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Washington's Tribunals

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WASHINGTON’S TRIBUNALS

REVOLUTIONARY TRIALS AND THE COMMANDER IN CHIEF CLAUSE

Establishing that the Framers understood Washington to be the model for the Commander-in-Chief Clause, this Article uses an originalist approach to advance contemporary debate regarding military tribunals. In analyzing the legality of the Bush Administration’s actions based upon the war powers of the United States’ first commander in chief, this Article uses extensive primary source materials to detail the functioning of American military courts under General George Washington. It uncovers evidence of the Executive’s obligation to turn American citizens over to civilian courts. At the same time, it also finds original intent support for the President’s power to convene military tribunals for foreign enemy combatants without Congressional authorization. This approach’s startling conclusions have profound implications for contemporary debate.

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INTRODUCTION

Dissenting in *Hamdan v. Rumsfeld*,¹ Justice Thomas argues that “[i]n the absence of attempts by Congress to limit the President's power, it appears that, as Commander in Chief of the Army and Navy of the United States, he may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions.”² Part of the basis for this conclusion rests upon the historical argument that “Hamdan’s commission has been constituted in accordance with . . . historical precedents. . . . [T]he procedures to be employed by that commission, and the Executive’s authority to alter those procedures, are consistent with the practice of previous American military commissions.”³ Referring back to the founding of the Republic, Thomas argues that the President should be allowed to try Hamdan by tribunal because “the structural advantages attendant to the Executive Branch – namely, the decisiveness, ‘activity, secrecy, and dispatch’ that flow from the Executive’s ‘unity,’ – led the Founders to conclude that the ‘President ha[s] primary responsibility – along with the necessary power – to protect the national security. . . .’”⁴ Analyzing the legality of the Administration’s actions based upon the war powers of the United States’ first commander in chief, this Article finds strong original intent support for Justice Thomas’s dissent.

This case’s debate over executive authority centers on Salim Ahmed Hamdan, a citizen of Yemen who was captured during the invasion of Afghanistan and detained by the United States Naval Base in the Guantanamo Bay, Cuba. After the September 11, 2001 attacks, President Bush

¹ 126 S. Ct. 2749 (2006) [hereinafter *Hamdan*].

² *Id.* at 2838.

³ *Id.* at 2843.

⁴ *Id.* at 2823 (quoting Alexander Hamilton, *The Federalist* No. 70, 472 (J. Cooke ed. 1961)).

issued an Executive Order allowing the first military tribunals in over five decades.⁵ Pursuant to this order, the Administration brought this first case in July 2004, charging Hamdan with conspiracy to commit terrorism. Arguing that their client was being held without due process of law as guaranteed by the 4th and 14th Amendments, Hamdan's attorneys filed a habeas corpus petition charging that Hamdan's trial in a military tribunal was "an unlawful exercise of executive branch authority."⁶ In response, the Bush administration claimed that "the president has the power to set up the tribunals based on his authority as commander in chief."⁷

On June 29, 2006, the Court issued a 5-3 decision holding that the Bush Administration could not try Hamdan in the special military commission. Associate Justice Stevens's opinion for the Court held that the President needed Congressional authorization in order to try Hamdan in this manner. Under the Congressionally-approved Uniform Code of Military Justice Act (UCMJ), the rules applied in military commissions must be "uniform insofar as practicable" to those used in courts-martial.⁸ Because the special military commissions forbade the defense from seeing certain evidence, admitted hearsay and statements acquired via torture, and permitted unsworn testimony, they do not adhere to the UCMJ. Therefore, the Court held that, lacking Congressional authorization, the Bush Administration's Article II power alone is not enough to permit him to try Hamdan by special commission. Utilizing this case as a springboard into the intense debate over the meaning of commander in chief powers, this Article presents original intent evidence to the contrary.

⁵ Military Order of Nov. 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 C.F.R. § 57833 (2001).

⁶ Tony Mauro, *Military Tribunal Case Comes Before Skeptical Supreme Court*, LEGAL TIMES, ALM Media, Inc., Mar 29, 2006.

⁷ James Vicini, *Top court to weigh Bush's Guantanamo tribunals*, Reuters, Tuesday (Mar. 28, 2006), available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/28/AR2006032800109.html>.

⁸ Unif. Code Mil. Justice art. 36, 10 U.S.C.S. § 836.

The level of deference afforded the President in deciding the procedures for trying foreign enemy combatants is a topic of considerable relevance, yet also considerable disagreement. This Article analyzes how Revolutionary War military trials functioned as a means of elucidating the original meaning of executive commander-in-chief power. In doing so, it contributes to our understanding of what was meant by “commander in chief” by the sovereign when they enshrined the clause into the “highest law of the land” upon ratification. Originalists contend that because our democracy’s laws emanate from “we the people” it is important to understand what those people had in mind. From this perspective, the original understanding of tribunals may have profound implications for contemporary debate. Currently, despite the fact that “participants in any credible common law trial must be familiar with relevant precedents, this knowledge is largely absent from the process followed by today's military commissions.”⁹ Because “there are no formal reporters, comprehensive printed digests, or online databases of trials by past military commissions” and “the government's shortfalls have not been corrected by academic scholarship,” this Article serves to advance a neglected area of legal scholarship.¹⁰ Relying on the archives of the Continental Congress, Washington’s writings, and other primary sources, this Article suggests that the Framers understood the commander in chief to have the power to convene special military commissions for foreign enemy combatants without congressional authorization.

It is not the purpose of this Article to rehash the arguments over the importance of original intent, but it instead posits that the Framers’ understanding is at least a starting point for interpreting the Constitution.¹¹ Accordingly, this Article seeks to use the lens of original intent to

⁹ David Glazier, *The Laws of War: Past, Present, and Future*, 46 VA. J. INT'L L. 5, 7.

¹⁰ *Id.* at 8.

¹¹ “Even for non-originalists, the Founders' unparalleled experience in applied constitutional thought, along with their not inconsiderable acumen, gives their views a certain persuasive, perhaps even presumptive, authority.”

examine the functionality of military tribunals under Art. II §2 Cl. 1. It commences in Part I with a summary of the general importance afforded to the historical record in the tribunal debate before arguing for the significance of the Washington Model in particular. After establishing why the Washington Model encompasses the original meaning of the Commander-in-Chief Clause, the Article then details the use of courts-martial versus tribunals under the nation's first commander in Part II. Part III provides an in-depth account of proceedings in both a court-martial proceeding and a special tribunal during the Revolution. The implications of the historical evidence uncovered in this part are then detailed in Part IV. Utilizing this approach, this Article presents substantial original intent support for the Presidential power to use special military commissions to try foreign enemy combatants. Special tribunals were contemplated by the founders, who actually supported Washington's use of his commander in chief powers to convene a special tribunal in spite of a Congressional resolution directing otherwise.

I. FRAMING THE MODEL: THE SIGNIFICANCE OF TRIBUNALS' HISTORICAL PRECEDENT

A majority of the present Court agrees that Uniform Code of Military Justice, Authorization for Use of Military Force,¹² and Detainee Treatment Act¹³ “acknowledge a general Presidential authority to convene military commissions in circumstances where justified under the Constitution.”¹⁴ A major part of the debate is over just what exactly the Constitution's Commander in Chief Clause means. The Washington model shows the Clause to encompass the power to convene tribunals without congressional authorization. This Part sets the stage for

Martin S. Flaherty, *Symposium Papers – Federalism In The 21st Century: Historical Perspective: More Apparent Than Real: The Revolutionary Commitment to Constitutional Federalism*, 45 KAN. L. REV. 993, 1006 (Jul. 1997); See also William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 49 COLUM. L. REV. 782, 859 (1995).

¹² 115 Stat. 224, note following 50 U.S.C.S. § 1541.

¹³ Pub. L. No. 109-148, 119 Stat. 2739 (2005).

¹⁴ Hamdan, at 2749.

discussion by briefly examining the importance afforded to original intent in contemporary debate and then turns to why Washington's actions deserve special scrutiny.

A. THE IMPORTANCE AFFORDED TO HISTORY

The amount of weight that should be afforded to the conclusions of this Article largely depends upon each reader's subjective convictions regarding the importance of original intent.¹⁵ However, even those who are intellectually opposed to granting original intent weight in constitutional analysis must agree that it is functionally important *precisely because major players believe it is*. In interpreting constitutional questions, the Bush Administration ardently advocates an originalist approach. In deciding upon judicial nominations, such as those of Chief Justice John Roberts and Justice Samuel Alito, Bush "pledged to make 'original meaning'¹⁶ appointments in the mold of Justices Scalia and Thomas."¹⁷ Indicative of the administration's views, Professor John Yoo, a former attorney in the Justice Department's Office of Legal Counsel under the Bush administration, has argued for broad presidential war-making powers using an originalist approach.¹⁸ This preoccupation with the historical understanding of constitutional mandates is not confined to the executive branch. Even prior to Bush's appointments to the bench, Supreme Court decisions in a series of recent separation of powers

¹⁵ It is important to note that this study does not take into account the political, moral or other considerations that may be necessary in fully evaluating some of these controversial issues.

¹⁶ This Article focuses on original intent because most information available is on the Framers' understanding; however, for the purposes of this study, the terms "original intent" and "original meaning" may potentially be used almost interchangeably, as the Framers and public alike saw Washington as the personification of the American cause and certain to be the first president. Likewise, many of Washington's actions during the war were well known to the white male voters, as many had served under him in the Revolution and newspapers also reported heavily upon his activities. For further discussion, see *infra* Section B. For further discussion on original intent and original meaning, see e.g. ROBERT H. BORK, *THE TEMPTING OF AMERICA* 144 (1990).

¹⁷ Bruce Fein, *Electing the Supreme Court*, WASH. TIMES, Sept. 14, 2004, at A16.

