
In the Supreme Court of the United States

DONALD J. TRUMP, ET AL.,

Applicants,

v.

STATE OF ILLINOIS AND CITY OF CHICAGO,

Respondents.

*On Application for a Stay of the Order Issued by the
United States District Court for the Northern District of Illinois*

**BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER
AS *AMICUS CURIAE* IN OPPOSITION TO APPLICATION
TO STAY THE ORDER OF THE DISTRICT COURT**

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October 20, 2025

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INTEREST OF *AMICUS CURIAE*¹

Constitutional Accountability Center is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to protect the rights, freedoms, and structural safeguards that our nation's charter guarantees. Accordingly, CAC has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Exercising its exclusive authority to “provide for calling forth the Militia,” U.S. Const. art. I, § 8, cl. 15, Congress passed a statute allowing presidents to call the National Guard into federal service, but only in specific circumstances. *See* 10 U.S.C. § 12406. Interpreting statutes like this “is what courts do,” *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012), and nothing in *Martin v. Mott*, 25 U.S. 19 (1827), is to the contrary. As history confirms, judges are as capable of construing and applying this statute as any other.

1. *Martin v. Mott* held that a private in the militia could not use a common law suit to relitigate his federal court-martial by challenging the validity of the order he disobeyed. It thus resolved only a narrow question: may a servicemember escape punishment for defying a presidential order by suing the officers tasked with

¹ No counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

carrying out that punishment, and requiring them to establish the soundness of the President's order? Answering no, the decision focused entirely on preserving the military chain of command and protecting officers who dutifully carried out orders from "ruinous litigation." 25 U.S. at 31.

Martin therefore settled the question of who decides "in the first instance," *id.*, whether the criteria in statutes like § 12406 are satisfied, holding that officers below the President could not decide for themselves if the conditions for calling up the militia were present. That question was hotly debated during the War of 1812, when Jacob Mott failed to serve. During that conflict, individual states frustrated the war effort by claiming that their own state militia commanders, not the President, were the arbiters of whether an "invasion" had occurred within the meaning of the militia statute. *Martin* was understood as resolving *that* dispute. Indeed, this is how *Martin*'s author, Joseph Story, characterized the decision in his *Commentaries* a few years later.

Read in context, *Martin*'s broad-sounding passages all focus on whether disagreement with presidential assessments could justify defiance by lower-level officers. The holding rested on the breakdown in the chain of command that would follow if "every officer" and "every militia-man" could "refuse to obey the orders of the President" based on their own views about "whether the exigency has arisen." *Id.* at 29-30. *Martin* did not establish any broad rule barring the *judiciary*, in a proper case, from evaluating the legality of presidential orders under laws like the militia statute.

After all, even if a plaintiff cannot use civil liability to challenge official decisions retroactively, as in *Martin*, courts can still grant prospective relief from such decisions. Compare *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982) (no damages liability for a President’s official actions), with *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 583 (1952) (enjoining implementation of presidential action). Whether “monetary and other liabilities should be imposed upon individual officers” raises different questions than whether “equitable remedies” are warranted. *Ziglar v. Abbasi*, 582 U.S. 120, 134, 136 (2017); e.g., *Chappell v. Wallace*, 462 U.S. 296, 300 (1983) (prohibiting damages suits against military officers for violating subordinates’ rights, based on the “need for special regulations in relation to military discipline”).

Given its posture, *Martin* had no need to—and did not—hold that judicial relief of every kind is foreclosed whenever presidents employ conditional laws like the militia statute. And “general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used.” *Cohens v. Virginia*, 19 U.S. 264, 399 (1821). If they “go beyond the case,” they do not “control the judgment in a subsequent suit when the very point is presented for decision.” *Id.*; accord *Carroll v. Carroll’s Lessee*, 57 U.S. 275, 287 (1853) (this Court “has never held itself bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties”).

2. Over the past two centuries, the sparse precedent discussing *Martin* has not transformed that decision into a barrier against judicial review whenever

statutes give conditional authority to presidents. The few opinions that address *Martin* in any depth, such as *Luther v. Borden*, 48 U.S. 1 (1849), are as inapplicable here as *Martin* itself.

3. Courts are fully competent to perform the legal and factual analysis required in cases like this. Recognizing as much, the Founding generation made *prior* judicial review a prerequisite to presidential action under the original militia statute. Adhering to that process, President Washington obtained judicial certification that federal law could not be enforced before he called up the militia to combat the Whiskey Rebellion. Neither he nor anyone else suggested that judges were unqualified to make such determinations. And as the proceedings in this and similar cases demonstrate, orderly judicial review of decisions under § 12406 causes none of the ill effects that motivated *Martin* and *Luther*'s holdings.

