

Essay

LUTHER MARTIN, MARYLAND AND THE CONSTITUTION

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Luther Martin of Maryland served as delegate to the Philadelphia Constitutional Convention, Attorney General of Maryland for a third of a century, advocate *par excellence*, and defender of Aaron Burr, Samuel Chase, as well as of the rich, the poor, and slaves. Giants walked the earth in the early days of the Republic, particularly among those who practiced law: Marshall, Jay, Burr, and Hamilton among the founding fathers; Story, Johnson, Wirt, Pinkney, and Key a half-generation later; Taney, Clay, and the "god-like" Webster still later. Luther Martin richly earned his place among these men who helped define America.

All but forgotten today,¹ Martin profoundly influenced early constitutional law. He played an important role in drafting the Constitution and then was a leading figure in the fight against its ratification. He participated in many Supreme Court cases, and two cases he lost, *Fletcher v. Peck*² and *McCulloch v. Maryland*,³ stand today as basic constitutional landmarks. But Martin did not always lose. His defense of Justice Chase helped insure the independence of the federal judiciary against political attack, and his defense of Aaron Burr has proved to be a bulwark against Presidential arrogance and unchecked prosecutorial power. Luther Martin—the great enemy of Jefferson, the "bulldog of federalism"—deserves to be remembered during the bicentennial of the Constitution. This essay tells his story, a tale which also highlights much of our early history as a

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1. Luther Martin well illustrates the fleeting nature of the fame of even the greatest lawyers. For two generations he was "an acknowledged leader of the American bar," and his preeminence in that noble profession was brightened by fine public service. Yet within a few years after his death, he was totally forgotten, and today few except historical students know that such a man ever lived.

3 A. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 186 n.1 (1919).

2. 10 U.S. (6 Cranch) 87 (1810).

3. 17 U.S. (4 Wheat.) 316 (1819).

Nation.⁴

I. THE LAWYER

Martin was born in 1748 in Piscataway, New Jersey,⁵ educated at Princeton, and became a schoolteacher, first in Cecil County, and then on the Eastern Shore. He began reading law in 1770 and was admitted to the Virginia Bar the next year.⁶ He practiced law on the Eastern Shore for several years and was admitted to the Maryland Bar. He also became an active and early revolutionary. Martin became Attorney General of Maryland in 1778 at the age of thirty,⁷ a position he held until 1811 when he became a judge on the Criminal Court.⁸

Martin was the leading lawyer in Maryland and perhaps the greatest lawyer of his day.⁹ He was extraordinarily active¹⁰ and successful,¹¹ representing the state in many matters as well as a plethora of private clients, both great and small.¹² His practice was enormously varied, and, as the Chase and Burr trials illustrated, Martin feared no one in seeking justice for his client.¹³ The richness

4. My interest in Martin stems from a book about him written by two Baltimore lawyers. See P. CLARKSON & R.S. JETT, *LUTHER MARTIN OF MARYLAND* (1970). This is a splendid work, which lovingly portrays Martin and his world. The book has been somewhat neglected, perhaps because the authors were not professional historians. I recommend it enthusiastically; I have drawn on it freely for this essay.

5. His birth date is usually given as 1744, but a persuasive case has been made for 1748. See P. CLARKSON & R.S. JETT, *supra* note 4, at 10-11. There is an autobiographical fragment by Martin which is reprinted in 50 MD. HIST. MAG. 152 (1955).

6. At one term of the criminal court in Williamsburg he won 29 of 30 cases. Gould, *Luther Martin*, in 2 GREAT AMERICAN LAWYERS 7 (W. Lewis ed. 1907).

7. High office at such an early age probably resulted from the reluctance of elders to stake their careers on positions in the new government. P. CLARKSON & R.S. JETT, *supra* note 4, at 41. Samuel Chase, whom Martin defended much later in his career, was partly responsible for the appointment. J. HAW, F. BEIRNE, R. BEIRNE & R. JETT, *STORMY PATRIOT: THE LIFE OF SAMUEL CHASE* 146 (1980) [hereinafter *STORMY PATRIOT*].

8. In 1818 Martin briefly served as Attorney General again.

9. Chief Justice Taney, in his autobiography, wrote: "In the enumeration of the great men of the bar, I have placed Luther Martin first. . . . [H]e was the acknowledged and undisputed head of the profession in Maryland." S. TYLER, *MEMOIR OF ROGER BROOKE TANEY* 5 (1872).

10. He told the Senate during the Chase impeachment that he had prosecuted over 5,000 criminal cases. 2 S. SMITH & T. LLOYD, *THE TRIAL OF SAMUEL CHASE* 160 (1970).

11. The third volume of Harris and McHenry's Reports, covering most of the 1790s, shows Martin participating in 40% of the 129 reported cases with a 56% success rate. P. CLARKSON & R.S. JETT, *supra* note 4, at 170 n.31. This extraordinary record continued for another decade. See *id.* at 194 n.22.

12. He represented a number of slaves, *id.* at 167, as well as an early labor union, the Journeymen Cordwainers Society of Baltimore, *id.* at 277-78.

13. See, e.g., *State v. Stone*, 3 H. & Mch. 115 (1792) (where Martin had three judges held in contempt—and fined!—for refusing to honor a writ of certiorari).

of his practice is hard to comprehend in today's highly specialized world.¹⁴

Martin was a thoroughly human lawyer. His drinking was legendary. Learned and scholarly, he was also vulgar, coarse, and profane. In court he was prolix and tiresome. But he was also brilliant. In an age of strong characters he was unique. Henry Adams described him:

This extraordinary man—"unprincipled and impudent Federalist bulldog," as Jefferson called him—revelled in the pleasure of a fight with Democrats. The bar of Maryland felt a curious mixture of pride and shame in owning that his genius and vices were equally remarkable. Rough and coarse in manner and expression, verbose, often ungrammatical, commonly more or less drunk, passionate, vituperative, gross, he still had a mastery of legal principles and a memory that over-balanced his faults, an audacity and humor that conquered ill-will. In the practice of his profession he had learned to curb his passions until his ample knowledge had time to give utmost weight to his assaults.¹⁵

Carl van Doren's description is similar, though more succinct: "Short, burly, slovenly, rough-voiced, gifted, learned if pedantic, a torrent in speech, a lover of brandy and taverns."¹⁶ Defects he may have had, but, as Taney wrote:

But with all these defects, he was a profound lawyer. He never missed the strong points of his case; and, although much might generally have been better omitted, everybody who listened to him would agree that nothing could be added, but, unfortunately for him, he was not always listened to. He introduced so much extraneous matter, or dwelt so long on unimportant points, that the attention was apt to be fatigued and withdrawn, and the logic and force of his argument lost upon the Court or the jury. But these very defects arose in some measure from the fulness of his legal knowledge. He had an iron memory, and forgot nothing that he had read; and he had read a great deal on every branch of the law, and took pleasure in

14. For an excellent account conveying a flavor of that richness, see P. CLARKSON & R.S. JETT, *supra* note 4, at 153-303.

15. H. ADAMS, *THE HISTORY OF THE UNITED STATES OF AMERICA DURING THE ADMINISTRATIONS OF THOMAS JEFFERSON* 458 (1986).

16. C. VAN DOREN, *THE GREAT REHEARSAL* 88 (1948).

showing it when his case did not require it.¹⁷

Martin, in short, was a lawyer's lawyer; a man to whom the law, rather than political theory or politics, provided the guiding intellectual force.

II. THE DELEGATE

A. Background

The Articles of Confederation, adopted in 1777 and ratified in 1781, proved to be an unsatisfactory method of running a country.¹⁸ A weak central government and trade barriers between the states were crippling defects. A successful compact between Maryland and Virginia led Virginia to suggest a convention in Annapolis in late 1786 to discuss interstate economic problems. Although only five states sent representatives to Annapolis, that gathering produced a resolution that another convention should meet to consider revising the form of government. Congress, in February, resolved that the Convention should have "the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall . . . render the federal constitution adequate to the exigencies of Government & the preservation of the Union."¹⁹

Although the first delegates convened on May 14, 1787, as planned, it was not until May 25 that a quorum gathered and the proceedings began. The Convention had been in session for two weeks when Martin arrived on June 9. Martin was a second choice for the Maryland delegation.²⁰ During the preceding winter, the legislature had nominated Charles Carroll, R.H. Harrison, Thomas Stone, James McHenry, and Thomas Lee, among others, as delegates. A crisis over paper money raged in Maryland at the time, however, and several of the nominees believed it was their duty to remain in the state to quell the crisis.²¹ The next spring Martin, James McHenry, Daniel Carrol, John Mercer, and Daniel of St. Thomas Jenifer were appointed as delegates.²²

17. S. TYLER, *supra* note 9, at 66-67.

18. Recent scholarship has thought more highly of life under the Articles of Confederation. See, e.g., M. JENSEN, *ARTICLES OF CONFEDERATION* (1940).

