



AMERICAN CONSTITUTIONALISM  
 VOLUME I: STRUCTURES OF GOVERNMENT  
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Supplementary Material

Chapter 2: The Early National Era – Separation of Powers

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

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*Article I, section 8 gives Congress the power “to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions.” In the Militia Act of 1795 Congress delegated this power to the President. Over the years, some states took the position that only the states could decide whether or not conditions existed which justified the use of the state militia by the federal government; others suggested that Congress might have to certify these exigencies before militias could be called forth. The question of the scope of the president’s power to call up the militias finally reached the Supreme Court in 1827 in a case arising out of the War of 1812. Martin was a private in the New York state militia but refused to “rendezvous and enter into the service of the United States” after the president called up that militia. Mott was a deputy-marshal of the United States who had collected a fine that had been imposed by Mott after a judgment by a court-martial. Martin sued to recover the fine.*

*In an opinion by Justice Joseph Story, the Court held that the authority to decide whether the “exigency” conditions of Article I, section 8 had been met was vested by the Constitution and statutes exclusively in the President, whose decision was conclusive upon all other persons. Constitutional scholar Clinton Rossiter later commented that the principle arising out of this opinion was this: “When the President decides to use military force to preserve the peace, neither the decision itself nor the methods employed are open to question in the courts of the United States. In such instances, his discretion must control, and the courts cannot intervene and grant relief. Powerless in fact, they have chosen likewise to be powerless in law.”<sup>1</sup> Is this the correct constitutional understanding? If so, is it for reasons of straightforward constitutional interpretation, or because of prudential considerations arising out of the weakness of courts during national emergencies? If the power was given to the Congress, should Congress be able to give it to the President? Does the answer depend on the kind of power being exercised?*

JUSTICE STORY delivered the opinion of the Court.

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For the more clear and exact consideration of the subject, it may be necessary to refer to the constitution of the United States, and some of the provisions of the act of 1795. The constitution declares that Congress shall have power “to provide for calling forth the militia, to execute the laws of the Union, suppress insurrections, and repel invasions:” and also “to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States.” In pursuance of this authority, the act of 1795 has provided, “that whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the President of the United States to call forth such number of the militia of the State or States most convenient to the place of danger, or scene of action, as he may judge necessary to repel such invasion, and to issue his order for that purpose to such officer or officers of the militia as he shall think proper.” And like provisions are made for the other cases stated in the constitution. It has not been denied here, that the act of 1795 is within the constitutional authority of Congress, or that Congress may

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<sup>1</sup> Clinton Rossiter, *The Supreme Court and the Commander in Chief*, expanded ed. (Ithaca, N.Y.: Cornell University Press, 1976), 17.

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not lawfully provide for cases of imminent danger of invasion, as well as for cases where an invasion has actually taken place. In our opinion there is no ground for a doubt on this point, even if it had been relied on, for the power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion, as the necessary and proper means to effectuate the object. One of the best means to repeal invasion is to provide the requisite force for action before the invader himself has reached the soil.

The power thus confided by Congress to the President, is, doubtless, of a very high and delicate nature. A free people are naturally jealous of the exercise of military power; and the power to call the militia into actual service is certainly felt to be one of no ordinary magnitude. But it is not a power which can be executed without a correspondent responsibility. It is, in its terms, a limited power, confined to cases of actual invasion, or of imminent danger of invasion. If it be a limited power, the question arises, by whom is the exigency to be judged of and decided? Is the President the sole and exclusive judge whether the exigency has arisen, or is it to be considered as an open question, upon which every officer to whom the orders of the President are addressed, may decide for himself, and equally open to be contested by every militia-man who shall refuse to obey the orders of the President? We are all of opinion, that the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the act of Congress. The power itself is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union. A prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object. The service is a military service, and the command of a military nature; and in such cases, every delay, and every obstacle to an efficient and immediate compliance, necessarily tend to jeopardize the public interests. While subordinate officers or soldiers are pausing to consider whether they ought to obey, or are scrupulously weighing the evidence of the facts upon which the commander in chief exercises the right to demand their services, the hostile enterprise may be accomplished without the means of resistance. If "the power of regulating the militia, and of commanding its services in times of insurrection and invasion, are (as it has been emphatically said they are) natural incidents to the duties of superintending the common defense, and of watching over the internal peace of the confederacy," [Federalist No. 29] these powers must be so construed as to the modes of their exercise as not to defeat the great end in view. If a superior officer has a right to contest the orders of the President upon his own doubts as to the exigency having arisen, it must be equally the right of every inferior officer and soldier; and any act done by any person in furtherance of such orders would subject him to responsibility in a civil suit, in which his defense must finally rest upon his ability to establish the facts by competent proofs. Such a course would be subversive of all discipline, and expose the best disposed officers to the chances of ruinous litigation. Besides, in many instances, the evidence upon which the President might decide that there is imminent danger of invasion, might be of a nature not constituting strict technical proof, or the disclosure of the evidence might reveal important secrets of state, which the public interest, and even safety, might imperiously demand to be kept in concealment.

If we look at the language of the act of 1795, every conclusion drawn from the nature of the power itself, is strongly fortified. The words are, "whenever the United States shall be invaded, or be in imminent danger of invasion, etc. it shall be lawful for the President, etc. to call forth such number of the militia, etc. as he may judge necessary to repel such invasion." The power itself is confided to the Executive of the Union, to him who is, by the constitution, "the commander in chief of the militia, when called into the actual service of the United States," whose duty it is to "take care that the laws be faithfully executed," and whose responsibility for an honest discharge of his official obligations is secured by the highest sanctions. He is necessarily constituted the judge of the existence of the exigency in the first instance, and is bound to act according to his belief of the facts. If he does so act, and decides to call forth the militia, his orders for this purpose are in strict conformity with the provisions of the law; and it would seem to follow as a necessary consequence, that every act done by a subordinate officer, in obedience to such orders, is equally justifiable. The law contemplates that, under such circumstances, orders shall be given to carry the power into effect; and it cannot therefore be a correct inference that any



other person has a just right to disobey them. The law does not provide for any appeal from the judgment of the President, or for any right in subordinate officers to review his decision, and in effect defeat it. Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts. And, in the present case, we are all of opinion that such is the true construction of the act of 1795. It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the constitution itself. In a free government, the danger must be remote, since in addition to the high qualities which the Executive must be presumed to possess, of public virtue, and honest devotion to the public interests, the frequency of elections, and the watchfulness of the representatives of the nation, carry with them all the checks which can be useful to guard against usurpation or wanton tyranny.

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