* * *

For all these reasons, precedent does not support the President's dangerous claim to immunity from judicial check on his deployment of the National Guard. Nor does it require the excessive deference to executive branch interpretations of § 12406 that would permit deployment whenever there is a merely "colorable" basis for it. *Newsom v. Trump*, 141 F.4th 1032, 1051 (9th Cir. 2025). That overly lenient standard would allow presidents to send armed soldiers into America's neighborhoods based on transparent pretexts, exploiting military force for political theater or partisan reprisal.

Unlike in *Martin*, Plaintiffs here have not disobeyed the President's orders. They do not argue that they can decide in the first instance whether § 12406's

conditions are satisfied. They are not trying to hold anyone civilly liable. They are simply asking the judiciary to “interpret the act of Congress, in order to ascertain the rights of the parties,” *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 385 (2024) (citation omitted), and to “say what the law is,” *id.* (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

ARGUMENT

I. ***Martin v. Mott* Does Not Foreclose Judicial Review of Decisions to Deploy the National Guard or Require Excessive Deference to the Executive Branch.**

A. ***Martin’s* Historical Context**

During the War of 1812, much of the country “was in virtual revolt against the general government.” Frederick Bernays Wiener, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181, 188 (1940). In particular, “the authority of the president . . . over the militia became a subject of doubt and difficulty, and of a collision of opinion between the general government and the governments of some of the states.”¹ James Kent, *Commentaries on American Law* 262 (1840). In defiance of President Madison, “[t]he governors of Massachusetts and Connecticut refused to call out their militia in the federal service.” Marcus Cunliffe, *Soldiers and Civilians: The Martial Spirit in America* 185 (1968); see Kent, *supra*, at 263. New York and Rhode Island would not allow their militias to leave their states to battle the British. Wiener, *supra*, at 189. These actions were “able to paralyze for the time being the military power of their respective States, and defeat the plans of the

General Government.” Emory Upton, *The Military Policy of the United States* 96 (1917).

Massachusetts’s governor even obtained judicial support for his view that state military leaders could decide independently whether an “invasion” had occurred, triggering authority to call up the militia. He asked the Massachusetts supreme court to declare if state militia commanders had “a right to determine whether any of the exigencies aforesaid exist, so as to require them to place the militia . . . in the service of the United States, at the request of the president.” *Opinion of the Justices*, 8 Mass. 548, 549 (1812). The court concluded that state officials could decide, “without reference to the . . . officers of the United States,” whether “the special cases exist, obliging them . . . to render themselves and the militia subject to the command of the president.” *Id.* Addressing Congress, Madison staunchly disagreed. Upton, *supra*, at 97.

“These embarrassing questions . . . remained unsettled by the proper and final decision of the tribunal that is competent to put them to rest, until the case of *Martin v. Mott*.” Kent, *supra*, at 265. As Joseph Story explained, the war provoked disagreement about whether “the governors of the states, to whom orders were addressed by the president to call forth the militia on account of danger of invasion, were entitled to judge for themselves, whether the exigency had arisen; and were not bound by the opinion or orders of the president.” 3 *Commentaries on the Constitution of the United States* 90 (1833). “*This question* was much agitated during the late war with Great Britain,” and “[a]t a very recent period, the question

came before the Supreme Court,” which “determined, that the authority to decide, whether the exigency has arisen, belongs exclusively to the president.” *Id.* (emphasis added).

B. *Martin’s* Procedural Context

Martin’s contours were shaped by the form of action in which it arose. The case addressed whether servicemembers could use common law suits to escape the consequences of federal military dereliction. This Court answered “no” based on the serious harm to military discipline and the national defense that would otherwise follow. *Martin* contains no sweeping announcement that courts may never evaluate the legality of presidential decisions under the militia statute.

Instead, *Martin* addressed who the militia statute empowered, “in the first instance,” 25 U.S. at 31, to decide whether its preconditions were satisfied. That is why the decision was understood to resolve whether the President or state militia leaders had the power to decide if a qualifying “invasion” had occurred. Regardless of whether a President erred in making that decision, it did not follow that officers in the chain of command could disobey the President’s order and later avoid liability by challenging the order’s factual or legal sufficiency in a common law suit.