19. C. VAN DOREN, *supra* note 16, at 264, (reprinting Resolution of Congress, Feb. 21, 1787).

20. See P. CLARKSON & R.S. JETT, *supra* note 4, at 69-71.

21. *Id.*

22. *Id.*

B. *Luther Martin at the Convention*

At this time Martin was little known outside of Maryland and was an unlikely candidate to play a leading role at the Convention. Martin, ever the practicing lawyer, was not a builder. Rather, his strength lay in critical analysis; hence, he "belonged preeminently to the class of excellent critics."²³ One historian described him at the Convention: "Not a man of striking appearance, Martin was of 'medium height, broad-shouldered, near-sighted, absent-minded, shabbily attired, harsh of voice' and with a 'face crimsoned by the brandy he continually imbibed.' Yet when he began to speak his appearance was forgotten by his appealing and fluid eloquence."²⁴ Indeed, Martin played a significant role at the Convention, especially in his efforts to preserve the role of the smaller states. His fight for equal representation, his stand against slavery, and his sponsorship of the supremacy clause place him in the second rank of those who met that summer at Philadelphia.

1. *The Congress.*—The first and most critical impasse at the Convention involved whether state representation in Congress would be equal or proportional. In early June, Edmund Randolph presented the Virginia plan of government to the Convention.²⁵ That plan provided for a national legislature of two bodies. The legislature was to wield broad powers over matters in which the states had proven incompetent. The states were to be represented either according to the number of free inhabitants or according to their wealth; in other words, proportional representation. The plan included a national executive and judiciary.²⁶ Discussion of the plan was postponed, but the timing of its introduction was a strategic victory for its proponents. By striking first, they forced their opponents to assume the defensive.²⁷

Martin took his seat at the Convention during the deliberations over the Virginia plan.²⁸ He sat in uncharacteristic silence for the first ten days of his attendance, studying the Virginia resolution and interviewing delegates who had been present for the deliberations

23. Gould, *supra* note 6, at 11.

24. 3 A. BEVERIDGE, *supra* note 1, at 186.

25. C. VAN DOREN, *supra* note 16, at 30-32. That plan was drafted in mid-May while the Virginia delegation, which arrived on time, waited for a quorum to gather.

26. *See id.* at 265-67 (reprinting *The Virginia Plan as Offered by Randolph* (May 29, 1787)).

27. *Id.* at 30-32.

28. P. CLARKSON & R.S. JETT, *supra* note 4, at 83.

he had missed.²⁹ Finally, always the scholar, he turned to history for guidance on this grave matter:

I procured everything the most valuable I could find in Philadelphia on the subject of governments in general, and on the American revolution and governments in particular. I devoted my whole time and attention to the business in which we were engaged, and made use of all the opportunities I had, and abilities I possessed, conscientiously to decide what part I ought to adopt in the discharge of that sacred duty I owed my country, in the exercise of the trust you [the people of Maryland] had reposed in me.³⁰

Martin decided to oppose the Virginia plan. His reasoning is evident in his later description of the Convention as

a violent struggle on the one side to obtain *all power and dominion* in their own hands, and on the other to prevent it; and that the *aggrandizement* of particular States and particular individuals, appears to have been much more the object sought after, than the welfare of our country.³¹

Delegates from the other small states joined Martin in bitterly attacking Virginia's proposal for proportional representation. William Paterson of New Jersey argued: "A confederacy supposes sovereignty in the members composing it [and] sovereignty supposes equality."³²

Nevertheless, what was essentially a coalition of big states agreed to the Virginia resolution with minimal modification. At this time, the small states became increasingly alarmed by the direction and shape the new national government was taking and its potential effect upon their position in the union. Martin later described with disdain the approved Virginia plan as "[t]his system of slavery, which bound hand and foot ten States in the Union, and placed

29. I attended the Convention many days without taking any share in the debates, listening in silence to the eloquence of others, and offering no other proof that I possessed the powers of speech, than giving my yea or nay when a question was taken, and notwithstanding my propensity to "endless garrulity," should have been extremely happy if I could have continued that line of conduct, without making a sacrifice of your rights and political happiness.

3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 283 (M. Farrand ed. 1966) [hereinafter 3 FARRAND] (reprinting *Luther Martin's Reply to the Landholder*, MD. J., Mar. 14, 1788). The *Landholder* series is described at *infra* p. (24).

30. *Id.*

31. *Id.* at 230.

32. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 178 (M. Farrand ed. 1966) [hereinafter 1 FARRAND].

them at the mercy of the other three, and under the most abject and servile subjection to them."³³ Accordingly, on June 14, Paterson moved that the Convention adjourn so the small state bloc could develop and present an alternative plan of government.

The delegations of Connecticut, New York, New Jersey, and Delaware, joined by Martin, drafted that alternative, known as the New Jersey plan. Martin described it as a plan of government "purely federal, and contra-distinguished from the reported [Virginia] plan."³⁴ The New Jersey plan concentrated on strengthening the existing confederate system through revision rather than replacing it with a new system. This approach was consistent with the powers granted the Convention by the congressional resolution and the powers given to the delegates by the enabling resolutions of their states.³⁵

The organization, cohesion, and zeal of the small state coalition apparently alarmed Madison and other key members of the nationalist bloc. " 'The eagourness,' he wrote, 'displayed by the Members opposed to a Natl. Govt. . . . began now to produce serious anxiety for the result of the convention.—Mr. Dickenson [sic] said to Mr. Madison you see the consequences of pushing things too far.' "³⁶

The New Jersey plan was not well timed. Scholars have observed that had the group's resolutions been presented earlier, they probably would have been entertained with more detailed discussion and debate.³⁷ Eventually, the Convention wearied of debate, discarded the New Jersey resolution, and voted seven to three to accept the Virginia plan as the basis for its deliberations. The Maryland delegation split—Jenifer voting aye and Martin no.³⁸

The whole Convention then took up the Virginia resolution. Luther Martin addressed the Convention for the first time at length, delivering a defense of equal representation. Martin celebrated the independence of the individual states:

When the States threw off their allegiance to Great Britain, they became independent of her and each other. They united and confederated for mutual defence, and this was

33. 3 FARRAND, *supra* note 29, at 178.

34. P. CLARKSON & R.S. JETT, *supra* note 4, at 90.

35. The instructions to most of the delegates from their states limited them to *revising* the Articles of Confederation. C. VAN DOREN, *supra* note 16, at 73.

36. P. CLARKSON & R.S. JETT, *supra* note 4, at 91.

37. *See id.* at 93.

38. *Id.* McHenry, the other Maryland delegate in attendance, was away from the Convention due to family illness.

done on principles of equality and perfect reciprocity— They now meet again on the same ground. But when a dissolution take place, our original rights and sovereignties are resumed.³⁹

A short time later, Martin held the Convention captive with a two-day soliloquy in defense of equal representation, replete with quotations from political philosophers and historical allusions.⁴⁰ One historian described this siege by oratory as “driving many members, supporters and opponents alike, to despair. The weather was warm, his audience was rude and inattentive, his speech was excessively voluble; but the logic of his arguments seemed unanswerable. . . .”⁴¹ Despite historical characterizations of Martin’s harangue as “boring,” “inopportune,” and “fatiguing,”⁴² both groups at the Convention acknowledged the critical weight and effectiveness of Martin’s effort. The nationalists had no choice but to offer their best orators in response.⁴³

Deliberations became even more intense, and it was clear that the Convention was at a critical point. Martin later wrote that the fractious Convention was “on the verge of dissolution, scarce held together by the strength of an hair.”⁴⁴ Fortunately, a committee was appointed to work out a compromise on the question of representation.⁴⁵ Martin was a member of that committee.

The large states offered a concession: if the small states acceded to the demands of the large states on the first legislative body, the latter would agree to the small states’ demands on the second. Although the smaller states at first rejected this offer, the fray gradually subsided, and the Convention adopted the so-called Connecticut compromise. It provided for a lower branch, consisting of one member for every forty thousand inhabitants, from which all appropriations should originate, and for an upper body in which each state would have an equal voice.⁴⁶

The idea of a strong national government finally achieved ac-

39. 1 FARRAND, *supra* note 32, at 329.

40. Obrecht, *The Influence of Luther Martin in the Making of the Constitution of the United States*, 27 MD. HIST. MAG. 173, 187 (1932).

41. *Id.*

42. See P. CLARKSON & R.S. JETT, *supra* note 4, at 101-02 n.114. But see J. BECK, *THE CONSTITUTION OF THE UNITED STATES* 90 (1924) (“The world lost a great oration [Martin’s] for Madison gives only a fragment of it.”).

43. P. CLARKSON & R.S. JETT, *supra* note 4, at 103.

44. 3 FARRAND, *supra* note 29, at 190.

45. P. CLARKSON & R.S. JETT, *supra* note 4, at 107.

46. See C. VAN DOREN, *supra* note 16, at 110-28.

ceptance among the delegates. Having resolved the problem of representation, many of Martin's allies among the small state delegations were willing to support the nationalist program. Martin, however, continued the fight. Appreciating the futility of securing a truly federal system, during the remainder of the Convention he devoted himself to mitigating the growing power of the national government.