¹⁸ See JOHN YOO, *THE POWERS OF WAR AND PEACE; THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (1st ed., University of Chicago Press) (2005) [hereinafter YOO WAR AND PEACE]; John Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996).

cases “indicate that a majority believe[d] history to be relevant, if not decisive, on questions of constitutional structure” and some justices make historical evidence dispositive in interpreting the Constitution.¹⁹ Even those critical of expansive executive power, such as Dean Harold Koh, Professor Michael Glennon, and Professor Louis Henkin, employ original intent arguments.²⁰ Both sides of the spectrum tend to agree that “triangulating from the wisdom of the past to the . . . circumstances of the present is at least the default point of departure The alternative to that is chaos.”²¹ Indeed, “[b]oth the Supreme Court and leading academics have come to accept that evidence of the original understanding of the Constitution is relevant to any discussion of the document’s meaning.”²²

B. WHY WASHINGTON?

*As Americans in 1787 tried to envision a republican head of state who could protect them against old King George without becoming a new King George, they did have a particular George in mind.*²³

Why is Washington’s conduct of special significance? While the Civil War and World War II precedents often cited in present debate occurred long after the signing of the Constitution,²⁴ it is Washington’s actions as commander in chief of the Continental Army that formed the original meaning of the Commander-in-Chief Clause. This Article contends that the Framers’ understanding of the term “commander in chief” was shaped by their experiences with

¹⁹YOO WAR AND PEACE, *supra* note 18, at 25. *See, e.g.*, Printz v. United States, 521 U.S. 898 (Souter, J., dissenting); United States Term Limits, Inc. v. Thornton, 514 U.S. 779, 802-15 (1995). “[T]he Supreme Court’s renewed interest in the structural [*2100] elements of the Constitution has relied in part upon the original understanding.” John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 1982 (1999).

²⁰ *See* MICHAEL GLENNON, CONSTITUTIONAL DIPLOMACY (1st ed., Princeton University Press, 1990); LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION, (2nd ed., Transnational Publishers, 1996); HAROLD KOH, NATIONAL SECURITY CONSTITUTION (1st ed., Yale University Press, 1990).

²¹ William Galston, Former Deputy Domestic Policy Advisor, Clinton administration 1993-95, *C-Span Weekend*, (C-Span television broadcast Mar. 19, 2006).

²² YOO WAR AND PEACE, *supra* note 18, at 25.

²³ AKHIL REED AMAR, AMERICA’S CONSTITUTION 131 (1st ed., Random House) (2005).

²⁴ *See, e.g.*, Hamdan, at 2749.

Washington.²⁵ As a result, in writing Article II, Section 2, Clause 1, the Framers' concept of the powers the clause encompassed was based upon the Washington actions as Commander in Chief of the Continental Army.²⁶ Therefore, this Washington model characterizes original intent for the powers of the American commander in chief.

In order to prove this premise, this Section first demonstrates the Americans' determined break from the old British ways. It then traces the Continental Congress's development of the new conception of the American commander in chief based upon their firsthand dealings with Washington. This Section concludes by discussing the Framers' strong approval of Washington's wartime actions and subsequent incorporation of the Washington model at the Constitutional Convention.

²⁵ Many legal scholars agree with the key assertion that Washington shaped the Framers' conception of the executive's powers. *See, e.g., Id.* at 131-187; M. FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 58 (1913); Steven G. Calabresi, *The President, the Supreme Court, and the Founding Fathers: A Reply to Professor Ackerman*, 73 U.CHI. L. REV. 469, 481 (2006) (“[The Framers’] immediate role model for [President] was, of course, George Washington, who everyone knew would be the first president. The presidential office was designed with him in mind, and he in turn further defined the office by the precedents he set . . .”); Ronald D. Rotunda, *Original Intent, the View of the Framers, and the Role of the Ratifiers*, 41 VAND. L. REV. 507, 509-10 (1988); Gordon Wood, *President George Washington, Republican Monarch*, (Princeton University, James Madison Leadership Conference Paper 3, 2004), *available at* <http://web.princeton.edu/sites/jmadison/events/conferences/leadership/Washington%20Gordon%20Wood.pdf>. (“[T]he Convention had . . . gone on to make the new chief executive so strong, so king-like, precisely because the delegates expected George Washington to be the first president.”). *See generally*, H. JEFFERSON POWELL, *THE PRESIDENT’S AUTHORITY OVER FOREIGN AFFAIRS: AN ESSAY IN CONSTITUTIONAL INTERPRETATION* (2002). Primary sources concur. *See* Letter from Pierce Butler to Weedon Butler, *in* 3 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 302 (Max Farrand ed., 1966), *available at* [http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field\(DOCID+@lit\(fr003220\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(fr003220))) . Washington himself saw his actions as precedent-setting. *See* Letter from George Washington to James Madison (May 5, 1789), *in* 30 *THE WRITINGS OF GEORGE WASHINGTON* 310-11 (Bicentennial Commission ed., 1976).

²⁶ Surely, at the start of the war, the Framers were influenced by English history and political theorists John Locke, William Blackstone, and Montesquieu. *See* John C. Yoo, *Article, Marshall’s Plan: The Early Supreme Court and Statutory Interpretation*, 101 YALE L.J. 1607, 1609-10 (1992). This Article does not contend that this political theory was irrelevant. Instead, this Article asserts that the Washington model *is composed of* these theories, as distilled through the Framers' firsthand, practical experience with Washington during the Revolution. *See* Flaherty, *supra* note 50, at 2112 (“More important in any case was the Founders' own experience.”); *see also* EDMUND S. MORGAN, *THE BIRTH OF THE REPUBLIC, 1763-89*. As discussed *infra*, having rejected the British Model, the Founders were seeking to create their own government. They tested their notions throughout the war and developed an understanding of those powers necessary for the Republic to grant the commander in chief in light of the practical realities of the Revolution. They supported and sanctioned the nearly-deified Washington's exertion of power and, when drafting the Constitution, “cast their eyes towards General Washington as President; and shaped their Ideas of the Powers to be given to a President, by their opinions of his Virtue.” Letter from Pierce Butler to Weedon Butler, *supra* note **Error! Bookmark not defined.** For this reason, the Washington model holds great weight for the original intent (and meaning) of the Commander-in-Chief Clause.

1. *The Revolt: Rejecting George for George*

While the Crown's use of commander-in-chief powers certainly influenced the Continental Congress's initial understanding of the phrase,²⁷ the Americans did not seek to duplicate the British system by any means.²⁸ In what this study contends is a false analogy, Professor John Yoo has argued for broad presidential war powers on the basis that the British King had such broad powers and the Framers' original "intent [was] to continue the general British patterns."²⁹ He contends that because the King was the "generalissimo, or the first in military command, within the kingdom,"³⁰ so was the design of the American executive since "the Framers did not wish to alter the constitutional authorities" known while under the British Crown.³¹ In order to show the applicability of the Washington Model over the British one, this

²⁷ See generally BLACKSTONE, *supra* note 16, for a discussion of the Crown's power. John Yoo does mention Washington's influence but focuses on the Crown as the Framers' model for executive war power. Yoo, *Continuation of Politics*, 84 CALIF. L. REV. 167, 252 (Yoo agrees that the "paternal vision of the President was consistent with the Framers' knowledge that the office would be held first by George Washington" but nevertheless focuses on the premise that "Americans of the Framers' generation would have widely understood the commander-in-chief power as a continuation of the English and colonial tradition in war powers."). See also YOO, *WAR AND PEACE* at 65. ("the revolutionaries [had] decided to mimic the British form of government."). This Article disagrees with Yoo's argument for using the British Model and the following paragraphs explain why.

²⁸ Surely, at the start of the war, the Framers were influenced by English history and political theorists John Locke, William Blackstone, and Montesquieu. See John C. Yoo, Article, *Marshall's Plan: The Early Supreme Court and Statutory Interpretation*, 101 YALE L.J. 1607, 1609-10 (1992). This Article does not contend that this political theory was irrelevant. Instead, this Article asserts that the Washington model *is composed of* these theories, as distilled through the Framers' firsthand, practical experience with Washington during the Revolution. See Flaherty, *supra* note 50, at 2112 ("More important in any case was the Founders' own experience."); see also EDMUND S. MORGAN, *THE BIRTH OF THE REPUBLIC, 1763-89*. As discussed *infra*, having rejected the British Model, the Founders were seeking to create their own government. They tested their notions throughout the war and developed an understanding of those powers necessary for the Republic to grant the commander in chief in light of the practical realities of the Revolution. They supported and sanctioned the nearly-deified Washington's exertion of power and, when drafting the Constitution, "cast their eyes towards General Washington as President; and shaped their Ideas of the Powers to be given to a President, by their opinions of his Virtue." Letter from Pierce Butler to Weedon Butler, *supra* note **Error! Bookmark not defined.**. For this reason, the Washington model holds great weight for the original intent (and meaning) of the Commander-in-Chief Clause.

²⁸ Flaherty, *supra* note 50, at 2112. The constitutional principles developed by the Framers were not abstract doctrines of political theory but rather developed out of the immediate needs and experiences during the Revolution. MORGAN, *supra* note **Error! Bookmark not defined.**

²⁹ *Id.* at 66. *But see* Louise Burnham Dunbar, *A Study of "Monarchical" Tendencies in the United States from 1776 to 1801*, 10 U. ILL. STUD. SOC. SCI. 1, 27-75 (1923).

³⁰ Yoo, *Continuation of Politics*, *supra* note 16, at 203 (quoting WILLIAM BLACKSTONE, *COMMENTARIES* *254).

³¹ YOO *supra* note 18, at 63 (arguing that the state constitutions, often based upon the British system, served as a model regarding allocation of authorities); Yoo also discusses the British Model in Yoo, *Continuation of Politics*, *supra* note 18, and John C. Yoo, *Clio At War: The Misuse Of History in the War Powers Debate*, 70 U. COLO. L. REV. 1169 (focusing on the British Model for the Declare War Clause). See also ERNEST R. MAY, *The President*

Section commences by dispelling this notion that “the revolutionaries [had] decided to mimic the British form of government.”³²

“More important in any case was the Founders’ own experience.”³³ Both the Declaration of Independence³⁴ and the Articles of Confederation³⁵ reflect the founders’ determined break with the British model. From the beginning of the war, the “radically new government clearly demonstrate[d] their intention to rethink leadership of the colonies from the ground up.”³⁶ The rebelling colonists’ opposition to the monarchy’s commander-in-chief powers is reflected at the outset in the Declaration of Independence, in which they charge:

[King George III] has kept among us, in times of peace, Standing Armies without the Consent of our legislatures. He has affected to render the Military independent of and superior to the Civil Power. He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation: For quartering large bodies of armed troops among us: For protecting them, by a mock Trial from punishment for any Murders which they should commit on the Inhabitants of these States . . .³⁷

Shall Be Commander in Chief, in *THE ULTIMATE DECISION* 8 (1960). *But see* GORDON WOOD, *CREATION OF THE AMERICAN REPUBLIC* (1998); Fisher, *Presidential Unchecked Wars*, 148 U. PA. L. REV. 1637, 1637 (2000) (noting the Framers “specifically rejected the British model”); *See supra* note **Error! Bookmark not defined.** (citing works that counter Yoo’s assertion).