Amid war with Britain, President Madison requisitioned state militia troops under the precursor to § 12406, which applied “whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation.” Act of Feb. 28, 1795, ch. 36, § 1, 1 Stat. 424. New York’s governor ordered his state militia members into federal service, but Mott (and others) failed to comply. After a federal

court-martial was convened to prosecute those who failed to serve, Mott was convicted and fined. When he did not pay, a federal marshal, Martin, was ordered to seize his property. *Martin*, 25 U.S. at 20-22.

Mott then brought a replevin action against Martin in New York court. Replevin enabled plaintiffs to secure the return of personal property wrongly taken and also to obtain damages. *See* 3 William Blackstone, *Commentaries on the Laws of England* 149-50 (1766). Martin responded that the seizure was justified, filing an avowry recounting its circumstances. Mott, in turn, demurred—challenging the sufficiency of Martin’s allegations on several grounds. This Court structured its opinion around the arguments in Mott’s demurrer. *See* 25 U.S. at 18.

Mott’s main contention was that Martin’s avowry failed to allege that the militia statute’s preconditions were satisfied—that “any of the exigencies had occurred, in which the President is empowered to call out the militia.” *Id.* at 23. He argued it was “necessary [for Martin] to aver the facts which bring the exercise [of the President’s power] within the purview of the statute.” *Id.* at 32.

C. *Martin’s* Holding and Reasoning

Rejecting Mott’s argument, this Court held that Martin need not show that the militia statute’s conditions were satisfied. If the factual basis for the President’s order could be contested in a common law suit, a state-court jury would resolve that fact dispute, “and thus the legality of the orders of the President would depend, not on his own judgment of the facts, but upon the finding of those facts upon the proofs submitted to a jury.” *Id.* at 33.

Significantly, officers who implemented unlawful presidential orders had no immunity from damages in this era. *Little v. Barreme*, 6 U.S. 170, 170-71 (1804); *Tracy v. Swartwout*, 35 U.S. 80, 98-99 (1836); cf. *Dynes v. Hoover*, 61 U.S. 65, 78-84 (1857) (federal marshals who executed court-martial sentences did so under the President's military authority). So if juries could reevaluate presidential assessments and invalidate orders calling up the militia, then "any act done by any person in furtherance of such orders would subject him to responsibility in a civil suit, in which his defence must finally rest upon his ability to establish the facts by competent proofs." *Martin*, 25 U.S. at 30. That is the burden Mott attempted to place on Martin. "Such a course would be subversive of all discipline, and expose the best disposed officers to the chances of ruinous litigation." *Id.* at 30-31.

Underscoring the Court's focus on the chain of command, *Martin* repeatedly endorsed another decision that rested on the same concerns. In *Vanderheyden v. Young*, 11 Johns. 150 (N.Y. 1814), the court rejected a false arrest suit against a court-martial official, brought by a militia member who was imprisoned for desertion. As in *Martin*, the plaintiff objected that the defendant failed to show that the nation was actually in danger of invasion. And as in *Martin*, that showing was held unnecessary. Otherwise, "every subordinate officer, who should be called into service, would be put to the necessity, when he was sued for any act of discipline upon the privates, to prove to a jury that the president had acted correctly in making his requisitions; and if he failed in this proof, it would subject him to damages." *Id.* at 158. The court rejected this "monstrous" result: "No man would

dare to obey the orders, either of the president, or of his superior officer, lest, peradventure, the president had either abused his authority, or misjudged.” *Id.* This “would be subversive of all discipline” and have “fatal” national-security consequences. *Id.* It was not the business of military subordinates “to investigate the facts . . . referred to their superior,” or “to rejudge his determination.” *Id.*

Martin expressly adopted this reasoning. 25 U.S. at 33. It prevented officers who disobeyed orders from suing officers who obeyed orders, because entertaining those suits would undermine military discipline and the national defense. If such suits were allowed, subordinates could defy presidential orders based on their own judgment of the facts—submitting those disputes to juries if later punished for disobedience—and no officers would be safe carrying out such orders, because a presidential misjudgment would expose them to “ruinous litigation.” *Id.* at 31.

That is why, in Mott’s replevin action, the President’s order was “conclusive as to the existence of the exigency, and may be given in evidence as conclusive proof thereof.” *Id.* at 32. This Court did not hold such presidential orders exempt from every form of judicial relief in every context. Nor did it declare that presidential discretion under the statute was absolute. On the contrary, *Martin* observed that the President’s discretion was “confined to cases of actual invasion, or of imminent danger of invasion.” *Id.* at 29.