2. *The Supremacy Clause.*—After resolving the representation problem, the Convention considered what powers should be given to the new national government. Madison proposed that the Congress should have power to “negative all laws passed by the several States.”⁴⁷ Martin objected, pointing to the impracticality of having “all the laws of the States be sent up to the Genl. Legislature before they shall be permitted to operate.”⁴⁸ Madison's proposal was ultimately—and, fortunately for his reputation—rejected.

Martin moved for the adoption of what now is known as the supremacy clause. That he could propose what is perhaps the most important clause in the Constitution shows the profound effect of the Connecticut compromise on the small states.⁴⁹ This clause was a component of the New Jersey plan rejected by the Convention earlier in the summer. In a revised form, it became the second paragraph of article VI of the Constitution. The clause as proposed by Martin was significantly altered before adoption. Martin described why he introduced the clause in its original form and why he distrusted the ratified form:

When this clause was introduced, it was not established that inferior continental courts should be appointed for trial of all questions arising on treaties and on the laws of the general government, and it was my wish and hope that every question of that kind would have been determined in the first instance in the courts of the respective states. . . . It was afterwards altered and amended. . . . [F]or being so altered as to render the treaties and laws made under the federal government superior to our constitution, if the system is adopted it will amount to a total and unconditional surrender to that government . . . of every right and privilege secured to them by our constitution. . . .⁵⁰

47. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 27 (M. Farrand ed. 1966) [hereinafter 2 FARRAND].

48. *Id.*

49. See C. VAN DOREN, *supra* note 16, at 133-34.

50. 3 FARRAND, *supra* note 29, at 287.

Clarkson and Jett explained why Martin believed the final form of the supremacy clause endangered freedom:

[W]ith no federal bill of rights incorporated in the constitution as submitted to the states, and the states' constitutional bills of rights inapplicable and subordinate to federal legislation, the citizens would be at the complete mercy of the whims and the excesses of the new congress. . . . It is somewhat startling to find, among all the great statesmen of the period, so few men other than Martin (and none more vehemently than he) expressing solicitude concerning such an important matter.⁵¹

Even Martin's detractors considered his arguments regarding the supremacy clause "among the greater positive virtues [he] exhibited in the Convention."⁵²

3. *The Judiciary*.—In leading the fight for an independent judiciary, Martin made his most often quoted comment at the Convention. Wilson proposed, and Madison seconded, that the power to veto legislation should be held by the judiciary "associated with the Executive."⁵³ This was another of Madison's ill-judged schemes. Martin successfully opposed the "association of the Judges with the Executive as a dangerous innovation. . . . And as to the Constitutionality of laws, that point will come before the Judges in their proper official character. In this character they have a negative on the laws."⁵⁴ Martin's comments on judicial review—especially his ready assumption that it would be used—was remarkable given the history of judicial deference to Parliament and the absence of any tradition of judicial review in the states up to that time.⁵⁵

The Convention had already adopted a federal Supreme Court. Martin opposed a proposal that the "Natl. [Legislature] be empowered to appoint inferior tribunals," on the ground that federal

51. P. CLARKSON & R.S. JETT, *supra* note 4, at 115-16.

52. 3 FARRAND, *supra* note 29, at 273 (reprinting Ellsworth, *The Landholder*, Md. J., Feb. 29, 1788).

53. 2 FARRAND, *supra* note 47, at 73.

54. *Id.* at 76.

55. See generally Strong, *Bicentennial Benchmark: Two Centuries of Evolution of Constitutional Processes*, 55 N.C.L. REV. 1, 17-28 (1976); Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 365 (1928). Martin later was to play an important role in developing the theory of judicial review. See P. CLARKSON & R.S. JETT, *supra* note 4, at 198-200 (discussing Martin's role in *Whittington v. Polk*, 1 H. & J. 236 (1802), an important precursor to the decision the next year in *Marbury v. Madison*).

courts "will create jealousies & oppositions in the State tribunals."⁵⁶ Fortunately, Martin lost this battle.⁵⁷

4. *The Executive*.—The Convention reached an uncharacteristically quick and unanimous decision that the "national executive" should be a single person, but then engaged in protracted debate over the technicalities of the office: questions of election, eligibility for re-election, and length of term of office.⁵⁸ Martin believed that the President should be ineligible for re-election. Although his argument did not prevail, his biographers have noted that "[t]he Twenty Third Amendment . . . essentially incorporates the limitations on the president's term of office proposed by Martin."⁵⁹

5. *Slavery*.—Slavery presented one of the thorniest issues at the Convention. Martin opened the debate by moving to give Congress the power to tax or even prohibit the importation of slaves. He did this to impede the growth of slave states and thus their representation in Congress, to protect those states from the danger of insurrection, and because "it was inconsistent with the principles of the revolution and dishonorable to the American character to have such a feature in the Constitution."⁶⁰ Heated debate followed, but the deep South remained adamantly opposed to Martin's proposals.

The matter was referred to a committee, on which Martin served. The ensuing compromises resulted in an extension of the period in which slaves could be imported, authority to impose an import tax on slaves, the passage of a capitation tax provision, and the dropping of the two-thirds vote requirement for the enactment of navigation acts.⁶¹ "As a result of these compromises in favor of economic interests, as well as the general drift toward what he considered an over-powerful central government at the expense of the states, Martin resolved to fight the adoption of the constitution by Maryland."⁶²

56. 2 FARRAND, *supra* note 47, at 45-46. Martin also suggested that federal judges be appointed by the House of Representatives. *Id.* at 41.

57. The dispute was eventually resolved by empowering future Congresses to establish "such inferior tribunals as they should deem necessary." C. WARREN, *supra* note 26, at 326-27.

58. P. CLARKSON & R.S. JETT, *supra* note 4, at 119.

59. *Id.* at 121 n.6.

60. 2 FARRAND, *supra* note 47, at 364.

61. C. VAN DOREN, *supra* note 16, at 155-56.

62. P. CLARKSON & R.S. JETT, *supra* note 4, at 128. During the ratification campaign Martin also attacked the constitutional provision which protected the slave trade until at least 1808. *Id.* at 127-28.

C. A Partial Summing Up

This essay does not attempt to describe everything Martin did at Philadelphia. He served on several committees, and he was active in debate on a number of issues, making a number of cogent and farsighted comments. His lawyer's instincts were readily apparent, as seen by his opposition to giving Congress the power to suspend the writ of habeas corpus.⁶³

Martin's role in the Philadelphia Convention is hard to fix at two centuries' distance. One critic wrote that he "was a gadfly. He came late, opposed everything that had already been agreed to, and . . . talked too much."⁶⁴ Gadfly he may have been, but his attendance certainly seems to have been above average,⁶⁵ and his biographers have done a good job of destroying the myth of his "eternal volubility."⁶⁶

But Martin was more than a gadfly. Unfortunately, history has generally overlooked his performance; perhaps because the resolutions adopted eclipsed the political position he represented. History rarely is kind to the losing side. Martin should be given credit for helping to secure proper representation for the smaller states at the Convention. Martin wrote of his defense of the small states' position against the large states: "I gave it every possible opposition, in every stage of its progression . . . while there, I endeavored to act as became a free man, and the delegate of a free state."⁶⁷ One commentator noted that it was probably Martin's "pungent criticism of this phase of the Virginia Plan that was responsible for the adoption of the Connecticut Compromise."⁶⁸ And, of course, without that compromise, it is very unlikely that there would have been a Constitution.

The supremacy clause was partially his work (and would come back a generation later to haunt him in the Bank Case).⁶⁹ His views on judicial power and the re-election of Presidents were prophetic. He pricked the conscience of the delegates on slavery. He was not a

63. See 2 FARRAND, *supra* note 47, at 438.

64. See MORRIS, Book Review, 15 AM. J. LAW & HIST. 150, 151 (1971).

65. See P. CLARKSON & R.S. JETT, *supra* note 4, at 306.

66. See *id.* at 305-07. Compare the comment of William Pierce of Georgia that Martin was "so extremely prolix that he never speaks without tiring the patience of all who hear him." 3 FARRAND, *supra* note 29, at 93.

67. 3 FARRAND, *supra* note 29, at 231. See also C. VAN DOREN, *supra* note 16, at 157 ("Martin was like a contentious lawyer, holding a brief for the rights of states as states.").

68. Gould, *supra* note 6, at 8.

69. See *infra* notes 166-78 and accompanying text.

key player like Madison, Gouverneur Morris, or Sherman, but his imprint is definitely on the document.⁷⁰ Certainly, Carl van Doren was right in saying that Martin "was at once a conspicuous figure in the Convention and outside of it."⁷¹

D. Ratification

The close of the Convention found Martin opposed to the new system of government and determined to fight its ratification.⁷² Martin was not alone in his feelings of disillusionment and disappointment, which cut deeply across party lines—perhaps the natural outcome of a Convention where so much compromise had taken place.⁷³ The delegates nevertheless carried the document and its debates from the State House in Philadelphia to Congress and from there to their respective states.⁷⁴

Maryland began its consideration of the Constitution in November of 1787 when Carroll, Jenifer, McHenry, and Martin appeared before the legislature to give their impressions of the proposed government. The nature of Martin's address to the Assembly befitted the most outspoken member of the Maryland delegation. His remarks were lengthy and heavy with the philosophy, controversy, and political drama of the summer in Philadelphia.⁷⁵ The speech eventually was published in newspapers and in pamphlet form under the title *Genuine Information*. Because the Convention's proceedings were secret, this speech provides "a great deal of information, some of it highly colored about the inside workings of the Convention

70. He even drafted a bill of rights and discussed it with several other delegates, but they agreed that the Convention was not in a mood to consider it. 3 FARRAND, *supra* note 29, at 296.