32. YOO, *WAR AND PEACE supra* note 18, at 65.

33. Flaherty, *supra* note 50, at 2112. The constitutional principles developed by the Framers were not abstract doctrines of political theory but rather developed out of the immediate needs and experiences during the Revolution. MORGAN, *supra* note **Error! Bookmark not defined.**

34. THE DECLARATION OF INDEPENDENCE, para. 13-17 (U.S. 1776) (“He has kept among us, in times of peace, Standing Armies without the Consent of our legislatures. He has affected to render the Military independent of and superior to the Civil Power. He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation: For quartering large bodies of armed troops among us: For protecting them, by a mock Trial from punishment for any Murders which they should commit on the Inhabitants of these States. . .”).

35. The Articles radically broke with the notion of the Crown’s control over the armed forces by instead granting “Congress had the ‘sole and exclusive right and power’ to make rules for the government and regulation of the land and naval forces, and to direct their operations.” Bennet N. Hollander, *The President and Congress: Operational Control of the Armed Forces*, 27 MIL. L. REV. 49, 49 (1955) (The “colonists shared a deep fear of the development under the new government of a military branch unchecked by the legislature and susceptible to use by an arbitrary executive power.”).

36. James McHenry, A report of a Committee Decr 23d 1783 Answer of Congress to Genl Washington, 25 Journals of the Continental Congress 838-38.

37. THE DECLARATION OF INDEPENDENCE paras. 13-17 (U.S. 1776).

This suggests that the colonists were not “in acceptance of the British approach” to government, as Yoo infers.³⁸ On the contrary, they deeply feared that the perceived failings of the British system would reemerge under their new government.³⁹

The colonists’ wariness of duplicating George III’s power over the military is, unsurprisingly, likewise reflected in the Articles of Confederation. At the outset of war, in addition to appointing all U.S. officers of the land forces,⁴⁰ “[t]he Congress had the ‘sole and exclusive right and power’ to make rules for the government and regulation of the land and naval forces, and to direct their operations.”⁴¹ Even after the Continental Army was in the field, Congress initially retained principle responsibility for the supply and administration of the troops. “Whatever executive and legislative power over the armed forces existed was vested in the Continental Congress.”⁴² Breaking with the British concept of a commander in chief in the likeness of King George III, the Second Continental Congress initially directly managed mobilization, military strategy, and even tactics via subcommittees.⁴³ Without a central executive, Congress sought to use various boards to carry out its executive functions.⁴⁴ In a deliberate move away from the British system, the American system served as “the very antithesis of the idea of vesting the power of war and peace in [an] executive[’s] hands.”⁴⁵ Congress toiled with its own vision of a commander in chief, commencing the war with a weak

38. Yoo, *supra* note 5, at 65.

39. Bennet N. Hollander, *The President and Congress: Operational Control of the Armed Forces*, 27 MIL. L. REV. 49, 49 (1955) (noting that the “colonists shared a deep fear of the development under the new government of a military branch unchecked by the legislature and susceptible to use by an arbitrary executive power”).

40. Except regimental officers, over whom Congress retained appointment authority.

41. Hollander, *supra* note 39, at 50.

42. *Id.* at 51.

43. JENNINGS B. SANDERS, *EVOLUTION OF THE EXECUTIVE DEPARTMENTS OF THE CONTINENTAL CONGRESS 1774-1789*, at 6 (1935).

44. Hollander *supra* note 39, at 53.

45. Arthur Bestor, *Separation of Powers in the Domain of Foreign Affairs: The Intent of the Constitution Historically Examined*, 5 SETON HALL L. REV. 527, 568 (1974) (regarding the original intent of the President’s foreign policy powers). See YOO, *WAR AND PEACE*, *supra* note 18; John Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 2009 n.252 (1999).

one. Initially “[i]nspired by fear of seizure of political control by military leaders, Congress kept a suspiciously watchful eye on the military force and its commanders.”⁴⁶ As discussed next subsection, only gradually did Congress grant Washington power as they learned from the realities of war.

These actions demonstrate a conscious and determined shift from the British model. With such deeds, the colonists were by no means attempting to recreate a commander in chief in the model of King George III. Rather than mimicking what they saw as the British monarchy’s “illegal and void” commander-in-chief orders,⁴⁷ the Framers came to find their model in the man they commended to “have conducted the great military contest with wisdom and fortitude invariably regarding the rights of the civil power through all disasters and changes.”⁴⁸

2. Towards a Constitution with a George in Mind

If the Framers were actively seeking to create a new concept of an American commander, how did they develop their understanding? Washington, the only commander the United States ever had, served as teacher and guinea pig. Amidst the battles of the Revolutionary War, General Washington “was obliged . . . to teach Congress how to govern a nation at war.”⁴⁹ From his numerous communications as commander in chief and statesman, Washington kept the Framers well-informed of his actions.⁵⁰ In doing so, he also communicated his understanding of the role

46. Hollander, *supra* note 39, at 51 (citing U.S. DEP’T OF ARMY, ROTCM, AMERICAN MILITARY HISTORY 145-20. *op. cit.*).

47. “The orders aforesaid for rendering the authority of the Commander-in-chief, and under him, of the Brigadiers-General, supreme, are illegal and void.” 1 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 69 (Oct. 14, 1774), (Worthington C. Ford et al. eds., 1904-37).

48. James McHenry, A Report of a Committee Answer of Congress to General Washington (Dec. 23, 1783), *reprinted in 25 id.* at 838.

⁴⁹ HENRY CABOT LODGE, GEORGE WASHINGTON 170 (1899 ed.).

⁵⁰ This Article draws very heavily upon primary sources from the period in addition to secondary academic interpretation, a widely sanctioned approach to interpretation. *See e.g.*, Martin S. Flaherty, *Response: History Right?: Historical Scholarship, Original Understanding, And Treaties As “Supreme Law Of The Land,”* 99 COLUM.

of the American commander in chief, including his power over military tribunals.⁵¹ Most importantly, not only were the Framers knowledgeable of Washington's actions – i.e. the Washington model – but they also officially supported them. After the first – and somewhat disastrous – battles, “[e]xperience taught the Framers [an] important lesson during this period: the war powers needed to be fixed to guarantee effective common defense.”⁵² A significant development in defining the role of the American commander occurred on December 27, 1776 when Congress passed a resolution granting Washington sweeping powers.⁵³ “[H]aving maturely considered the . . . crisis and having perfect reliance on the wisdom, vigour, and uprightness of General Washington,”⁵⁴ Congress granted their commander “full, ample, and complete powers” over his army and resolved that he have the power to “arrest and confine persons who [were] disaffected to the American cause.”⁵⁵ From this time through the end of the war, Congress allotted Washington great authority in running the war.⁵⁶ These powers were seen as so sweeping that in a speech at the British House of Commons, Lord George Germaine claimed that the Continental Congress had made Washington the “dictator of America.”⁵⁷ More importantly, Washington also understood his wartime powers to be sweeping. In his response, he expressed gratitude to Congress for having “done [him] the honor to intrust [sic] me with powers, in my Military Capacity, of the highest nature and almost unlimited in extent.”⁵⁸ One of Congress's

L. REV. 2095, 2101 (“[H]istorical interpretation that relies extensively on primary sources [and] demonstrates a command of the secondary literature . . . should, and on reflection does, command greater respect.”).

⁵¹ See LODGE, *supra* note 49 (General Washington “In the hours allotted to sleep, he sat in his headquarters, writing a letter, with blots and scratches, which told Congress with the utmost precision and vigor just what was needed” to conduct a war).

⁵² Major Michael P. Kelly, *Fixing The War Powers* 141 MIL. L. REV. 83, at 110.

⁵³ Friday, Dec. 27, 1776, JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 1045-46.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ See Part III, Section I for a discussion of the most pertinent information.

⁵⁷ *The Continental Congress Grants Washington Greater Powers*, The Library of Congress, <http://rs6.loc.gov/learn/features/timeline/amrev/contarmy/powers.html>.

⁵⁸ Letter from George Washington to Robert Morris, George Clymer, and George Walton (Jan. 1, 1777), 6 THE WRITINGS OF GEORGE WASHINGTON [JOHN C. FITZPATRICK ED., 1931] at 463, 464.

final holds on Washington was removed when, in 1780, Congress reconsidered a resolution that confined the fighting to the United States theater and voted “the restriction taken off.”⁵⁹

During the Revolution, both Congress and Washington understood the commander’s authority over troops, strategy, and engaging the enemy to be necessarily complete in order to effectively conduct a war.⁶⁰ Some may question, however, whether Washington’s wartime actions were still supported by the Framers and voters after the Treaty of Paris. To answer this, it is important to note that Washington emerged from the war an even greater hero.⁶¹ “His reputation in the 1780s as a great classical hero was international,” with Washington seen as “a living embodiment of all that classical republican virtue the age was eagerly striving to recover.”⁶² He was hailed as “the great soldier of liberty – a man whose exceptional virtue and patriotism assured final triumph.”⁶³ In fact, “[t]he merest rumor that Washington might be passing through town was sufficient to trigger spontaneous celebrations [and] these sentiments ran so deeply that his critics . . . felt it necessary to hold their tongues lest they be deemed unpatriotic.”⁶⁴ It is of no stretch to say that virtually all of the Framers respected his virtuous leadership, including his widely publicized use of a special tribunal.⁶⁵ Indeed, their approval of his wartime actions is evidenced by his unanimous election to the presidency of the Convention.