Martin’s concerns about civil liability disrupting the chain of command were thus central to the entire decision—not simply a reflection of that case’s “particular facts.” Appl. 22. All of *Martin*’s broad-sounding passages, read in context, focus on

these concerns. For example, *Martin*'s statement that presidential decisions were "conclusive upon all other persons" referred not to judges, but to the military hierarchy:

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.

25 U.S. at 29-30 (emphasis added); *accord id.* at 31 (similarly using "any other person" to refer to "a subordinate officer").

Further illustrating its chain-of-command preoccupation, *Martin* reasoned that the power to call up the militia "is to be exercised upon sudden emergencies . . . under circumstances which may be vital to the existence of the Union," where an "unhesitating obedience to orders is indispensable." *Id.* at 30. Every hindrance to "immediate compliance" would "jeopard[ize] the public interests," because "[w]hile subordinate officers or soldiers are pausing to consider whether they ought to obey, or are scrupulously weighing the evidence of the facts . . . the hostile enterprise may be accomplished without the means of resistance." *Id.*

In short, *Martin* addressed only whether these "subordinate officers" in state militias could decide independently if the conditions for calling up the militia were satisfied. It put to rest the "embarrassing questions," Kent, *supra*, at 265, that were "much agitated" during the War of 1812, Story, *supra*, at 90, about whether the lawfulness of calling up the militia was "an open question, which every officer, to

whom the orders of the president are addressed, may decide for himself,” *id.* at 89-90. The *judiciary’s* power, vis-à-vis the President, was simply not discussed.

This is the context in which *Martin* stated that the President’s exercise of “his own opinion of certain facts” made him “the sole and exclusive judge of the existence of those facts.” 25 U.S. at 31-32. Here, Plaintiffs seek a different form of judicial relief in a different procedural context with different implications. *Martin* does not resolve this case.

II. Subsequent Decisions Citing *Martin* Do Not Foreclose Judicial Review.

Martin was not the font of a robust doctrine. In 200 years, it has garnered little more than an assortment of peripheral citations. *E.g.*, *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943) (upholding curfews on Americans of Japanese ancestry). None justifies giving presidents free rein under 10 U.S.C. § 12406.

Like *Martin*, the “very similar” case of *Luther v. Borden*, 48 U.S. 1, 44 (1849), rejected civil liability for officers who followed orders, based on the untenable consequences of reevaluating those orders in common law suits. Specifically, *Luther* held that tort suits could not be used to force the federal courts to decide which of two rival state governments was legitimate. None of the considerations relied upon applies here.

Luther’s backdrop was an unusual armed conflict between two competing legislatures in Rhode Island. *Id.* at 34-35. In a trespass suit against officers who entered his home to arrest him, Luther asked the courts to rule that the government these officers served was illegitimate. This Court cited many reasons

for rejecting that request. Deciding which of two governments was legitimate was a political, not judicial, task. *Id.* at 39. The Rhode Island courts had sided with the legislature the officers served, and federal courts were bound to follow that ruling on state law. *Id.* at 40. No judicial standards existed for resolving the question. *Id.* at 41. And the dispute was ultimately a factual disagreement, which in a common law suit could be resolved differently by different juries, leaving the validity of the rival governments forever “unsettled and open to dispute.” *Id.* at 41-42.

Finally, citing *Martin*, this Court noted that if one of the two legislatures requested federal support under the militia act, “the President must, of necessity, decide which is the government, and which party is unlawfully arrayed against it.” *Id.* at 43. Could a federal court, *Luther* asked, reevaluate that decision “while the parties were actually contending in arms,” “call witnesses before it,” and “inquire which party represented a majority of the people?” *Id.* If so, and if the court ruled against the original government, then all of its laws “were nullities; its taxes wrongfully collected; its salaries and compensation to its officers illegally paid; its public accounts improperly settled; and the judgments and sentences of its courts in civil and criminal cases null and void, and the officers who carried their decisions into operation answerable as trespassers, if not in some cases as criminals.” *Id.* at 38-39. Adjudicating *Luther*’s claim would thus have made the Constitution “a guarantee of anarchy.” *Id.* at 43. Nothing comparable can be claimed here.

Other decisions citing *Martin* have involved statutes that imposed no standards limiting presidential discretion. *E.g.*, *United States v. George S. Bush*

& Co., 310 U.S. 371, 378-79 (1940) (because nothing in the statute required any particular method for tariff calculations, and “[t]he matter was left at large,” courts could not scrutinize “[t]he President’s method of solving the problem”). While standardless grants of discretion provide nothing for a court to enforce, *Dalton v. Specter*, 511 U.S. 462, 476 (1994), a law imposing specific criteria, like § 12406, confers “in its terms, a limited power,” *Martin*, 25 U.S. at 29.