71. C. VAN DOREN, *supra* note 16, at 88.

72. Carroll later moved, and Martin seconded, that ratification must be unanimous. 2 FARRAND, *supra* note 47, at 477. This classic lawyers' move surely would have defeated the proposed government had it passed.

73. Only 39 delegates signed the final document. Delegate Randolph "expressed the pain he felt at differing from the body of the convention, on the close of the great and awful subject of their labors," and moved to consider changes and improvements to the new Constitution at a second convention. The weary delegates, however, rejected the proposal. 2 FARRAND, *supra* note 47, at 631-33.

74. Although ratification sparked quite a ruckus in the press, the populace remained curiously aloof. One historian estimated that "only about three or three and a half percent of the free populated voted [in the ratification elections], and perhaps on an average not more than one-third of those eligible to vote." D. MATTESON, *THE ORGANIZATION OF THE GOVERNMENT UNDER THE CONSTITUTION* 198 (1943).

75. Martin's address to the legislature was "an account not only of the accomplishment of the convention but of the conflicting philosophies, motives, and arguments on most of the matters considered there." P. CLARKSON & R.S. JETT, *supra* note 4, at 137.

which is to be found nowhere else."⁷⁶

Luther Martin was one of the leading Anti-Federalists. He was a voluminous contributor to newspapers, writing widely read attacks against all aspects of the proposed system of government.⁷⁷ The most ardent and informative collection of these writings arose from his controversy with Oliver Ellsworth, "The Landholder." Ellsworth anonymously published an extended series of letters in the *Connecticut Courant* in which he addressed, from a strong Federalist point of view, various aspects of the new Constitution.⁷⁸ Martin responded in kind and the two "carried on a long-range debate that the whole country read."⁷⁹ Martin eventually ended the war by declaring himself "at a loss which most to admire—the depravity of this individual writer's heart, or the weakness of his head."⁸⁰

The Maryland General Assembly called a convention to ratify the Constitution. When it met in April of 1788, six states had ratified, but the Federalists worried that Maryland, Virginia, and South Carolina might refuse to ratify.⁸¹ They need not have been concerned. The Maryland convention was so strongly Federalist that it did not recommend any amendments (*e.g.*, a bill of rights) be made—the only state ratifying after Massachusetts that failed to make such a proposal.⁸² Martin played a limited role at the state convention because he had a severe case of laryngitis.⁸³

Martin opposed the Constitution primarily because he believed its centralizing tendency would destroy the liberty of the individual and the sovereignty of the states. He distrusted congressional power to tax as well as "that engine of arbitrary power," the standing army.⁸⁴ He argued passionately that the Constitution was fatally

76. C. VAN DOREN, *supra* note 16, at 191. A comparison of Madison's notes and *Genuine Information* shows how remarkable was Martin's memory.

77. His letters, for example, were among "the principal Anti-federalist writings from without the State which were circulated in Massachusetts." S. HARDING, *THE CONTEST OVER THE RATIFICATION OF THE FEDERAL CONSTITUTION IN MASSACHUSETTS* 18 n.8 (1896).

78. P. CLARKSON & R.S. JETT, *supra* note 4, at 139.

79. C. VAN DOREN, *supra* note 16, at 190.

80. P. CLARKSON & R.S. JETT, *supra* note 4, at 140. Martin's position was strongly supported by Eldridge Gerry. See 3 FARRAND, *supra* note 29, at 298-300.

81. *THE ANTI-FEDERALIST* 255 (H. Storing ed. & M. Dry abr. 1985).

82. *Id.* at 256. The recommendations of these states eventually led to the adoption of the Bill of Rights.

83. P. CLARKSON & R.S. JETT, *supra* note 4, at 145.

84. He also did not like congressional power "to march the whole militia of Maryland to the remotest part of the Union and keep them in service as long as they think proper." This point might find some sympathy with those present-day governors who have tried to keep their National Guardsmen from serving in Central America. During the Convention, Martin had tried to write into the Constitution an express limit on the

flawed because it tolerated slavery: "[S]lavery is inconsistent with the genius of republicanism, and has a tendency to destroy those principles on which, if it is supported, as it lessens the sense of the equal rights of mankind, and habituates us to tyranny and oppression."⁸⁵ He worried over lawyers' concerns also: the exclusive jurisdiction of the Supreme Court, the lack of juries, and the absence of a provision for local trials.⁸⁶ Martin's conclusion that the Philadelphia Convention was part of a plot by aristocrats who sought to establish a monarchy reinforced his views.⁸⁷

Strange as those views appear to us who appreciate two centuries of prosperity and liberty under the Constitution, that outcome was not so apparent in 1787. Fear of monarchy was a constant concern during the early days of the Republic. The submergence of state sovereignty into an all-powerful central government has, of course, long been fact. That the Constitution and the body politic could maintain a regime of liberty testifies to the suppleness of that document and to the wisdom of those who administer it. Nevertheless, liberty at times has been a very closely contested matter. At least one of Martin's warnings—about how acceptance of slavery would pollute the document—proved all too unfortunately true; a civil war was necessary to cleanse the Nation.⁸⁸

III. STATE TRIALS

The election of Thomas Jefferson and other Republicans in 1800 was followed by the victors' attempt to stifle the independence of the judiciary and, indeed, dissent generally. Luther Martin played a prominent role in the two great state trials of Jefferson's

size of the peacetime army. 2 FARRAND, *supra* note 47, at 330. Martin's concerns over the militia were echoed in the ratifying conventions. See D. MATTESON, *supra* note 74, at 296.

85. 2 THE COMPLETE ANTI-FEDERALIST 62 (H. Storing ed. 1981).

86. 3 FARRAND, *supra* note 29, at 222.

87. These views were reflective of the Anti-Federalists in general. These men (including some very influential leaders such as George Mason, Patrick Henry, and Elbridge Gerry) believed generally in a decentralized society where government was close to the people, and public life was virtuous. Ketcham, *Introduction to THE ANTI-FEDERALIST PAPERS* 16-20 (R. Ketcham ed. 1986). Although history tends to disdain them, the Anti-Federalists were not a collection of oddballs. They had sincere concerns over the new form of government, a form which was to be put squarely to the test during the Presidencies of Adams, Jefferson, and Madison.

88. See generally R. COVER, *JUSTICE ACCUSED* (1975); Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513 (1974). Justice Marshall has recently reminded us of the flawed nature of the original Constitution. See Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1 (1987).

Presidency: the impeachment trial of Justice Samuel Chase in 1803 and the trial of Aaron Burr for treason in 1807. Because Jefferson failed in both instances, the independence of the judiciary was largely secured; Martin's pivotal role made his defense of Chase and Burr his greatest service to his country.

A. *The Chase Impeachment*

Samuel Chase had been in Maryland politics since his election to the General Assembly in 1764 at the age of 23. In 1786 he became chief judge of the General Court of Maryland. In 1795, at the recommendation of James McHenry, President Washington nominated him to the Supreme Court—an appointment unanimously approved by the Senate.⁸⁹

Samuel Chase was a very able jurist.⁹⁰ Edwin Corwin described Chase's record on the Court "as the most notable of any [Justice] previous to Marshall."⁹¹ But Chase lacked certain personal amenities: "[a] man of violent opinions, overbearing manners, and fierce temper, he made enemies rapidly and easily, and he was always a center of controversy."⁹² Abusive to counsel and witnesses, Chase was viewed as a highly partisan judge.

Chase was at the center of the firestorm that was the Alien and Sedition Act;⁹³ his conduct in several trials brought under that Act created great hostility. Later, in 1804, Chase charged a grand jury in Baltimore in a highly political manner that deeply offended the Republicans. This last offense was particularly unfortunate because it came only two weeks after the House had moved to impeach Judge John Pickering of the District of New Hampshire.

Pickering, insane and alcoholic, was the first target in the Republican attack on the independence of the federal judiciary. The goal of that impeachment was to broaden the constitutional requirement that impeachment could lie only in cases of "Treason, bribery,

89. G. HASKINS & H. JOHNSON, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES; FOUNDATIONS OF POWER: JOHN MARSHALL 1801-15*, at 91-93 (1981).

90. Chase was also a notable legal educator. Among those who read law in his office were William Pinckney, Hugh Brackenridge (later a justice of the Pennsylvania Supreme Court), and Kensey Johns (later chief justice of Delaware's highest court). Chase believed legal education should extend well beyond the law into history, philosophy, and other liberal arts. His curriculum took five years to complete. See *STORMY PATRIOT*, *supra* note 7, at 120-21.