⁵⁹ Letter from George Washington (Jul. 1777), in 19 THE WRITINGS OF GEORGE WASHINGTON, at 402, 402 n.52.

⁶⁰ See *supra* pages 23-25.

⁶¹ To the point of “near deification.” *Id.* at 24.

⁶² Gordon Wood, *President George Washington, Republican Monarch*, James Madison Leadership Conference Paper 3 (Princeton University), available at

<http://web.princeton.edu/sites/jmadison/events/conferences/leadership/Washington%20Gordon%20Wood.pdf>

[hereinafter *Republican Monarch*]

⁶³ JOHN MARSHALL, THE LIFE OF GEORGE WASHINGTON 84 (2000).

⁶⁴ *Id.*

⁶⁵ *Id.*

So great was the approval of his wartime conduct among the populace, few debate that Washington could have made himself King.⁶⁶

With the Framers bringing this experience to the Convention, the “most sensible textual inference is to read the Commander-in-Chief Clause as a constitutional constraint on the other two federal branches, especially Congress, from interfering with the President’s command of U.S. military forces.”⁶⁷ After fighting a long and bitter war to rid themselves of the British monarchy, the Americans turned, in the Constitutional Convention, to creating a radically new federal government defined by separation of powers. The Framers felt the “need to institutionalize American experience under the exigencies of a revolutionary situation . . . The result[ing Constitution], clear to many Americans by 1790, was a truly original formulation of political assumptions and the creation of a distinctly American system of politics.”⁶⁸ But on whom was the new commander in chief based?

“[The Framers’] immediate role model for [President] was, of course, George Washington, who everyone knew would be the first president. The presidential office was designed with him in mind”⁶⁹ Since he was “held in awe by the delegates and already the de facto leader of the country,”⁷⁰ certainly, “[e]very man at Philadelphia . . . understood, as did the ratifiers, that Washington would likely serve as America’s first president . . . [and] were consciously or subconsciously influenced by the fact that George Washington was the presiding

⁶⁶ See Wood, *supra* note 51. In the famous conversation with American painters Benjamin West, George III commented that if Washington were to return to the farm after his victory rather than make himself King, “he will be the greatest man in the world.” Indeed, “the god-like Washington was certain to be the first President” and could have been more. Henry P. Monaghan, *The Protective Power of Presidency*, 93 COL. L.REV. 1, 74 (1993). See also, Wood, *supra* note **Error! Bookmark not defined.**, at 3 (“Though it was widely thought that Washington could have become king or dictator, he wanted nothing of the kind.”).

⁶⁷ Julian G. Ku, *Is There an Exclusive Commander-in-Chief Power?*, YALE L.J. (THE POCKET PART), (Mar. 2006), at <http://www.thepocketpart.org/2006/03/ku.html>.

⁶⁸ WOOD at xi.

⁶⁹ Steven G. Calabresi, *The President, the Supreme Court, and the Founding Fathers: A Reply to Professor Ackerman*, 73 U.CHI. L. REV. 469, 481 (2006)

⁷⁰ Rotunda, *supra* note **Error! Bookmark not defined.**, at 510

officer – the unanimously chosen ‘president’ – of the Philadelphia Convention itself.”⁷¹ Indeed, since “the influence of the commanding presence [at the Convention] of the most famous and trusted of Americans,”⁷² was so great, “[i]t is often observed that the American presidency was created in George Washington's image since all of the Founders knew that he was almost certain to be the first occupant of the new chief executive office.”⁷³ Primary sources agree that “members [of the Continental Congress] cast their eyes towards General Washington as President; and shaped their Ideas of the Powers to be given to a President, by their opinions of his Virtue.”⁷⁴ With Washington shaping the Framers’ ideas of their future executive’s powers, this Article drills down into the implications for the Commander in Chief Clause in particular. Having just served as commander in chief of the Continental Army prior to the Convention, Washington’s specific actions during the Revolution provide direct insight into what the Framers envisioned for their future leader based upon their direct experience with the young nation’s only commander in chief to date.

Some may contend that even if the Framers wrote the Constitution with Washington as a direct model, they didn't expect presidents after him to maintain the same powers as those of the man they exulted to the point of “near deification.”⁷⁵ Primary sources provide evidence that the Framers knew full well that they were setting specific precedents that would be followed by

⁷¹ *Id.* at 134-35 (“[H]is presence filled the room” in which the Convention was held). *See also* Butler to Weedon Butler, *supra* note **Error! Bookmark not defined.**, FARRAND, *supra* note **Error! Bookmark not defined.**, at 58 (“His presence in the convention was felt to be essential to the success of its work.”); Rotunda, *supra* note **Error! Bookmark not defined.**, at 509-510.

⁷² CLINTON ROSSITER, 1787: THE GRAND CONVENTION 222 (1966)

⁷³ Steven G. Calabresi, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. 1451, 1490. “This may generally be a phenomenon of presidential regimes. The presidency of the French Fifth Republic was, of course, created for Charles DeGaulle, the first occupant of that office. Similarly, the presidency of the Russian Federation was created by and for Boris Yeltsin. . . .” *Id.* at n.136.

⁷⁴ Letter from Pierce Butler to Weedon Butler, in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 302 (Max Farrand ed., 1966), available at [http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field\(DOCID+@lit\(fr003220\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(fr003220))).

⁷⁵ GLENN A. PHELPS, GEORGE WASHINGTON AND AMERICAN CONSTITUTIONALISM 24 (1993). “The feeling towards him was one of devotion, almost of awe and reverence. His presence in the convention was felt to be essential to the success of its work.” FARRAND, *supra* note 16, at 58.

future presidents. Wilson reminded those at the Convention: “We should consider that we are providing a constitution for future generations, and not merely for the peculiar circumstances of the moment.”⁷⁶ Similarly, Washington discussed this understanding with Madison, contemplating: “As the first of every thing, in our situation will serve to establish a Precedent, it is devoutly wished on my part, that these precedents may be fixed on true principles.”⁷⁷ “Thus Washington was well aware of his unique position in this regard and his adoption of a unitary executive structure was the result of his best constitutional judgment.” Realizing that all the details of his life – especially those during the Revolution – would be scrutinized for understanding, “[h]e even changed his handwriting and revised earlier, youthful letters, deleting less graceful wording so future generations wouldn't think him inelegant.”⁷⁸ Indeed, the Founding Fathers were very much focused on the future implications of the powers granted to the presidency, and keenly aware that they were setting specific precedents that later leaders would follow.⁷⁹

Having now established the importance afforded to history in the debate over executive power, this Article has presented evidence as to why Washington's actions deserve special consideration. Since these actions are those understood by the Framers to be just functioning of the American commander in chief and therefore subsequently enshrined in the Commander in

⁷⁶ The Debates in the Several State Conventions on the Adoption of the Federal Constitution, in 5 ELLIOT'S DEBATES 368, 373. Wilson again prophesizes, “the influence of the government we are to form will have, not only on the present generation of our people, and their multiplied posterity, but on the whole globe” *Id.* at 293.

⁷⁷ Letter from George Washington to James Madison (May 5.", 1789), in 12 THE PAPERS OF JAMES MADISON 131, 132 (Charles F. Hobson & Robert A. Rutland eds., 1979).

⁷⁸ Gary Robertson, *Opening a Window on Washington: Virginia Magazine Pays Tribute at Anniversary of His Death*, in The Papers of George Washington (December 14, 1999), available at <http://gwpapers.virginia.edu/articles/news/richmond.html>. See also W. W. Abbot, An Uncommon Awareness of Self: The Papers of George Washington, available at http://gwpapers.virginia.edu/articles/abbot_2.html. (“After the Revolution, Washington returned to these early papers and sought to prepare some of them for future perusal by others.”).

⁷⁹ See also, Letter from George Washington to Thomas Paine, 32 The Writings of George Washington, 38, 39. (“[T]he enlightened policy of the present age may diffuse to all men those blessings, to which they are entitled, and lay the foundation of happiness for future generations.”).

Chief Clause, the Washington Model provides insights into the originally-intended Article II, Section 2, clause 1 powers. Using this historical model in the next Parts, this Article will focus on the original intent support for the Bush Administration's power to use special military tribunals.⁸⁰

II. TO COURT-MARTIAL OR NOT TO COURT-MARTIAL

Modern military commissions have been faulted for deviating from the Congressional rules for courts-martial.⁸¹ What, exactly, is the historic difference between special commissions/tribunals and courts-martial? Tribunals have traditionally been described as “a quick and dirty way to curtail and eliminate due process and fair trial norms that have been carefully crafted for use in courts-martial and criminal trials.”⁸² Because of the relative lack of protection afforded to defendants in tribunals, whether a foreign enemy combatant must be tried in a court-martial proceeding, as opposed to a special tribunal, is of great import to modern debate. Since the Revolutionary War, courts-martial proceedings have been governed by Congress and provide some sort of minimal due process guarantee.⁸³ During the Revolution, Congress ensured that the proceedings were before a “panel [that] consisted of thirteen commissioned officers [in which the] president could not be the convening authority.”⁸⁴

⁸⁰ This Article does not seek to address the power of the Commander in Chief to initiate hostilities, as they had commenced prior to Washington's relevant actions.

⁸¹ “Because UCMJ Article 36 has not been complied with here, the rules specified for Hamdan's commission trial are illegal. The procedures governing such trials historically have been the same as those governing courts-martial.” Hamdan, 126 S. Ct. 2749 (U.S. 2006).

⁸² Richard J. Wilson, *Military Commissions In Guantánamo Bay: Giving "Full And Fair Trial" A Bad Name*, 10 GONZ. J. INT'L L. 63, 65.

⁸³ Christopher W. Behan, *Don't Tug On Superman's Cape: In Defense Of Convening Authority Selection And Appointment Of Court-Martial Panel Members*, 176 MIL.L.R. 190, 209 (June, 2003).

⁸⁴ *Id.*

Although historically granting no right to counsel,⁸⁵ in an attempt at a fair trial, “court members [in some instances] took an oath . . . promising to ‘duly administer justice ... without partiality, favor, or affection,’ and to use their ‘conscience, the best of [their] understanding, and the custom of war in like cases.’”⁸⁶ What is most important to modern debate is that when a person fell within the realm of court-martial proceedings, they were tried according to Congress’s rules and accompanying due process guarantees.

