, modern administrations contend that the power to use the military to protect American interests similarly does not demand explicit congressional approval.<sup>251</sup>

In 2011 and early 2012, President Obama twice called out the United States military without explicit Congressional approval.<sup>252</sup> In the former instance, Seal Team Six killed Osama

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<sup>247</sup> Arthur H. Garrison, *The History of Executive Branch Legal Opinions on the Power of the President as Commander-in-Chief from Washington to Obama*, 43 CUMB. L. REV. 375, 407 (2012-2013) (citing Suspension of the Privilege of the Writ of Habeas Corpus, 10 Op. Att’y Gen. 74, 84 (1861)).

<sup>248</sup> *Id.* (quoting Suspension of the Privilege of the Writ of Habeas Corpus, 10 Op. Att’y Gen. at 82).

<sup>249</sup> *Id.* (noting that Attorney General Bates’ view of *Mott* was the “antecedent to the view of presidential power that was asserted by President Bush and Vice President Chaney—that the President is the empowered as Commander in Chief to act to protect the people of the United States and this broad power carries various inherent powers to act in the pursuit of that protection.”).

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 478.

<sup>252</sup> *Id.*

bin Laden; in the latter instance, Seal Team Six rescued aid workers held hostage by pirates in Mogadishu, Somalia.<sup>253</sup> In neither instance, was congressional approval sought. While the bin Laden assassination was subsequently validated as part of the congressionally authorized War on Terror, the latter military operation was not.<sup>254</sup> In short, the Somalia expedition was a unilaterally authorized use of American military might.<sup>255</sup> The lack of public outcry can in part be explained by history dating back to *Mott*.

#### IV. Conclusion

Although contemporary usage cites it for its interpretation of the President's emergency powers, *Martin v. Mott* encapsulated many of the themes sweeping early nineteenth century America. The case arose out of Federalist opposition to the War of 1812, and ultimately solidified the national government's authority. Besides the relative paucity of information concerning the parties in *Mott*, the case begs the question of what limits would currently be imposed on a President in a true domestic crisis.<sup>256</sup> The answer, according to at least some scholars, is unclear.<sup>257</sup>

The constitutional basis for martial law asserted by *Mott* through *Luther*, coupled with the modern approach to protecting American interests via unilaterally authorized military force suggests few, if any, real limits governing a President faced with an actual domestic emergency.<sup>258</sup> *Mott* envisioned Congress as a check on the President's ability to abuse his

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<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> Stephen I. Vladeck, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 192 (2004).

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

power.<sup>259</sup> That said, what if Congress cannot be convened?<sup>260</sup> What if (as will be the case on January 20, 2017) Congress agrees with the President?<sup>261</sup> What role do the courts play?<sup>262</sup> In short, the power of the President during a true national crisis is ill-defined and murky at best. In that light, *Martin v. Mott* remains relevant.

## V. Appendix

### a. *Biographical Information: President James Madison*

Born in 1751 in Orange County, Virginia, few have left a more indelible legacy than the fourth President of the United States, James Madison.<sup>263</sup> Madison's views on governance evolved wildly. Following his graduation from Princeton, Madison was a frequent and emphatic participant at the 1776 constitutional Convention.<sup>264</sup> In the 1780s as the "Father of the Constitution," Madison was a zealous nationalist who distrusted states and yearned to subjugate them to the authority of a central government.<sup>265</sup> By the 1790s Madison was a staunch states' rights advocate who feared the tyrannical tendencies of the federal government. To that end, he cofounded (along with Thomas Jefferson) the Democratic-Republican party. In juxtaposition to the Madison of the 1780s who viewed states as mere administrative units in the federal scheme,

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<sup>259</sup> See *supra* note 205.

<sup>260</sup> Vladeck, *Emergency Power and the Militia Acts*, 114 YALE L.J. at 192.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* Remember that *Luther* held the President's decision to act unreviewable by the courts. See generally *Luther v. Borden*, 48 U.S. 1 (1849).

<sup>263</sup> WHITE HOUSE HISTORY AND GROUNDS: PRESIDENT JAMES MADISON, <https://www.whitehouse.gov/1600/presidents/jamesmadison> (Last Accessed 10:49, December 21, 2016).