91. Corwin, *Samuel Chase*, in 4 *DICTIONARY OF AMERICAN BIOGRAPHY* 36 (1920).

92. G. HASKINS & H. JOHNSON, *supra* note 89, at 91.

93. For a discussion of the Alien and Sedition Act, see *id.* at 51 n.2.

or other high Crimes and Misdemeanors."⁹⁴ Pathetic Judge Pickering clearly had to be dealt with one way or another; once that was done by impeachment, however, the constitutional definition of an impeachable offense broadened beyond that of an indictable offense.⁹⁵ The path lay open to attack judges on political grounds.

The Federalists deeply feared this deliberate policy by the Republicans.⁹⁶ John Marshall—the author of *Marbury v. Madison*⁹⁷—went so far as to suggest in a letter to Chase that judicial decisions should be subject to *legislative* review.⁹⁸

The House presented articles of impeachment in 1804, and trial began in the Senate early in 1805. Chase was charged with legal mistakes and improper conduct during two trials in 1800 under the Alien and Sedition Act, an unsuccessful attempt to secure an indictment under that Act, and making a politicized charge to the Baltimore grand jury. Charles Warren wrote of those charges:

The acts for which he was now to be impeached certainly did not arise out of corrupt or improper motives; neither were they intentionally arbitrary or illegal; nor were they "prompted by a spirit of persecution and injustice" as charged; but they were undoubtedly such acts as a calm and scrupulous Judge would not have committed. . . . Of all of these, the last only would, in calmer days, have been deemed a ground for impeachment.⁹⁹

Trial began in the Senate on February 9 with Vice-President Burr presiding.¹⁰⁰ John Randolph led the House managers, a poor choice in the opinion of all who have written on the topic. An all-

94. U.S. CONST. art. II, § 2. One wonders why Jefferson did not try to "pack" the Court, as President Roosevelt tried to do a century later.

95. There is considerable historical support for this proposition, one which was adopted by Congress in 1913 in the impeachment of Judge Robert Archbold. See J. ELSMERE, *JUSTICE SAMUEL CHASE* 305 (1980).

96. G. HASKINS & H. JOHNSON, *supra* note 89, at 229. Although there is no record that Jefferson himself sought to destroy the Federalist courts, that certainly was the goal of many in his party who were less circumspect, and Jefferson did nothing to stay their hand. Jefferson, who preferred to act through others, was instrumental in starting the impeachment proceedings. As Samuel Eliot Morrison wrote, Jefferson "incited some of his henchmen in the House." S. MORRISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* 363 (1965).

97. 5 U.S. (1 Cranch) 137 (1803).

98. 3 A. BEVERIDGE, *supra* note 1, at 177.

99. C. WARREN, *supra* note 26, at 281-82.

100. The presiding officer, Vice-President Burr, had arranged the Senate Chamber so that it "was a mimic reproduction of the splendid scene in Westminster Hall" during the impeachment of Warren Hastings. H. ADAMS, *supra* note 15, at 454-55. Burr drew high marks for his conduct at the trial. See J. ELSMERE, *supra* note 94, at 269-70.

star cast led by Martin represented Chase. Martin, whose help Chase had sought early, was "the dominating figure of this historic contest."¹⁰¹ Henry Adams called the contest "unequal . . . for the intellectual power of the House was quite unable on the field of law to cope with the . . . champions who stood at the bar . . . Luther Martin alone could easily deal with the whole box of managers. . . ."¹⁰²

The trial began with the presentation of factual evidence. A review of the testimony reveals the truth of Warren's characterization of the articles of impeachment. Chase may not have conducted himself in a Solomonic manner, but he had done nothing indictable or even very wrong. Chase's lawyers carefully demonstrated the lack of a factual basis for impeachment.¹⁰³

The managers for the House then proceeded to argue the law. They seem not to have performed this task well because "representatives and visitors for the first time fled the hearing in droves."¹⁰⁴ Then came the turn of the defense. Martin followed four of his colleagues who had themselves spoken eloquently. All agree that Martin's speech not only was pivotal in the trial, but was also one of the great moments in American legal history. "When . . . Luther Martin rose, the Senate Chamber could not contain even a small part of the throng that sought the Capitol to hear the celebrated lawyer."¹⁰⁵ Henry Adams related that "the audience felt that the managers were helpless in his hands."¹⁰⁶ Adams continued:

Nothing can be finer in any way than Martin's famous speech. His argument at Chase's trial was the climax of his career; but such an argument cannot be condensed in a paragraph. Its length and variety defied analysis within the limits of a page, though its force made other efforts seem insubstantial.¹⁰⁷

Martin reviewed the facts once more, using sarcasm and humor to deflate the charges. He took special care to argue that to be impeachable an offense must also be indictable, and he emphasized the importance of an independent judiciary. To a modern ear his argu-

101. 3 A. BEVERIDGE, *supra* note 1, at 186.

102. H. ADAMS, *supra* note 15, at 455.

103. The evidence is reviewed at length in J. ELSMERE, *supra* note 94, at 225-70. A good lawyer's review of the weak evidence presented by the prosecution is found in P. CLARKSON & R.S. JETT, *supra* note 4, at 214-18.

104. See P. CLARKSON & R.S. JETT, *supra* note 4, at 219.

105. 3 A. BEVERIDGE, *supra* note 1, at 201.

106. H. ADAMS, *supra* note 15, at 457.

107. *Id.* at 458.

ment sounds somewhat florid, but its power cannot be denied. In his five-and-a-half hour speech over two days, Martin, along with his co-counsel, demolished the prosecution.¹⁰⁸ Beveridge summed up Martin's performance:

Martin's great speech deeply impressed the Senate with the ideas that Chase was a wronged man, that the integrity of the whole National Judicial establishment was in peril, and that impeachment was being used as a partisan method of placing the National Bench under the rod of a political party. And all of this was true.¹⁰⁹

The Senate returned its verdict on March 1. Although the Senate acquitted Chase on all counts, on three of them a majority of the Senate had voted to convict. Other attacks would be made by strong Presidents on the independence of the Court, but it had weathered the strongest challenge to its independence it ever was to receive.

B. *Aaron Burr and Treason*

Of all the extraordinary events and engaging rascals of the early days of the Republic, the saga of Aaron Burr and his filibustering expeditions takes first place. Burr himself was dramatic enough. The charming, brilliant former Vice-President and slayer of Alexander Hamilton provoked intense reaction in everything he did. His strange expeditions out West, the acclaim he received everywhere including the embrace of Andrew Jackson,¹¹⁰ his sudden fall from grace and his arrest, the long trip to Richmond to stand trial for treason, and the notorious General Wilkinson add up to high drama and provide the material for endless argument: Did Burr mean to detach the Ohio and Mississippi basin and form a separate nation as Jefferson argued?

Immediately following the Chase trial, Burr's term as Vice-President ended. Two years later he was brought before Chief Justice Marshall in Richmond to face charges of treason. What happened

108. A modern biography of Chase is less generous. See J. ELSMERE, *supra* note 94, at 284. Beveridge notes of the reply by one of the managers for the House: "Lucky for Nicholson that Martin had spoken before him and could not reply For his words would have burned the paper on which the reporters transcribed them." 3 A. BEVERIDGE, *supra* note 1, at 208.

109. 3 A. BEVERIDGE, *supra* note 1, at 205-06.

110. Jackson was no fair-weather friend. He appeared at Burr's trial in Richmond, praising Burr and denouncing Jefferson "as a prosecutor who sought the ruin of one he hated." *Id.* at 404.

in those two years is one of the greatest puzzles in our history. The evidence, vague and contradictory, is subject to different interpretations. Many modern writers suggest that Burr did not intend to detach the West, but did intend to invade and conquer Mexico when war with Spain, thought to be inevitable, broke out.¹¹¹ Burr made two trips to the West where he was very warmly received. In the middle of the second trip Burr was arrested and charged with treason.

Treason is the only crime with a constitutional definition¹¹²—a problem which was soon to bedevil the prosecution. Jefferson, who proclaimed in a message to Congress that Burr's guilt was "beyond question,"¹¹³ closely supervised that prosecution.¹¹⁴ Jefferson's role in Burr's prosecution is not a pretty one. The evidence of his malignity, including the "issuance of blank pardons and the collection of blatantly false affidavits . . . almost astounds the mind."¹¹⁵

Martin,¹¹⁶ Charles Lee, and Edmund Randolph represented Burr; the accused, a first-rate lawyer in his own right, also participated actively in his own defense. The United States Attorney, George Hay, prosecuted, assisted by the brilliant William Wirt, among others. Martin had already had some connection with the conspiracy. He and Robert Goodloe Harper had represented two of Burr's messengers, Samuel Swartwout and Justis Erich Bollman, in habeas corpus proceedings in the Supreme Court in which the two sought release from treason charges.¹¹⁷ Burr and Martin had be-

111. See G. HASKINS & H. JOHNSON, *supra* note 89, at 249; W. McCALEB, *THE AARON BURR CONSPIRACY* 124 (1966); 3 A. BEVERIDGE, *supra* note 1, at 322.