Military tribunals, on the other hand, were tried according to the commander’s discretion and did not necessarily provide any protections whatsoever. The processes of the trial – if one could even call them that – were largely left to the whims of the commander.⁸⁷ “While it is undoubtedly true that military commissions have invariably employed most of the procedures employed by courts-martial, that is not a requirement.”⁸⁸ Indeed, “[t]hese war-courts [were and are] indeed more summary in their action than are the courts held under the Articles of War, and . . . their proceedings . . . will not be rendered illegal by the omission of details required upon trials by courts-martial.”⁸⁹ As will be shown in Part III, such tribunals are characterized by “not being bound by the rules of procedure prescribed for General Courts Martial.”⁹⁰ The Bush Administration desires to be able to create such tribunals, as Washington did, since “[t]he military commander decides upon the character of the military tribunal which is suited to the occasion . . . and his decision is final.”⁹¹

When should a defendant be brought before a court-martial and when may a defendant be brought before a tribunal? The Revolutionary War precedent provides perspective: Under the

⁸⁵ 15 JOUR. CONT. CONG. 1277, 1278.

⁸⁶ Behan at 209.

⁸⁷ These tribunals were often more like investigative bodies than formal courts.

⁸⁸ Hamdan v. Rumsfeld, 165 L. Ed. 2d 723, 824 (U.S. 2006)

⁸⁹ I UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS 116-117 (1997).

⁹⁰ *Id.* at 117.

⁹¹ Hamdan quoting W. BIRKHIMER, MILITARY GOVERNMENT AND MARTIAL LAW 536, 537-538 (3d ed. 1914).

Articles of War passed in 1775, Congress made no provisions for trying spies. This was remedied in August 21, 1776, when Congress resolved:

All persons, not members of, nor owing allegiance to any of the United States of America...who shall be found lurking as spies in or about the fortifications or encampments of the armies of the United States...shall suffer death, according to the law and usage of nations...by sentence of a court martial, or such other punishment as such court-martial shall direct.⁹²

Although not technically an Article of War, this resolution nevertheless granted courts-martial legislative authority over spies.⁹³

Washington was fully cognizant of this resolution, as evidenced by his letter to members of Congress seeking clarification on it.⁹⁴ Indeed, *Ex Parte Quirin*⁹⁵ footnote 14 lists twenty spies – British and American alike – as being tried just as the resolution would suggest: under courts-martial proceedings. Additionally, Washington’s papers mention five other trials and two other spies were also found at the seat of Congress.⁹⁶ All were likewise tried in courts-martial. However, there is a major case in which Washington instead employed the use of a special tribunal: Major John Andre’s 1780 proceedings. While Andre’s trial by special tribunal was indeed a rare occurrence,⁹⁷ it nevertheless set an important precedent: Washington, when he “sought to avoid the formality of a regular trial” for a foreign enemy combatant, had the

⁹² Resolution of the Continental Congress (Aug. 21, 1776), in 5 Journals of the American Congress 1774 to 1779 693 (1906).

⁹³ The Government Brief’s argument that “at the time [of Andre’s execution], there was no provision in the American Articles of War providing for jurisdiction in a court-martial to try an enemy for the offense of spying” is technically true, but nevertheless misleading. *Brief for Appellants at 58, Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005)* (No. 04-5393).

⁹⁴ Letter from George Washington to Philip Livingston et al. (July 19, 1777), in 8 Writings at 444. (“Written after the new Articles of War were adopted in September 1776, it confirms Washington’s understanding that the resolution on spies was not superceded by the new law.” Glazier, at 8 n.97).

⁹⁵ 317 U.S. 1 (1942).

⁹⁶ Glazier, 21.

⁹⁷ Only Thomas Shanks and Thomas Lewis Woodward were similarly sent before a Board of General Officers. *See* Letter from George Washington to the Board of General Officers (June 2, 1778), in 12 Writings, supra note 19, at 11, and Letter from George Washington to Major General Israel Putnam (Feb. 20, 1777), in 7 Writings of George Washington 175 (John C. Fitzpatrick ed., 1932).

discretion to do so.⁹⁸ Even with a Congressional resolution “providing for jurisdiction in a court-martial to try an enemy,” Washington, solely by means of his commander-in-chief power,⁹⁹ could form a special commission as he saw fit.¹⁰⁰ This demonstrated power over the trials of foreign enemy combatants has original meaning implications that reverberate through to contemporary debate. The specific course of events surrounding the Andre Affair is detailed in Part III.

III. TRIBUNALS IN ACTION: COURTS MARTIAL V. SPECIAL TRIBUNALS

From the beginning of the war, Washington “ordered an examination into [prisoners’] cases, to know who of them were subject to Military Jurisdiction and who came properly under the cognizance of civil power.”¹⁰¹ According to Hamilton, Washington recognized, and Congress assented, that the “examination that [was] made . . . [was] somewhat irregular, and out of the common order to things; but in the . . . unsettled State of government, the distinction between Civilian and Military power, [could not] be upheld with that exactness which every friend to Society must [have] wish[ed].”¹⁰² Hamilton wrote that “[h]is Excellency desire[d] to avoid nothing more, than . . . the least Encroachment either upon the rights of the *Citizens*, or the

⁹⁸ Letter from George Washington to the Board of General Officers (June 2, 1778), in 12 WRITINGS, *supra* note 19, at 11.

⁹⁹ An important caveat is that Washington’s status during the Revolution was as an agent of Congress. This Article does not seek to address whether the President has additional powers under his executive authority rather than under his commander in chief powers specifically. The modern President, like Washington under the Continental Congress, “is Commander-in-Chief and [is] accountable for obeying acts of Congress” to this day. As during the Revolution, the “Commander-in-Chief . . . is precisely accountable to Congress’ decision to constrain the use of the armed forces. It is Congress’ option to impose such restrictions as it deems appropriate” as long as the powers are not already inherent to the Commander-in-Chief Clause. Bennett, *supra* note 81, at 27-28.

¹⁰⁰ Brief for Appellants at 58, *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005) (No. 04-5393).

¹⁰¹ Letter from Alexander Hamilton, by direction of George Washington, to Gov. William Livingston (April 21, 1777), 7 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 19, at 77, 77 n.450.

¹⁰² *Id.*

Magistrate.”¹⁰³ With this unwavering adherence to the proper procedure of the day, Washington tried enemy combatants in courts-martial on many occasions but in special military tribunals at other times.¹⁰⁴ Throughout the trials, Washington’s correspondence depicts a commander in chief eager to protect civil liberties but possessing the power – with the Continental Congress in agreement – to set up tribunals and refer foreign enemy combatants as he saw fit.¹⁰⁵ Accepting the realities of combat, Congress allowed Washington broad discretion over these tribunals. While often trying American troops and British infiltrates accused of spying in the typical court-martial according to congressional resolution, Washington nevertheless had the discretion to

¹⁰³ *Id.* [emphasis added].

¹⁰⁴ (1) Major John Andre, Sept. 29, 1780, . . . (2) Thomas Shanks was convicted by a ‘Board of General Officers’ at Valley Forge on June 3, 1778, for ‘being a Spy in the Service of the Enemy,’ and sentenced to be hanged. 12 WRITINGS OF WASHINGTON (Bicentennial Comm’n ed.) 14. (3) Matthias Colbhart was convicted of ‘holding a Correspondence with the Enemy’ and ‘living as a Spy among the Continental Troops’ by a General Court Martial convened by order of Major General Putnam on Jan. 13, 1778; General Washington, the Commander in Chief, ordered the sentence of death to be executed, 12 *Id.* 449-50. (4) John Clawson, Ludwick Lasick, and William Hutchinson were convicted of ‘lurking as spies in the Vicinity of the Army of the United States’ by a General Court Martial held on June 18, 1780. The death sentence was confirmed by the Commander in Chief. 19 *Id.* 23. (5) David Farnsworth and John Blair were convicted of ‘being found about the Encampment of the United States as Spies’ by a Division General Court Martial held on Oct. 8, 1778 by order of Major General Gates. The death sentence was confirmed by the Commander in Chief. 13 *Id.* 139-40. (6) Joseph Bettys was convicted of being ‘a Spy for General Burgoyne’ by coming secretly within the American lines, by a General Court Martial held on April 6, 1778 by order of Major General McDougall. The death sentence was confirmed by the Commander in Chief. 15 *Id.* 364. (7) Stephen Smith was convicted of “being a Spy” by a General Court Martial held on Jan. 6, 1778. The death sentence was confirmed by Major General McDougall. [*Id.*] (8) Nathaniel Aherly and Reuben Weeks, Loyalist soldiers, were sentenced to be hanged as spies. Proceedings of a General Court Martial Convened at West Point According to a General Order of Major General Arnold, Aug. 20-21, 1780 (National Archives, War Dept., Revolutionary War Records, MS No. 31521). (9) Jonathan Loveberry, a Loyalist soldier, was sentenced to be hanged as a spy. Proceedings of a General Court Martial Convened at the Request of Major General Arnold at the Township of Bedford, Aug. 30-31, 1780 (*Id.* MS No. 31523). He later escaped, 20 Writings of Washington 253n. (10) Daniel Taylor, a lieutenant in the British Army, was convicted as a spy by a general court martial convened on Oct. 14, 1777, by order of Brigadier General George Clinton, and was hanged. 2 Public Papers of George Clinton (1900) 443. (11) James Molesworth was convicted as a spy and sentenced to death by a general court martial held at Philadelphia, March 29, 1777; Congress confirmed the order of Major General Gates for the execution of the sentence. 7 JOURNALS OF THE CONTINENTAL CONGRESS 210. See also cases of ‘M. A.’ and ‘D. C.’ G. O. Headquarters of General Sullivan, Providence, R. I., July 24, 1778, reprinted in Niles, Principles and Acts of the Revolution (1822) 369; of Lieutenant Palmer, 9 WRITINGS OF WASHINGTON, 56n; of Daniel Strang, 6 *Id.* 497n; of Edward Hicks, 14 *Id.* 357; of John Mason and James Ogden, executed as spies near Trenton, N. J., on Jan. 10, 1781, mentioned in Hatch, ADMINISTRATION OF THE AMERICAN REVOLUTIONARY ARMY (1904) 135 and VAN DOREN, SECRET HISTORY OF THE AMERICAN REVOLUTION (1941) 410.