Even further afield is *Sterling v. Constantin*, 287 U.S. 378 (1932), where this Court “assume[d], without deciding, that the law of the state authorize[d] what the Governor ha[d] done,” *id.* at 396. *Sterling* addressed only the Governor’s contention that his decision to restrict production from the plaintiffs’ oil wells did not violate the Fourteenth Amendment—i.e., his claim that “the finding of the Governor of necessity to take property is due process of law.” *Id.* at 393. This Court squarely rebuffed the notion “that the Governor’s order had the quality of a supreme and unchallengeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the federal government.” *Id.* at 397. While the Court cited *Martin* for the proposition that executives are often given military powers “to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union,” *id.* at 399 (quoting *Martin*, 25 U.S. at 30), the Court emphatically clarified: “It does not follow from the fact that the executive has this range of discretion . . . that every sort of action the Governor may take, no matter how unjustified by the exigency . . . is conclusively supported by mere executive fiat,” *id.* at 400.

Whatever else this decision stands for, it does not support unbridled presidential authority to invoke statutory powers even when the conditions Congress has prescribed are absent. “If the court finds that the limits of executive authority have been transgressed,” and that “equitable relief by injunction is essential in order to afford the protection to which the injured party is entitled, it cannot be said that the judicial power is fettered because the injury is attributable to a military order.” *Id.* at 403.

III. History Confirms that Courts Can Evaluate Whether the Conditions for Deploying the National Guard Are Met.

Defendants also argue that courts lack “the competence” to determine whether the conditions for activating the National Guard are satisfied. Appl. 23. The Founding generation disagreed. Congress made *prior* judicial review a prerequisite to presidential action under the original militia statute. Adhering to that process, President Washington obtained judicial certification before mobilizing the militia to combat the Whiskey Rebellion—a truly existential threat to the enforcement of federal law. As that history underscores, courts can interpret terms like “rebellion” and “unable . . . to execute the laws,” 10 U.S.C. § 12406, using the normal tools of statutory construction, and they can examine evidence to assess whether those terms are satisfied. That is what courts do.

Congress passed the first militia statute in 1792, authorizing presidents to federalize the state militias under three conditions: (1) invasion or imminent danger of invasion, (2) insurrection against a state government, or (3) inability to execute federal law. *See* Act of May 2, 1792, ch. 28, §§ 1, 2, 1 Stat. 264, 264. Unlike

§ 12406, however, the original militia statute separated invasion and insurrection (in section one) from an inability to execute the laws (in section two). Before the latter power could be employed, Congress required a Supreme Court Justice or the local district judge to certify to the President that federal law was being “opposed, or the execution thereof obstructed, . . . by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the [federal] marshals.” *Id.* § 2, 1 Stat. at 264; *see also id.* § 9, 1 Stat. at 265 (allowing federal marshals to execute federal law using the same powers possessed by local law enforcement).

Requiring judicial certification was a considered choice, driven by fears of overreaction or abuse if military force could be used to execute federal law. Initially, the legislation placed much greater discretion in the President, empowering him “to call out the Militia, or such part thereof, *as the exigence may, in his opinion, require*, to execute the laws of the Union, suppress insurrections, and repel invasions.” H. Journal, 2d Cong., 1st Sess. 575 (1792) (emphasis added). “Representatives were not troubled over the use of the militia in circumstances so grave as invasion or outright insurrection; but they were deeply concerned over the prospect of troops being used in common civilian situations ‘to execute the laws of the Union.’” David E. Engdahl, *Soldiers, Riots, and Revolution: The Law and History of Military Troops in Civil Disorders*, 57 Iowa L. Rev. 1, 44 (1971).

One representative, for instance, invoked the prospect of federal statutes being “enforced by martial law.” 3 Annals of Cong. 574 (1792) (Rep. Page). Another

declared that this power “could not with safety be intrusted to the President.” *Id.* at 576 (Rep. Giles). Still another acknowledged “the necessity of providing for an energetic execution of the laws,” but stressed “the importance of having the power defined and guarded as much as possible,” to ensure that “the military is never called in but in the last extremity.” *Id.* at 575 (Rep. Murray). Referencing the new and already unpopular whiskey tax, one representative warned that the bill would allow presidents “to call forth the military in case of any opposition to the excise law; so that if an old woman was to strike an excise officer with a broomstick, forsooth the military is to be called out.” *Id.* (Rep. Clark).