112. Treason against the United States shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have the Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

U.S. CONST. art. III, § 3. The proviso permitting conviction "on confession in open court" had been added by Martin at the Convention. 2 FARRAND, *supra* note 47, at 349-50.

113. G. HASKINS & H. JOHNSON, *supra* note 89, at 254.

114. *Id.* at 267.

115. *Id.* at 266-67. See also 3 A. BEVERIDGE, *supra* note 1, at 384-469.

116. Martin had personal and professional reasons for helping Burr. Martin hated Jefferson who, in his famous work, *Notes on the State of Virginia*, had accused Martin's father-in-law, Michael Cresap, of murdering Indians. Martin attacked Jefferson, and a long and bitter exchange followed. See P. CLARKSON & R.S. JETT, *supra* note 4, at 171-78.

117. Marshall discharged the prisoners, issuing a famous opinion on the law of treason. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807). This decision led Senator Giles, who was close to Jefferson, to get the Senate to pass a bill repealing habeas corpus.

come friends during the Chase trial, a friendship which "intensified when [Martin] met [Burr's beautiful daughter] Theodosia with whom he became infatuated."¹¹⁸

Fireworks soon erupted with Burr's demand that the President produce letters written to him by General Wilkinson concerning the conspiracy.¹¹⁹ The defense apparently wanted to use the letters to attack Wilkinson's credibility if he should testify.¹²⁰ Jefferson, resembling a number of modern Presidents, invoked executive privilege.¹²¹ Marshall was caught in a very precarious position between the Republican desire for blood (and hatred for him) and the rule of law. He was very careful throughout the proceedings, but he did not flinch. In a landmark opinion, "which no lawyer can read without a thrill of pride in his profession and in the great Chief Justice,"¹²² Marshall issued a subpoena duces tecum to the President, reserving the question of privilege until after its return.¹²³

These principles were confirmed much later in the dramatic Watergate Tapes Case.¹²⁴ Marshall's holding that anyone—including the President—who has evidence bearing on a criminal trial is subject to process is fundamental to a government of laws. As Martin had argued, "If every order, however arbitrary and unjust, is to be obeyed, we are slaves as much as the inhabitants of Turkey . . . Resistance to an act of oppression unauthorized by law can never be

Fortunately, the House did not go along. G. HASKINS & H. JOHNSON, *supra* note 89, at 256.

118. 3 A. BEVERIDGE, *supra* note 1, at 428. According to Taney, Martin never took a fee from Burr. See S. TYLER, *supra* note 9, at 68.

119. General Wilkinson, Governor of Louisiana, was one of the most despicable officials in American history. Deeply involved in whatever Burr was plotting, he denounced Burr to save his skin. Wilkinson was also in the pay of Spain. See G. HASKINS & H. JOHNSON, *supra* note 89, at 246-91.

120. Freund, *Foreword: On Presidential Privilege*, 88 HARV. L. REV. 13, 24 (1974).

121. Martin made a remarkable denunciation of Jefferson at argument:

The president has undertaken to prejudice my client by declaring that 'of his guilt there can be no doubt.' He has assumed to himself the knowledge of the Supreme Being himself, and pretended to search the heart of my highly respected friend. He has proclaimed him a traitor in the face of that country, which has rewarded him. He has let slip the dogs of war, the hellhounds of persecution, to hunt down my friend.

1 D. ROBERTSON, REPORTS OF THE TRIALS OF COLONEL AARON BURR 128 (Da Capo Press 1969).

122. Gould, *supra* note 6, at 30.

123. *United States v. Burr*, 25 F. Cas. 87, 200-07 (C.C.D. Va. 1807) (No. 14,694). Apparently only one letter was produced, but the issue became moot with Burr's acquittal. Freund, *supra* note 119, at 27 & n.75.

124. *United States v. Nixon*, 418 U.S. 683 (1974).

criminal. . . ."¹²⁵

Jefferson could not contain his rage when he learned of the decision. He directed his anger not at Marshall, his fellow Virginian, but at Martin who had thwarted him during the Chase trial and who had caused him so much trouble during the Cresap affair. In a letter which can only be called extraordinary, the President wrote to Hay that Martin was an "unprincipled and impudent federal bulldog," and that he must be "put down. Shall we move to commit L M [Martin] a *particeps criminis* with Burr? Greybell will fix upon him misprision of treason, at least. . . ."¹²⁶ Fortunately, Hay had too much sense to follow Jefferson's suggestion.

The grand jury eventually indicted Burr,¹²⁷ and jury selection began. This proved difficult because, as Martin argued, "[O]ur rulers in Washington . . . have created such a prejudice, that colonel Burr cannot be rightly tried. . . ."¹²⁸ A jury eventually was selected,¹²⁹ however, and trial began. The Government's evidence demonstrated that the only conceivable basis for treason was in the gathering of a group of armed men at the home of Blennerhasset, a friend of Burr's, on an island in the Ohio River; Burr concededly was not there.¹³⁰ Was this enough evidence to constitute treason in the constitutional sense?

The defense argued that point following the presentation of the Government's case. Luther Martin closed the debate. He had been drinking more than usual throughout the proceedings, but never was he in more perfect command of all his wonderful powers.¹³¹ Martin argued that the Constitution rejected the British doctrine of "constructive treason," a doctrine used only to oppress legitimate dissent. Martin had to attack some unfortunate dicta by Marshall in *Ex parte Bollman*.¹³² He did so in his usual style: "As a binding judicial opinion, it ought to have no more weight than the ballad of Chevy Chase."¹³³ He closed by reminding Marshall of his duty as a judge: the heavily political trial "require[s] fortitude in judges to

125. P. CLARKSON & R.S. JETT, *supra* note 4, at 249.

126. 3 A. BEVERIDGE, *supra* note 1, at 451.

127. This was hardly surprising—14 of 16 jurors were Republican and John Randolph was the foreman.

128. P. CLARKSON & R.S. JETT, *supra* note 4, at 258.

129. Despite Martin's arguments, this was clearly a hanging jury. *See id.* at 259-60.

130. A good lawyer's review of the evidence is found in P. CLARKSON & R.S. JETT, *supra* note 34, at 264-70.

131. 3 A. BEVERIDGE, *supra* note 1, at 501.

132. 8 U.S. (4 Cranch) 75 (1807).

133. 3 A. BEVERIDGE, *supra* note 1, at 502-03.

perform their duty If they do not and the prisoner fall a victim, they are guilty of murder in *foro coeli* whatever their guilt may be in *foro legis*. . . ."¹³⁴ Marshall agreed, ruling that the Constitution demanded a showing of the "employment to exhibition of force" and that Burr must be shown—by two witnesses—to have been present at the exhibition or to have organized it.¹³⁵ On the scanty evidence before it, the jury could only return a verdict of not guilty, which it did.

Burr's trial was conducted as much in the press as in the courtroom. Indeed, Martin alleged that the government was striving to keep Burr from having a "fair trial . . . [for] the newspapers and party writers are employed to *cry* and *write* him down; his counsel are denounced for daring to defend him;¹³⁶ the passions of the grand jury are endeavored to be excited against him."¹³⁷ That Marshall could stand up to the President and the public in that atmosphere and insure justice testifies to his greatness as a judge. That Martin, the "bulldog," would fight the prosecution every step of the way testifies to his greatness as a lawyer.

IV. LUTHER MARTIN BEFORE THE SUPREME COURT

Martin and the Supreme Court knew each other well. He was counsel in the first case on the Supreme Court's docket,¹³⁸ although he did not make his first argument there until 1804.¹³⁹ In the 1806 Term he argued and won four cases.¹⁴⁰ Between the 1808 and 1813 Terms he argued over two dozen cases before that tribunal.¹⁴¹ But of all of Martin's appearances before the Supreme Court, two stand apart, marked for their drama and for their impact on the young Nation.¹⁴²

134. *Id.* at 503.

135. *United States v. Burr*, 25 F. Cas. 87, 177, (C.C.D. Va. 1807) (No. 14,694).

136. This was no idle fancy, for a Baltimore mob later rioted and hanged Marshall, Martin, Burr, and Blennerhasset in effigy. 3 A. BEVERIDGE, *supra* note 1, at 537-40.

137. *Id.* at 469. "This was one of Luther Martin's characteristic outbursts. Every word of it, however, was true." *Id.* at n.1.

138. *Vanstopphorst v. Maryland* (unreported). For a decision on a collateral issue in the case, see *Vanstopphorst v. Maryland*, 2 U.S. (2 Dall.) 401 (1791).

139. *Little v. Barreme*, 6 U.S. (2 Cranch) 169 (1804).

140. P. CLARKSON & R.S. JETT, *supra* note 4, at 230.

141. *Id.* at 280.

142. Martin just missed arguing a third landmark case, *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819). The College chose instead to be represented by its alumnus, Daniel Webster. See 3 A. BEVERIDGE, *supra* note 1, at 238 n.2. Even Martin could not have delivered the great peroration that Webster made on behalf of his alma mater: "It is sir, as I have said, a small College. And yet, *there are those who love it.*" See *id.* at 249.