Ex parte Quirin, 317 U.S. 1, 42 n.14 (U.S. 1942) (emphasis added).

¹⁰⁵ *Id.*

create special tribunals for foreign persons when he deemed it necessary.¹⁰⁶ This only happened three times throughout the Revolution,¹⁰⁷ and the only well-documented case of Washington bringing an enemy combatant before a military tribunal was the infamous Major Andre Affair.¹⁰⁸ This famous occurrence created a precedent for the commander in chief's power to utilize tribunals without Congressional authorization.

After American General Benedict Arnold fell into debt and was charged with “various accounts of extortion on the citizens of Philadelphia, and with peculating funds of the continent,” his allegiances began to shift.¹⁰⁹ He began communicating military plans to British General Sir Henry Clinton, via British Major John Andre, in a plot to betray West Point to the enemy. Andre and his accomplice, Joshua Hett Smith, were captured attempting to relay this information on September 23, 1780.¹¹⁰ They were confined in the safety of American-controlled territory around the heavily-fortified, and now secure, West Point. Washington, without seeking any permission from Congress, understood it to be his mandate to decide the means of prosecution; interestingly, Andre received disparate treatment from Smith at Washington's discretion. Congress, while intervening regarding the American Smith's trial, deferred to Washington over the question of the foreign-born Andre.

¹⁰⁶ See *supra* note 104.

¹⁰⁷ The other cases involved Thomas Lewis Woodward and Thomas Shanks, Other than the fact that Shanks was “cashiered for stealing shoes” and hung as a spy by a Board of General Officers, no recordings of the specifics of the case survive. George Washington, General Orders (June 3, 1779), in 12 *The Writings of George Washington*, *supra* note 35.

¹⁰⁸ Discussed generally *supra* page 14.

¹⁰⁹ MARTIN, JAMES KIRBY, *BENEDICT ARNOLD, REVOLUTIONARY WARRIOR: AN AMERICAN WARRIOR RECONSIDERED* (NEW YORK UNIVERSITY PRESS, 1997).

¹¹⁰ See Letter from George Washington to Major General William Heath (September 26, 1780), 20 *THE WRITINGS OF GEORGE WASHINGTON*, *supra* note 19, at 89.

At the start of the war, Congress had made it a crime to spy for the enemy by explicitly granting court-martial jurisdiction over all enemy spies, as discussed.¹¹¹ Despite this Congressional resolution calling for the use of courts-martial proceedings for spies, the use of a military tribunal for a foreign enemy combatant was Washington's prerogative. Indeed, "while Congress repeatedly defined the jurisdiction of courts martial governing the armed forces, it . . . rarely defined the scope of military commissions."¹¹² "Rather than proceeding from specific Congressional grants, military commissions . . . [were] used 'as a pragmatic gap filler. . .'"¹¹³ As the Andre Affair demonstrates, Washington welded the discretion to try Andre in an ad hoc special court of inquiry even though Smith, although accused of the same offense, was tried in a congressionally-defined court-martial.

The most detailed account of the proceedings faced by the two spies can be found in Smith's autobiographical *AN AUTHENTIC NARRATIVE OF THE CAUSES WHICH LED TO THE DEATH OF MAJOR ANDRÉ*.¹¹⁴ His account elucidates the practical reality of the military proceedings – both court martial and tribunal – of the day. Along with Andre, Smith was taken to West Point, where he was detained in the provost guard room. Washington sent interrogators to question Andre and Smith without representation. After this captivity, however, the two prisoners' fates diverged.

A. Treatment of Americans

¹¹¹ Resolution of the Continental Congress, Aug. 21, 1776, in 1 *JOURNALS OF THE AMERICAN CONGRESS: FROM 1774 TO 1778*, at 450 (1823)

¹¹² Captain Brian C. Baldrate, *The Supreme Court's Role In Defining The Jurisdiction Of Military Tribunals: A Study, Critique, & Proposal For Hamdan V. Rumsfeld*, 186 *MIL. L. REV.* 1, 11.

¹¹³ *Id.* (quoting Glazier, *Kangaroo Court or Competent Tribunal?: Judging The 21st Century Military Commission*, 89 *VA. L. REV.* 2005, 2010 (2003)).

¹¹⁴ *JOSHUA HETT SMITH, AN AUTHENTIC NARRATIVE OF THE CAUSES WHICH LED TO THE DEATH OF MAJOR ANDRÉ, ADJUTANT-GENERAL OF HIS MAJESTY'S FORCES IN NORTH AMERICA* (1808).

The Continental Congress's experiences with their commander in chief reflect Washington's view of his own limited powers over fellow Americans. "Unlike other revolutionary leaders, both ancient and modern, Washington never declared martial law over civilians while conducting the war, demonstrating that a republican government could fight effectively in the face of overwhelming odds without resorting to the suspension of civil liberties."¹¹⁵ The Washington Model provides evidence that in the case of private Americans the military is subservient to the civil power in determining the proper trial.

In the beginning of the war, Washington agonized over whether he could decree that American civilians who aided the British be tried by military commissions. He wrote that a

doubt has arisen whether a person who belongs to any of the United States of America . . . that went over to the Enemy some time past, and since that time has been lurking about any of the Fortifications[.]. . . plundering[.] . . Recruiting for them, or committing any other atrocious Crimes . . . can be tried by a Genl. Court Martial . . . and punished as a spy.¹¹⁶

This "doubt" blossomed into outright admonishment after a hanging occurred a little more than a week later. American Brigadier General Preudhomme De Borre had tried a Tory by court-martial and had him executed.¹¹⁷ Washington reproved, "[w]ith respect to the Tory, . . . though his crime was heinous enough to deserve the fate he met with . . . it was a matter that did not come within the jurisdiction of martial law."¹¹⁸ There is indeed evidence of other occasions in which other Tories were tried by military court-martial, but Washington's concern is that such trials only be

¹¹⁵ Christopher A. Chrisman, *Article III Goes To War: A Case For A Separate Federal Circuit For Enemy Combatant Habeas Cases*, 21 J.L. POL 31, 40 (2005); see also Davies, *supra* note **Error! Bookmark not defined.**, at 76 (discussing presidential declaration of martial law). Martial law can be defined as "the rule which is established when civil authority in the community is made subordinate to military, either in repelling invasions or when the ordinary administration of the laws fail to secure the proper objects of the government," *Id.* at 86-87.

¹¹⁶ Letter from George Washington to Philip Livingston, Elbridge Gerry and George Clymer (July 19, 1777), in 8 THE WRITINGS OF GEORGE WASHINGTON, *supra* note **Error! Bookmark not defined.**, at 439, 445.

¹¹⁷ The details of the crime are unclear.

¹¹⁸ Letter from George Washington to Brigadier General Preudhomme De Borre (Aug. 3, 1777), in 9 THE WRITINGS OF GEORGE WASHINGTON, *supra* note **Error! Bookmark not defined.**, at 6, 7.

held in strict adherence to the civil power's directives.¹¹⁹ When it came to the crime of spying, Congress explicitly granted courts-martial jurisdiction and only by such a Congressional Resolution did the military have such control over an American's trial.¹²⁰ What is significant about the Tory cases is that the Commander in Chief had jurisdiction (and seemingly only court-martial jurisdiction) over Loyalists only due to explicit Congressional authorization, and Washington steadfastly adhered to his subservience to civil authority when dealing with Americans.¹²¹ Aside from charges of spying, Americans were to be tried in civilian courts, with fair trials and representation as decided by Congress.¹²² Showing great deference to Congress and the states, Washington clarified the basis for his conduct, writing, "it is not my desire, neither indeed is it within my power, [to interfere with] the Civil Power. [Civil authorities] best know the Charge and Merit of the Case, consequently should ultimately determine it."¹²³

Smith, as an American, fell under Congress's authority. And under the aforementioned resolution, Congress authorized the commander to try spies such as Smith by court-martial. Indeed, this afforded the American certain rights. While "commissioners of sequestration" initially seized Smith's property and arrested his nephew as an accomplice, under the order of Washington, the property was returned and the nephew released. Unlike what would befall Andre, Congress passed a specific resolution upon Smith's capture calling for his trial in a

¹¹⁹ In reading through Benedict Arnold's Papers, Washington found evidence of the trials of Jonathan Loverberry, Nathaniel Ackesly, and Reuben Weeks. Interestingly, each of these three trials was initiated by Benedict Arnold, not Washington. Washington learned of these trials while reading through Arnold's papers after he was discovered to be a spy, and did not confirm the sentences as he usually did in other cases. George Washington, General Orders (October 24, 1780), in 20 THE WRITINGS OF GEORGE WASHINGTON, *supra* note **Error! Bookmark not defined.**, at 253, 253. *See also* WALLACE BROWN, THE GOOD AMERICANS, THE LOYALISTS IN THE AMERICAN REVOLUTION 138 (describing journalist accounts of Tory executions.)

¹²⁰ Hence, Washington's fixation on whether "a person who belongs to any of the United States of America . . . can be tried . . . and punished as a spy." Letter from George Washington to Philip Livingston, Elbridge Gerry and George Clymer (July 19, 1777), in 8 THE WRITINGS OF GEORGE WASHINGTON, *supra* note **Error! Bookmark not defined.**, at 439, 445.

¹²¹ *Id.*

¹²² John Ross successfully represented "[l]oyalists prosecuted by [Congressman Joseph] Reed in the state courts." WILLARD STERNE RANDALL, BENEDICT ARNOLD: PATRIOT AND TRAITOR 425-31, *available at* http://www.cooperativeindividualism.org/randall_on_benedict_arnold.html.