In response to these concerns about overreach, Congress amended the bill to require that before presidents could employ the militia to enforce federal law, notification that the laws could not be executed must first “be communicated to the President of the United States by one of the Associate Justices, or the District Judge.” *Id.* at 577, 580; *see* Act of May 2, 1792, § 2, 1 Stat. at 264. Congress thus “assign[ed] to the courts the judgment of whether the necessary contingency had occurred,” Engdahl, *supra*, at 48, preventing presidents from taking *any* responsive action with the militia without first obtaining judicial authorization.

Two years later, President Washington complied with this process when combatting the Whiskey Rebellion—an organized, armed, and sustained resistance to enforcement of the federal excise tax in Pennsylvania. *See* Richard H. Kohn, *The Washington Administration’s Decision to Crush the Whiskey Rebellion*, 59 J. Am. Hist. 567, 569-70 (1972) (recounting how local leaders openly coordinated to

“obstruct the operation of the Law”). Among other incidents in that conflict, hundreds of “armed insurgents . . . besieged the home of the revenue collector, wounding some of the inhabitants,” and “seized the federal marshal, releasing him only on his agreement to renounce any future service of process.” Engdahl, *supra*, at 49 n.237. The rebels “caused both the revenue collector and the marshal to flee,” and “[t]he federal district court in the insurgent district was unable to sit.” *Id.*; see Kohn, *supra*, at 570 (the revenue collector reported that “the law was now unenforceable”).

In response to the calamity, President Washington “turned over to Associate Justice James Wilson the evidence which had been collected showing resistance to the laws.” Bennett M. Rich, *Washington and the Whiskey Insurrection*, 65 Pa. Mag. Hist. & Bio. 334, 340 (1941); see Kohn, *supra*, at 572 n.23 (noting that this evidence included deposition testimony from a military officer). Three days later, Justice Wilson provided the certification required by the statute. See *A Proclamation*, 4 Annals of Cong. 1413 (1794) (relating that Justice Wilson “did, from evidence which had been laid before him, notify to me that ‘in the counties of Washington and Allegany, in Pennsylvania, laws of the United States are opposed, and the execution thereof obstructed by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshal of that district’”). Upon the arrival of the militia in Pennsylvania, resistance to the laws ceased. Rich, *supra*, at 347.

President Washington’s handling of the Whiskey Rebellion confirmed the truth of what Congress recognized when passing the militia statute: even during a national crisis, judges are capable of examining facts and deciding whether the legal conditions for deploying the militia are satisfied.

The original militia statute expired after two years, *see* Act of May 2, 1792, § 10, 1 Stat. at 265, and when Congress enacted a new version in 1795, it omitted the requirement for judicial precertification, *see* Act of Feb. 28, 1795, § 2, 1 Stat. at 424. Although “no reasons for the deletion appear in the legislative history,” Engdahl, *supra*, at 48 n.229, lawmakers may have been reassured by the President’s measured and restrained conduct during the Whiskey Rebellion, which gave “abundant evidence of Washington’s scrupulous regard for the law,” Rich, *supra*, at 350; *see id.* at 351-52 (highlighting President Washington’s “patience over a considerable period of law violation, his attempts at conciliation and peaceful settlement, his efforts to enlist the co-operation of state officials, and his especial concern for the protection of the civil rights of the citizenry”). Congress also may have decided that requiring prior authorization through an unusual warrant-like procedure—paralyzing any responsive action in the meantime—could prove a hindrance when emergencies required especially prompt action.

Whatever the reason, Congress’s new policy choice on this matter did not negate what the original statute helped demonstrate: the capacity of judges to interpret statutes like § 12406 and resolve whether their conditions are satisfied.

Resolving concrete disputes about the legality of presidential action is a key part of what federal courts do. *E.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 535-36 (2004); *Dames & Moore v. Regan*, 453 U.S. 654, 667 (1981); *Youngstown*, 343 U.S. at 588-89; *Marbury*, 5 U.S. at 177. The Founding generation, mindful of the gravity of assigning domestic military power to the President, entrusted judges with making the same determinations required in this case. And as discussed above, *Martin v. Mott* does not prevent judges from making those determinations or require them to give undue deference to the executive branch's interpretation of the statute.

CONCLUSION

For the foregoing reasons, this Court should deny the application.

Respectfully submitted,

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Dated: October 20, 2025

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