A. *The Yazoo Land Case*

*Fletcher v. Peck*¹⁴³ was an extraordinary case from start to finish.¹⁴⁴ The state of Georgia at one time owned most of the land which now makes up Alabama and Mississippi. The Georgia legislature, by statute, sold the land to the Yazoo Land Company.¹⁴⁵ That sale, unfortunately, had resulted from the bribery of every member of the legislature but one.¹⁴⁶ The Yazoo Land Company then resold the land, much of it going to settlers who were bona fide purchasers.

The people of Georgia rose in revolt and elected a new legislature which repealed the land grant.¹⁴⁷ Obviously, this created a cloud on the title of those who held from the Yazoo Company as well as making uncertain the title of later grantees. The situation could not endure.

The solution, then as now, was to bring a test case.¹⁴⁸ The vehicle was a suit, filed in 1803 in Boston, by a purchaser of Yazoo land (Fletcher) against his vendor (Peck) for breach of warranty. The lower court rendered its opinion in 1807,¹⁴⁹ holding that the warranty had not been breached. The case was then argued in the Supreme Court in 1809 with Martin representing the purchaser; Robert Goodloe Harper and John Quincy Adams were counsel for the vendor. Although it seems clear that everyone, including Martin's client, wanted a definitive ruling, the irrepressible Martin, a master of pleading, could not resist pointing out a fatal variance between the complaint and the demurrer, which had escaped earlier

143. 10 U.S. (6 Cranch) 87 (1810).

144. The history of the case is told in depth in C. MAGRATH, *YAZOO: LAW AND POLITICS IN THE NEW REPUBLIC* (1966).

145. The land had been sold before, a transaction which led to the decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), which in turn led to the adoption of the eleventh amendment. See G. HASKINS & H. JOHNSON, *supra* note 89, at 337-38. One wonders what American law would look like but for evil land speculators.

146. G. HASKINS & H. JOHNSON, *supra* note 89, at 338-39. The virtue of the lone holdout has never been explained.

147. The old act was burned in public, the flame being provided by a magnifying glass held up to the sun. 3 A. BEVERIDGE, *supra* note 1, at 565-66.

148. For an argument that this was not an improper collusive case, see C. MAGRATH, *supra* note 143, at 68-69; 3 A. BEVERIDGE, *supra* note 1, at 586. Adams reported that he had heard that the Court was unhappy with the fact that the case "appeared manifestly made up for the purpose of getting the Court's judgment upon all the points." C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 395 (1922) (quoting Adams' diary of Mar. 7, 1810). Later, Justice Johnson, in his dissent, said that he would reach the merits only because he believed that "the respectable gentleman . . . engaged for the parties . . . would never consent to impose a mere feigned case upon this court." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 147-48 (1810).

149. C. MAGRATH, *supra* note 144, at 55-56.

notice.¹⁵⁰ Thus, only a week after argument, the Court reversed on that point, but it permitted amendment without need for the parties to return to the circuit court to correct the record.¹⁵¹

The case was re-argued in 1810; a young Joseph Story replaced Adams, who had become Minister to Russia.¹⁵² The opinion held the attempted repeal of the Yazoo Land Grant unconstitutional as an impairment of a contractual obligation. Because *Fletcher* was the first Supreme Court decision to hold a state statute unconstitutional, it played an extremely important role in the development of our jurisprudence; it also roused a great deal of controversy.¹⁵³ Martin's resentment over his role in creating a precedent strengthening the federal government must have been acute, a resentment made all the worse because it involved a strict reading of the contract clause, something Martin had warned against in Philadelphia.

Martin's argument in *Fletcher* has provoked controversy. As reported, it is very short and concentrates on but one issue. David Currie has noted that, "if Cranch's report is anywhere near complete, Luther Martin's argument for *Fletcher* overlooked the two most important issues in the case."¹⁵⁴ Those issues, of course, were whether the bribery of the legislature invalidated the Georgia law, and, if not, could the land grant be repealed constitutionally? Martin argued according to Cranch, that title to the land rested in the national government due to a proclamation made by George III in 1763; if that were true, Georgia had no title to convey. Given the Court's disposition of the case, perhaps Martin was wise to concentrate his fire on this point, one which at least drew the support of Justice Johnson in dissent.¹⁵⁵

Marshall refused to address one of the "main points," the bribery issue, because the plaintiff lacked what today we would call standing to raise the issue.¹⁵⁶ As for the contract clause, important

150. See G. HASKINS & H. JOHNSON, *supra* note 89, at 346 n.138.

151. 10 U.S. (6 Cranch) at 125-27.

152. Story earlier had written this description of Martin: "He never seems satisfied with a single grasp of his subject; but urges himself to successive efforts, until he moulds and fashions it to his purpose. You should hear of Luther Martin's fame from those who have known him long and intimately, but you should not see him." P. CLARKSON & R.S. JETT, *supra* note 4, at 279.

153. See C. WARREN, *supra* note 26, at 396-99.

154. D. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT* 130 n.27 (1985). The accuracy of Cranch's reporting is an open question. See Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 MICH. L. REV. 1291, 1311-12 (1985).

155. 10 U.S. (6 Cranch) at 145-48.

156. *Id.* at 130-31. See also D. CURRIE, *supra* note 153, at 129-30.

and interesting as that issue was, it might have been clear to a lawyer of Martin's acumen that the times demanded that Marshall send a message to the states concerning their duties.¹⁵⁷ Martin may well have been wise, therefore, to attempt to deflect the case onto the technical issues he loved so well. Nevertheless, as Clarkson and Jett pointed out, brevity was not Martin's stock in trade.

There are two alternative explanations for the narrowness of Martin's argument. One is that Martin was paid to lose. A short argument would be in line with that kind of retainer. There is little support for this argument, however, and it really seems a bit odd to hire the leading lawyer of the day only to tell him to *lose* the case.¹⁵⁸ Martin's detection of the procedural flaw at the first argument also does not square with the notion that he had been paid to lose.

Martin may also have viewed the conclusion as foregone. Magrath wrote that "the Chief Justice was irresistibly drawn to the Yazooist position both because of his principal convictions and, less consciously, because of his own personal interest."¹⁵⁹ Moreover, Joseph Story and Marshall had been spending much time together. Magrath noted that the two "quickly formed a mutual admiration society, for their tastes in law, poetry, politics, and religion were remarkably congenial; a recent student of Story's early career is convinced that the two men discussed the Georgia claims."¹⁶⁰

The only support for the paid-to-lose alternative is itself another explanation for Martin's unwarranted brevity. This is the "tradition" that Martin was so drunk during argument that Marshall adjourned the Court until Martin was sober enough to proceed. Drunkenness would explain a short argument.¹⁶¹ Frustration at having to lose a case (if that be true) or alcoholism could have caused such intoxication.

Nonetheless, this "tradition" has little historical basis. Beveridge and Magrath both referred to it, but, as Clarkson and Jett pointed out, neither cited a contemporary source.¹⁶² Beveridge did refer to Adams' memoirs, but Adams was in Russia when *Fletcher* was

157. See 3 A. BEVERIDGE, *supra* note 1, at 592-93.

158. Of course, there is the possibility that Martin's reputation was needed to convince the Court that this was a real case. Faint support for this argument can be found in Justice Johnson's dissent. See 10 U.S. (6 Cranch) at 145-48.

159. C. MAGRATH, *supra* note 143, at 70.

160. *Id.* at 68 (footnote omitted).

161. Martin's rebuttal was longer than his argument in chief; perhaps that can be explained by his sobering up.

162. P. CLARKSON & R.S. JETT, *supra* note 4, at 284 n.42.

re-argued, so his information, if any, was stale and hearsay.¹⁶³ Magrath merely refers to a "tradition" without telling us how it arose.¹⁶⁴ Other writers merely have referred to Beveridge or Magrath.

The story is unlikely, although possible; perhaps it was a tale spread by the many enemies Martin made defending Chase and Burr. Martin was no doubt a heavy drinker, but surely an attorney does not stay on top of the profession by being too drunk to argue before the Supreme Court.¹⁶⁵ Both pride and reputation could not survive such an episode.¹⁶⁶

B. *The Bank Case*

Martin's last argument in the Supreme Court came in 1819 as counsel for the State in the great case of *McCulloch v. Maryland*.¹⁶⁷ That case sustained the constitutionality of the Second Bank of the United States and established a broad interpretation of congressional power to legislate. The Bank Case also made clear that the supremacy clause precludes state regulation of federal institutions.

The case grew out of legislative efforts to deal with a recurrent theme in Maryland history—scandal in its financial institutions. The scandal this time involved the Baltimore branch of the Bank of the United States. David Bogen has explained:

The Baltimore branch of the Bank of the United States was particularly eager to foster growth. It was run by a small group of men. Although the charter attempted to prevent

163. 3 A. BEVERIDGE, *supra* note 1, at 586. Beveridge also refers to a sketch by Henry Goddard, which may have been the source of this story. Goddard related that [A]t a meeting of the Maryland Historical Society many years since, Judge Giles . . . cited John Quincy Adams as having informed him that he (Adams) was once present in the United States Supreme Court when Martin was so drunk that the Court adjourned rather than let him attempt to conduct his case.