¹²³ Letter from George Washington to Brigadier General Thomas Mifflin (Feb. 14, 1777), in 7 THE WRITINGS OF GEORGE WASHINGTON, *supra* note **Error! Bookmark not defined.**, at 151, 151.

special court-martial.¹²⁴ Specifically, it reiterated that Smith was to be tried under “a 1777 resolve of Congress authorizing the commander in chief of the army, to hear and try by court-martial, any of the citizens of the United States who should harbour or [abet] any of the subjects of soldiers of the King of Great Britain.”¹²⁵ The court-martial consisted of 14 soldiers, who were seen as a “packed jury” because they were predominantly from Connecticut and therefore, as Arnold’s countrymen, were more likely to be enraged at Smith.¹²⁶ Smith was formally charged with ten counts, which, upon his request, were consolidated into one: “You stand charged with aiding and abetting Benedict Arnold, late major general in our service, in a combination with the enemy, for the purpose of taking, seizing, and killing, such of the loyal soldiers of these United States, as were garrisoned in West Point.”¹²⁷ During the initial proceedings, Smith was allowed to make a case – albeit unsuccessfully – for citizens being only amenable to the civil courts. He argued that he had

a right to trial by jury in the constitution recently adopted, determining the liberties of the subject within the state [of New York and] a mere resolve of Congress could [not] abrogate a fundamental article in any of the any of the civil constitutions of the United States, for if so, it made the military paramount to the civil authority.¹²⁸

After deliberation, the court-martial ultimately rejected this argument and the proceedings commenced with hearing testimony.

In what turned out to be a rather thorough inquiry, many witnesses were called and formally questioned before Smith. Marquis de la Fayette, General Knox, and Colonels Harrison and Hamilton all gave (somewhat conflicting) accounts of Smith’s involvement in the Andre Affair. Next, the testimony of two boatmen, Samuel and Joseph Colquhoun, then corroborated

¹²⁴ A. Wigfall Green, *The Military Commission*, 42 AM J. INT’L L. 832, 833 (1946).

¹²⁵ JOSHUA SMITH 131.

¹²⁶ *Id.* at 211.

¹²⁷ *Id.* at 130.

¹²⁸ *Id.* at 132.

Smith's account. Despite "disgraceful means that were used to impeach the integrity of the eldest Samuel," the two men "seemed to have much weight with the court-martial."¹²⁹ The court then turned to two ferrymen, who reported seeing "no intimacy between Major Andre and [Smith]" in their separate dispositions.¹³⁰ Finally, two militiamen testified to finding a paper on Andre that listed Smith's name, to which Smith did not object since "no man was bound to say that legally which might condemn himself."¹³¹ The court-martial process continued for weeks, with many witnesses deposed. Smith, although without counsel, presented a defense for 48 hours. After a fortnight of deliberations, Smith was acquitted due to lack of evidence, despite being captured right with Andre and top generals testifying against him. He was then released to the civil authority of New York for separate trial but escaped to New York City before proceedings commenced.¹³²

i. Implications for Today: Padilla

On April 3, 2006, the Supreme Court decided not to hear the habeas corpus petition of Jose Padilla, a U.S. citizen who was held for more than three years in military custody as an enemy combatant.¹³³ The District Court for the Southern District of New York had "accepted the Government's contention that the President has authority as Commander in Chief to detain as enemy combatants citizens captured on American soil during a time of war."¹³⁴ The Supreme Court's basis for dismissing the case rested on the fact that Padilla has been released from

¹²⁹ *Id.* at 137.

¹³⁰ *Id.* at 139.

¹³¹ *Id.*

¹³² See Letter from George Washington to George Clinton (October 29, 1780) in 20 WRITINGS OF GEORGE WASHINGTON, *supra* note 35, at 262.

¹³³ Padilla v. Hanft, 126 S.Ct. 1649 (2006).

¹³⁴ Rumsfeld v. Padilla, 542 U.S. 426, 426 (2004); see also Press Release, Department of Justice, Statement Of Mark Corallo, Director Of Public Affairs, on the Padilla Decision (Dec. 2003), available at <http://www.fas.org/irp/news/2003/12/doj121803.html>. The Department of Justice argued that the detention was justified because "President Bush, acting as Commander in Chief, determined that . . . Jose Padilla, is an enemy combatant who poses a serious and continuing threat to . . . national security [so he] was subsequently transferred from the custody of the Justice Department to the control of the Defense Department." *Id.*

military custody and is being tried in Federal District Court with a criminal defendant's full Constitutional protections. Three Justices, however, warned that "[w]ere the Government to seek to change the status or conditions of Padilla's custody, [the courts] should act promptly to ensure that the office and purposes of the writ of habeas corpus are not compromised."¹³⁵ Based upon Washington's actions during the revolution, this Section finds that Padilla's three year military detention was inconsistent with the Washington model and the original intent of commander-in-chief powers.¹³⁶ As indicated by the Supreme Court, only now that the Administration released Padilla to the jurisdiction of the Federal Courts is Bush back within the limits of his commander-in-chief powers.

Analogously to the Smith Case, Padilla, a private citizen accused of turning to the enemy, can only be tried according to Congressional – and not the Commander in Chief's – discretion. According to the Washington model, while President Bush may have broad powers in handling foreign combatants,¹³⁷ original intent evidence suggests that his power over private Americans is heavily curtailed. Washington made it quite clear that "[t]he establishment of military law where the civil prevails, is a measure of extreme necessity, and which [the commander in chief has] no authority to recommend."¹³⁸ This strongly supports the Justice Kennedy's assertion that Padilla should be afforded "the protection, including the right to a speedy trial, guaranteed to all federal criminal defendants."¹³⁹ From an originalist perspective, it is beyond Bush's commander-in-chief

135. Padilla, 126 S. Ct. 1649, 1650.

136. While it was not unknown for Americans to be held and treated as foreign combatants throughout the Revolution, this was due to the difficulty of classifying whether the individual was an American or implanted by the British ("The examination that is made . . . is somewhat irregular, and out of the common order to things; but in the . . . unsettled State of government, the distinction between Civilian and Military power, cannot be upheld with that exactness which every friend to Society must wish.") Letter from Washington to Governor Jonathan Trumbull, 7 THE WRITINGS OF WASHINGTON, 450 n.90 (April 21, 1777). In modern times, this defense holds little weight, as a person's citizenship may be much more easily ascertained, as Padilla's was.

137. As discussed *infra* Section B.

138. Letter from George Washington to Colonel Daniel Brodhead (May 21, 1779), *in* 15 Writings of Washington, 119, 119.

139. Padilla v. Hanft, 126 S. Ct. 1649, 1650 (2006) (denying certiorari) (Kennedy, J., concurring).

powers to direct otherwise.¹⁴⁰ However, when the prisoner is not an American, the Washington Model suggests that the Commander be allotted far greater discretion.

B. Foreign Enemy Combatants

Major Andre, a British subject, faced a different experience under a special tribunal. Congress left the format of his “trial” and the rights allotted to him to their Commander in Chief’s discretion.¹⁴¹ Days after Andre’s capture, Washington had determined to forgo a typical court-martial and chose to hold the proceedings under a specially-appointed “Board of General Officers.” Regarding Major Andre’s actions in aiding Benedict Arnold, Washington wrote, “Major Andre was taken under such circumstances as would have justified the most summary proceedings against him. *I determined* however to refer his case to the examination and decision of a Board of General Officers.”¹⁴² Always meticulously conscientious of proper procedure, Washington deemed it proper to refer Andre to a special tribunal rather than the typical military court-martial as directed by Congress. This tribunal was to be assisted by Judge Advocate John Laurance and was charged with examining the “sundry . . . papers relative to this matter, which he [would] lay before the Board.”¹⁴³

140. There may be one exception to this: Washington determined that Thomas Shanks, an ensign in the Tenth Pennsylvania Regiment, should be tried by special tribunal. *See* Letter from George Washington to the Board of General Officers (June 2, 1778), *in* 12 THE WRITINGS OF GEORGE WASHINGTON, *supra* note **Error! Bookmark not defined.**, at 11. However, Shanks was not a private citizen, and it is not even clear whether he was even an American or a British plant.

¹⁴¹ Glazier asserts that this was not even a trial, *per se* (“Although Washington himself at least once referred to Andre as having been “tried,” 81 the Board was an advisory panel, not a “court” that legally determined guilt or imposed a sentence”) 46 VA. J. INT’L L. 5, 19. This Article is not concerned with whether this was an actual trial but seeks to merely show that the Commander in Chief had full discretion in its treatment of foreign combatants – trial or not.

¹⁴² Letter from George Washington to Sir Henry Clinton (Sept. 30, 1780), *in* 20 WRITINGS OF GEORGE WASHINGTON, *supra* note 35, at 103 (emphasis added).

¹⁴³ Letter from George Washington to the Board of General Officers (September 29, 1780), *Id.* at 101.

Although “no precise charge was exhibited against him,” the investigation speedily commenced.¹⁴⁴ “[T]here was at the time no aid to assist Andre”¹⁴⁵ and the only counseling he did receive was from the appointed Judge Advocate, who merely suggested he “not hasten his replies to the interrogatories . . . and if the questions appear to him to be worded with ambiguity, to demand a fair explanation of them, which would be granted.”¹⁴⁶ The Board primarily delved into the transcripts of Andre’s answers to previous interrogatories during captivity, in which he argued that he could not be treated as a spy since he was a “prisoner of war subject to Arnold’s orders.”¹⁴⁷ However, this testimony conflicted with letters – evidence of which Andre was unawares – from Arnold and British General Clinton, who claimed that Andre had traveled under a flag of truce.¹⁴⁸ During lengthy questioning by the Board, Andre was “defenseless, friendless.”¹⁴⁹ The United States’ case was based almost entirely on hearsay,¹⁵⁰ as “[n]o witnesses were adduced, nor could any be brought who had the slightest knowledge of the secret part of [the Arnold] transaction.”¹⁵¹ Instead, the Board relied upon the written “statements of some facts” from Andre’s captors, regarding his disguised dress and the documents found in his possession.¹⁵² In addition, the tribunal viewed interrogatories aimed at determining Andre’s character.¹⁵³ Andre had no opportunity to confront these witnesses against him.¹⁵⁴ After reviewing all of this “evidence,” the board of fourteen officers quickly debated, with Baron De

¹⁴⁴ JOSHUA SMITH, 92.

¹⁴⁵ *Id.* at 152.