<sup>264</sup> *Id.*

<sup>265</sup> Gordon S. Wood, *Is there a "James Madison Problem"?*, in LIBERTY AND AMERICAN EXPERIENCE IN THE EIGHTEENTH CENTURY 425, 425 (David Womersely ed., 2006).

the Madison of the 1790s upheld the states as the last bastion against unconstitutional exercises of federal power.<sup>266</sup>

Historians have struggled to reconcile Madison's seemingly diametrically opposed political views.<sup>267</sup> Perhaps the most persuasive perspective of Madison is of an idealistic Republican, reluctant to cultivate a strong national government.<sup>268</sup> As President Jefferson's Secretary of State, Madison complained to France and Britain that their seizure of American ships violated international law.<sup>269</sup> John Randolph acerbically noted that this had the effect of "a shilling pamphlet hurled against eight hundred ships of war."<sup>270</sup> Elected president in 1808, Madison might have been properly prepared for the War of 1812 had he more aggressively advanced a strong national agenda. Instead, apprehensive of debt, taxation, and standing armies, Madison and fellow Republicans relied on economic measures and a near fanatical faith in state militias.<sup>271</sup>

Madison retired to his Orange County, Virginia estate where he died in 1836.<sup>272</sup> In a note opened posthumously, Madison stated, "[t]he advice nearest to my heart and deepest in my convictions is that the Union of the States be cherished and perpetuated."<sup>273</sup>

b. *Biographical Information: Major General Morgan Lewis*

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<sup>266</sup> Compare the immense national power proposed by Madison in the Virginia Plan with Madison's 1798 belief that states could invalidate federal measures. *Id.* at 426.

<sup>267</sup> Compare Lance Banning, SACRED FIRE OF LIBERTY (1995), with Ralph Ketcham, JAMES MADISON: A BIOGRAPHY (1971), with Wood, *supra* note 265, at 425.

<sup>268</sup> Wood, *supra* note 265, at 425.

<sup>269</sup> WHITE HOUSE, *supra* note 263.

<sup>270</sup> *Id.*

<sup>271</sup> Wood, *supra* note 263, at 437.

<sup>272</sup> WHITE HOUSE, *supra* note 263.

<sup>273</sup> *Id.*

In 1814, Governor Tompkins would empower Major General Morgan Lewis to convene a court martial—one that ultimately heard the case of Jacob E. Mott. Major General Morgan Lewis was born in New York on October 16, 1754.<sup>274</sup> His father (a successful merchant and a signer of the Declaration of Independence) was frequently away on business and so he was largely raised by his mother.<sup>275</sup> A serious student, Lewis enrolled in Princeton College, where one of his closest companions was none other than James Madison.<sup>276</sup> Upon his graduation from Princeton, Lewis intended to join the clergy.<sup>277</sup> His father urged him to pursue a law degree.<sup>278</sup> As Lewis was preparing to travel to England to study, the Revolutionary War broke out and Lewis volunteered for the service.<sup>279</sup> In 1776, his prodigious military talents were recognized when he was appointed Quarter-Master general of the Northern army.<sup>280</sup> Lewis was elected Governor of New York in 1804.<sup>281</sup> A Republican, he was subsequently defeated by Daniel D. Tompkins in a campaign remarkably devoid of controversy.<sup>282</sup>

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<sup>274</sup> Julia Delafield, *BIOGRAPHIES OF FRANCIS LEWIS AND MORGAN LEWIS* 71 (Anson D. F. Randolph, 1877), [https://archive.org/stream/biographiesoffra01dela/biographiesoffra01dela\\_djvu.txt](https://archive.org/stream/biographiesoffra01dela/biographiesoffra01dela_djvu.txt) (Last Accessed 17:55, November 13, 2016).

<sup>275</sup> *Id.* at 73.

<sup>276</sup> *Id.* at 75.

<sup>277</sup> *Id.* at 78.

<sup>278</sup> *Id.*

<sup>279</sup> *Id.* at 79–80.

<sup>280</sup> *Id.* at 83.

<sup>281</sup> *Id.* at 191.

<sup>282</sup> IRWIN, *supra* note 80, at 55 (The campaign had chiefly concerned “men and offices, principles being of relatively little consequence in the party divisions of the day. There was general acceptance of the Federal Constitution; there was still little organized opposition to Jefferson’s administration; and issues leading to the War of 1812 were only beginning to affect party alignments.” That said, the political divisions of the day were somewhat responsible for Lewis’ defeat. The Republican leadership in New York was split amongst three factions: the Clintonians, the Livingstonians, and the Burrrites. *Id.* at 47. With Tompkins strongly supported by the Clintonians, Lewis’ political opponents’ ability to paint him as a puppet of the Livingstonians contributed to his defeat. *Id.* at 54. Lewis was the victim of one of America’s

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earliest political songs—a three stanza work that associated him with Britain and Federalists. *Id.* at 55.).