Goddard, *Luther Martin: The "Federal Bull-Dog,"* MD. HIST. SOC'Y FUND PUB. No. 4, at 35 (1886). Goddard identifies the case as *Fletcher v. Peck*, without citing any other source. *Id.* The story lacks credibility; not only is it double hearsay of ancient vintage, but it is patently false: Adams was in Russia when *Fletcher* was argued.

164. C. MAGRATH, *supra* note 143, at 69.

165. Taney tells a revealing story. Martin and Taney had gone to Frederick to argue a case; Martin got drunk and passed out. The young Taney desperately stayed up all night to prepare. When he got to court, however, he found a sober and successful Martin. S. TYLER, *supra* note 9, at 122-23.

166. I offer a compromise explanation for the statement made by Adams. Martin may have been indisposed—perhaps due to drink—and the Court recessed to permit him to recover. Malicious gossip by Martin's enemies turned this into a public spectacle, which eventually reached Adams in St. Petersburg.

167. 17 U.S. (4 Wheat.) 316 (1819).

a few individuals from gaining control of the bank by limiting stockholders to voting thirty shares, some Baltimore investors avoided this by paying people to buy shares for them and to give them the proxies for those shares. Thus, George Williams purchased 1172 shares in 1172 names, and Williams joined with James Buchanan and James McCulloch to buy another 1000 shares in the Baltimore branch under another 1000 names. All Buchanan's actions were taken on behalf of the partnership of Smith and Buchanan, but Smith apparently left business affairs to Buchanan while he toiled in Washington. The purchases were financed by borrowing from the Baltimore branch on the security of the shares themselves. Williams became a director of both the Baltimore and Philadelphia branches, Buchanan was made President of the Baltimore branch, and McCulloch, its cashier. Whenever any of these gentlemen or their friends wanted money, they simply took it from the bank without giving any security and without informing the other directors.¹⁶⁸

Trouble arose because Maryland taxed all bank notes issued in the state by a bank not chartered by the state.¹⁶⁹ The Baltimore branch refused to pay the tax. The state sued and won in the state courts, whereupon the case went to the Supreme Court.

As usual in those days, argument was a star-studded occasion. Daniel Webster, William Wirt, and William Pinckney represented the bank; Congressman Joseph Hopkinson, Walter Jones, and Luther Martin argued for the state. Marshall's masterful opinion in *McCulloch* surely could not have been gainsaid by counsel.¹⁷⁰ Nevertheless, Martin got in some good licks. To begin with, *McCulloch* abounded in delicious irony. Martin, of course, had proposed the supremacy clause during the federal Convention.¹⁷¹ He also had

168. D. BOGEN, *TWELVE CASES 63-64* (1985).

169. Many states had such a tax, a response to the credit-contracting policies of the Bank of the United States. *Id.* at 64.

170. Although the opinion seems almost self-evident today, it was very controversial in its time. Marshall resorted to an extraordinary public defense of it in a letter to a Philadelphia paper. See G. GUNTHER, *JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND* 95 (1969) (reprinting Marshall, *A Friend to the Union*, Philadelphia UNION, April 28, 1819). The mastery of the opinion is captured in the famous lament by John Randolph of Roanoke: "wrong, wrong, all wrong, and not a man alive can say why."

Martin's co-counsel, Hopkinson, had argued that even if the government was immune from state taxes, the bank was basically a *private* organization and, therefore, could not be immune. This argument, not really addressed by Marshall, has a good deal of plausibility. See D. CURRIE, *supra* note 153, at 167 n.62.

171. Martin, now at least 71, was one of the last of the surviving delegates.

opposed ratification of the Constitution on the ground, among others, that it gave too much power to the Congress. The decision in *McCulloch*, of course, rested on both of those grounds.

John Marshall, on the other hand, was hoist with his own petard during Martin's argument. While arguing that the states had not surrendered to the federal government their power to tax, Martin told the Court that he would read from the records of the Virginia ratifying convention of 1788. According to Justice Story, Chief Justice Marshall at this point sighed and drew a long breath.¹⁷² For John Marshall, then a young lawyer, had said during those debates:

The powers not denied to the states are not vested in them by implication, because, being possessed of them antecedent to the adoption of the government, and not being divested of them, by any grant or restriction in the Constitution, the States must be as fully possessed of them as ever they had been.¹⁷³

Marshall, however, was not a man to let his youthful follies limit his later life.¹⁷⁴

Martin made two main arguments before the Court. The first argument centered on the notion that the Congress had not been given the power to incorporate a bank. He supported this notion by referring to and reading from *The Federalist Papers* and the debates of the New York and Virginia ratifying conventions "to show that the contemporary exposition of the Constitution by its authors . . . was wholly repugnant to that now contended for by the Counsel for the [Bank]."¹⁷⁵ He amplified this argument by referring to the tenth amendment as "declaratory of the sense of the people, as to the extent of the powers conferred upon the new government."¹⁷⁶ In response to the argument that the Constitution necessarily implies the power to charter a bank, Martin argued powerfully that many powers could be implied including some which are specifically enumerated. If some powers are specified "which, being only means to

172. P. CLARKSON & R.S. JETT, *supra* note 4, at 300.

173. 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 419 (J. Elliot ed. 1830).

174. Marshall told Story after the argument that "I was afraid I had said some foolish things in the debate; but it was not so bad as I expected." C. WARREN, *supra* note 26, at 507.

175. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 372 (1819). Martin added that the supporters of the Constitution had denied the power now claimed, saying that it was "a dream of distempered jealousy." *Id.* The search for the "original intent" of the framers, it would seem, is not a recent development.

176. *See id.* at 372-73.

accomplish the ends of government, might have been taken by implication; by what just role of construction are other sovereign powers, equally vast and important, to be assumed by implication?"¹⁷⁷

Martin's second argument assumed that Congress could charter a bank. Even so, he argued, the states had not lost their right to tax the property of a federal corporation. Martin addressed the argument that Marshall was to make famous in his opinion in *McCulloch*—that the power to tax is the power to destroy—by stating that the Convention had been unable to resolve the question of discrimination by one branch of the federal system against another. The result left to the states alone the power to tax except as to import duties: "The states would not have adopted the Constitution upon any other understanding."¹⁷⁸

Marshall, of course, rejected the state's position on all fronts and, in perhaps his most powerful opinion, made clear both the supremacy of federal law and of the power of Congress to enact legislation helpful to carry out the enumerated powers. Although Martin certainly was right that opposition to the Constitution would have been enhanced if the broad sweep of congressional power had been made explicit in 1787, Marshall certainly was correct in holding that the framers' plan required a broader reading of the Constitution.¹⁷⁹

V. THE END

In a macabre denouement to *McCulloch*, Martin suffered a severe stroke later in 1819 while making criminal presentments against the principals of the Baltimore branch.¹⁸⁰ He lived seven years longer, but his mind was destroyed. John Latrobe, as a young lawyer, commented that he saw Martin "in his dotage. He used to come in the Courts when they were in session . . . dressed in the style of the past generation . . . and stare with a vacant lack lustre eye as the members of the bar made way for him."¹⁸¹ Learning that he was penniless, the General Assembly recognized Martin's service to the state by requiring each attorney in Maryland to contribute five

177. *Id.* at 373-74.

178. *Id.* at 376.

179. As Marshall observed, the First Congress—recognizing this need—chartered the first Bank of the United States.

180. Although the indictments were upheld, *see* *State v. Buchanan*, 5 H. & J. 317 (1821), the scoundrels were acquitted. D. BOGEN, *supra* note 167, at 66. Perhaps the result would have been different if Martin had been able to prosecute.

181. *See* J. SEMMES, JOHN H.B. LATROBE AND HIS TIMES 204 (1917).

dollars annually to support Martin.¹⁸² This measure, surely unique in the history of the American bar, demonstrates vividly the great respect Martin's peers held for him.

Later, Aaron Burr heard of Martin's plight and brought him to New York to live with Burr. Burr did so, according to one of his biographers "[b]ecause Luther Martin had once come forward voluntarily, to stand at the Colonel's shoulder through the ordeal of a Richmond summer; and, one feels quite certain, because this wretched old man . . . had once loved Theodosia."¹⁸³ Martin died in New York on July 10, 1826, and was buried there. Today, the site of his tomb "is unknown and unmarked."¹⁸⁴

Martin serves as an exemplar for all who practice at the bar. Learned, tenacious, loyal, and strong, he was willing to defy a President to serve his clients; in doing so, he helped to preserve the rule of law. He served his state and Nation well. The memory of "Lawyer Brandy Bottle," the "bulldog of federalism," should be toasted wherever lawyers foregather.

182. 1822 Md. Laws 141. See P. CLARKSON & R.S. JETT, *supra* note 4, at 303.

183. 2 S. WENDELL & M. MINNIGERODE, AARON BURR 308 (1925).

184. P. CLARKSON & R.S. JETT, *supra* note 4, at 303.