¹⁴⁶ *Id.* at 92.

¹⁴⁷ EDWARD W. KNAPPMAN, ED., 1 GREAT AMERICAN TRIALS 72, 75.

¹⁴⁸ JOSHUA SMITH, 92.

¹⁴⁹ *Id.* at 99.

¹⁵⁰ Were this in a courts-martial proceeding during the present day, virtually all of the government’s case would likely constitute a violation of federal rule of evidence 801.

¹⁵¹ JOSHUA SMITH, 99.

¹⁵² *Id.*

¹⁵³ *Id.* at 107.

¹⁵⁴ Were this in a courts-martial proceeding during the present day, this would likely constitute a violation of the confrontation clause of the 6th Amendment.

Stuben arguing that, according to Grotius and Puffendorf,¹⁵⁵ Andre ought not be condemned.¹⁵⁶ Nevertheless, De Stuben was overruled by a majority, and, within days of his capture, the Board held that “Major John Andre, adjunct general of the British army, ought to be considered as a spy form the enemy, and that, agreeably to the law and usage of nations, it is there opinion that he ought to suffer death.”¹⁵⁷

Without a formal charge, a unanimous vote, representation, means of adequate discovery, a right to confrontation, or even direct questioning of pertinent witnesses, Andre was sentenced to death based upon admitted hearsay. While he was given adequate quarter – albeit one in which he was constantly interrogated – and was informed by the Laurance of his right to fair explanation of questioning, Andre had little chance to mount a defense in this ad hoc system of justice. Indeed, “Washington handled Andre's case more summarily than the actual court-martial that [the] Congress[ional Resolution] had called for.”¹⁵⁸

This historical account demonstrates the understanding of military proceedings during the Revolutionary War. Far from an isolated incident that may have been unknown or forgotten by the Framers, Washington’s Andre tribunal was a widely publicized event that received Congressional approval.¹⁵⁹ Besides the fact that “[t]he Board was a virtual who's who of revolutionary figures with General Nathanael Greene as president of the Board,” “there was also a political element” ensuring widespread attention to the whole affair.¹⁶⁰ The British eagerly wanted Andre’s return and Washington engaged in high level negotiations in an unsuccessful bid to exchange for Benedict Arnold. Washington kept Congress and New York Governor George

¹⁵⁵ See Hugo GROTIUS, RIGHT OF WAR AND PEACE (2005 ED.) 3 VOLS., PUFFENDORF, LAW OF NATURE AND NATIONS.

¹⁵⁶ JOSHUA SMITH, 99.

¹⁵⁷ *Id.* at 107.

¹⁵⁸ Glazier, 46 VA. J. INT'L L. 5, 21.

¹⁵⁹ See Proceedings of a Board of General Officers Respecting Major John Andre (Francis Bailey ed., 1780).

¹⁶⁰ Turley at 722.

Clinton abreast of the whole situation, sending reports and transcripts of the proceedings daily, thus ensuring that other future Framers indeed understood his actions.¹⁶¹ Signaling a shared belief that foreign enemy combatants need not be afforded significant legal protection, Congress did not object.¹⁶² Despite a resolution on the books calling for enemy combatants to be tried by courts-martial, they deferred to their Commander's discretion in forming a special tribunal and deciding its rules. The minutes of the Continental Congress reflect no debate over the legality of Washington's actions and only indicate assumed propriety of his handling of Andre.¹⁶³ After his hanging, Congress demonstrated its approval of the trial by cheering Washington and the fact that "insidious designs of the enemy [had been] baffled, and the United States rescued from impending danger."¹⁶⁴

Some contend that the urgency of the war forced Congress to allow such tribunals and, therefore, this original intent evidence is not applicable today.¹⁶⁵ However, this attack on the relevance of the Washington model to present debate becomes irrelevant itself when one considers this Article's "control variable:" Joshua Hett Smith. The Continental Congress' acquiescence to Washington's control over foreigners does not appear to be necessarily fueled by desperation. The argument that Congress allowed Washington to convene a tribunal because it was too busy fighting for its life to employ all the procedures normally required fails to consider the parallel case of Smith. As discussed *supra*, pages 20-25, many prisoners received full courts-martial proceedings. Smith's case is especially pertinent because his trial was at the same time,

¹⁶¹ Washington also recommended that Congress publish these proceedings and the relevant letters from Andre and Arnold. Letter from George Washington to the President of Congress (October 7, 1780), 130.

¹⁶² 20 WRITINGS OF GEORGE WASHINGTON, *supra* note 35.

¹⁶³ See Journals of the Continental Congress 1774-1789, October 1780.

¹⁶⁴ *Id.* at 1009 (November 3, 1780).

¹⁶⁵ "Is our Congress today in more danger than were their predecessors when the British army was marching on the Capitol?" Transcript: Former Vice President Gore's Speech on Constitutional Issues, WASHINGTONPOST.COM, (January 16, 2006). The Bush Administration has been charged with attempting to create "a sense that we were facing a dire threat" when we are not. Transcript: Presidential Address, American Morning, CNN (September 12, 2006).

with the United States facing the same uncertainty, as during Andre's commission, yet desperation did not preclude the military from conducting a full court-martial investigation according to their resolution. In a nutshell, the Found Fathers possessed the means to try Andre according to whatever procedures they deemed proper. Despite Congress's resolution calling for prisoners such as Smith and Andre to be tried by courts-martial, the Founding Fathers deemed it proper for Washington to decide to try Andre by special tribunal.

At the time of the signing of the Constitution, the Framers assumed what military justice ought to be accorded to foreign enemy combatants was left to the discretion of the Commander in Chief. It was this sentiment, based on their shared experiences and understandings developed throughout the war, that characterizes the original meaning of commander-in-chief powers with respect to trying foreigner combatants. The Framers understood their commander to wield the power to utilize tribunals for foreigners without Congressional authorization.¹⁶⁶

IV. CONCLUSION: HISTORY'S IMPLICATIONS

Professor Gordon Wood noted that one can "make little or no sense of the various institutional or other devices written into the Constitution" until one understands "the assumptions from which the constitution-makers acted."¹⁶⁷ George Washington's actions and writings throughout the Revolutionary War reveal much about the original understanding of the Commander-in-Chief Clause with regard to military tribunals. With the Revolution, the Founding Fathers were establishing a new and radical republic. They consciously sought to break away from not only British dominance but also the entire monarchical system. In doing so, however, they needed to develop their own alternative. In forming their own understanding of

¹⁶⁶ And even despite a resolution commanding otherwise.

¹⁶⁷ GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at viii (1969).

the commander in chief, the Continental Congress experimented with the only commander in chief the United States ever had: George Washington.

This Article finds evidence for the Commander's possession of quite limited power over the trial of American citizens. As the Smith case demonstrates, the Washington and the founding fathers understood civil authorities to have control over Americans. Smith, while captured under the similar circumstances as Andre, was afforded rights that his co-conspirator was not. Andre was immediately turned over to the civil authorities. Such original intent evidence supports the Court's holding in *Padilla*. It seems that, based upon their experiences during the Revolution, the Framers intended that there be civil control in the case of an American such as Padilla. However, the evidence is far different when the prisoner is a foreigner.

Focusing on the Framers' understanding of military tribunal procedure, the Washington model lends original intent support for the Bush Administration's use of special military tribunals for trying foreign combatants.¹⁶⁸ From a strictly original intent-based perspective, the President may not only decide to try foreign combatants in special tribunals but also possesses wide discretion over the rights – or, more likely, lack thereof – afforded the defendant. This analysis's findings provide historical backing for a central premise of *Amicus Brief of Former Attorneys General, et al.* that

[t]he Framers created a Chief Executive, answerable to the entire body politic, and assigned him both the duty and the power to defend that body politic from all armed aggression from abroad. The Framers' decision must be respected today, and the President must be given the discretion to choose the military and diplomatic strategy he and his advisors believe will best protect the Nation and defeat our enemies. The use of military commissions to punish and deter violations of the laws of war is part of the battle plan itself. The form and function of such tribunals are a matter of Executive discretion – no more or less than questions of troop strength or choice of weaponry – and their control must remain entirely within the chain

¹⁶⁸ It may be argued that Washington was confronting a more dire situation—one of literal life and death not only for soldiers, but regular citizens and even statesmen as well – while Bush can hardly claim such dire straits. Thus, Bush's power should be prorated according to this diminished context. Especially in light of the September 11, 2001 terrorist attacks on U.S. soil, it is nearly impossible to accurately assess the direness of the situation. This Article does not attempt any such assessment and merely purports to show whether there is or is not original intent evidence for the commander in chief power to use special tribunals.

of military command.¹⁶⁹

This Article’s historical inquiry provides original intent evidence supporting deference to the Commander in Chief’s discretion regarding – even arbitrary and seemingly unjust – military proceedings against foreign enemy combatants.¹⁷⁰ Whether original intent findings such as those of this Study are dispositive or merely a “default point of departure” is certainly widely debated; however, this Article’s evidence does not contend to serve as the final say but is instead merely one of the considerations in deciding this Constitutional question.¹⁷¹ It views the power of the commander to utilize special military tribunals through a narrow lens: finding original intent support for specific presidential authority based upon Washington’s actions during the Revolutionary War. Harnessing this approach, this Article advances present debate over presidential war powers by providing historical evidence of the American commander in chief’s power to utilize special military tribunals without Congressional authorization.

¹⁶⁹ Amicus Brief of Former Attorneys General, et al., *Hamdan v. Rumsfeld*.

¹⁷⁰ The original intent evidence from the time of the signing of the Constitution suggests that the Administration has the power to utilize tribunals for foreign enemy combatants without Congressional Authorization. It may certainly be argued that there is a difference between an actual war and a foreign military operation. Nevertheless, both the Revolutionary War and Operation Enduring Freedom in Afghanistan represent hostilities backed by Congressional authorization. After gaining this approval, both commanders in chief captured foreign enemy combatants in the course of their military operations. While it is debatable whether the capture on U.S. soil makes a difference, this Article serves to present evidence of the commander in chief’s power to refer a foreign enemy combatant to a special military commission without specific Congressional authorization.

¹⁷¹ Galston, *supra* note 9.