George vs. George vs. George: Commander-in-Chief Power

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George vs. George vs. George: Commander-in-Chief Power

Brian Logan Beirne*

Introduction ............................................................................................................. 266

I. The Model Commander: George III vs. George Washington .................... 271
   A. Modeled After George III? ................................................................. 271
   B. Rejecting George III ........................................................................ 274
      1. The War Years: Evolving Understanding ........................................ 275
      2. Framing the Constitution ............................................................ 277

II. The Washington Model: The Context of Washington’s Actions .............. 280
   A. Rule by Committee: A Weak Commander ......................................... 280
   B. Washington’s War: A Strengthened Commander ............................. 285
   C. Approval of Washington’s Wartime Conduct .................................... 289

III. Implications of the Washington Model: The Powers of George
     Washington vs. the Actions of George W. Bush ............................... 290
    A. Congressional Consultation During Times of War ......................... 290
    B. Rights of Americans ...................................................................... 296
       1. Suspending Habeas Corpus ......................................................... 297
       2. Seizure of American Property .................................................... 301

Conclusion .......................................................................................................... 307

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INTRODUCTION

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.¹

In responding to attacks on his handling of the broadly defined war on terror, President George W. Bush declared, “As President and Commander-in-Chief, I have the constitutional responsibility and the constitutional authority to protect our country. Article II of the Constitution gives me that responsibility and the authority necessary to fulfill it.”² Days later, the Administration again invoked commander-in-chief powers upon signing a congressional measure to ban torture, warning that “the executive branch shall construe the section in a manner consistent with the President’s constitutional authority as Commander in Chief” and adding that “situations may arise, especially in wartime, in which the President must act promptly under his constitutional grants of executive power and authority as Commander in Chief.”³ What exactly are these commander-in-chief powers to which the President repeatedly refers?

In interpreting constitutional questions such as these, the Bush Administration ardently advocates an originalist approach. In deciding upon the nominations of Chief Justice John Roberts and Justice Samuel Alito, Bush “pledged to make 'original meaning'⁴ appointments in the mold of Justices Scalia and Thomas.”⁵ 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

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4. This Note 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, since 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 Revolutionary 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 text accompanying notes 119-23. For further discussion on original intent and original meaning, see, for example, ROBERT H. BORK, THE TEMPTING OF AMERICA 144 (1990).
war-making powers using an originalist approach. 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 cases “indicate[d] that a majority believe[d] history to be relevant, if not decisive, on questions of constitutional structure,” and some justices treat historical evidence as dispositive in interpreting the Constitution. Even those critical of expansive executive power, such as Dean Harold Koh, and Professors Michael Glennon and Louis Henkin, employ original intent arguments. Both sides of the spectrum 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.” 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.” It is not the purpose of this Note to rehash the debate over the importance of original intent. This study instead assumes that the Framers’ understanding is at least a consideration in interpreting the Constitution. Accordingly, this Note seeks to use the lens of


10. Yoo, War and Peace, supra note 6, at 25.

11. See Martin S. Flaherty, Symposium, More Apparent Than Real: The Revolutionary Commitment to Constitutional Federalism, 45 U. KAN. L. REV. 993, 1006 (1997) (“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, au-
original intent to examine the meaning of Article II, Section 2, Clause 1 of the United States Constitution based upon the actions of the only commander in chief to lead the fledgling United States of 1787: General George Washington.

General Washington "was obliged . . . to teach Congress how to govern a nation at war." With his numerous communications as commander in chief and statesman, Washington kept the Framers well informed of his actions throughout the Revolution. In doing so, he also communicated his understanding of the role of the American commander in chief. This Note contends that the Framers' understanding of the term "commander in chief" was shaped by their experiences with Washington. As a result, in

12. See supra note 1.

13. 1 Henry Cabot Lodge, George Washington 170 (1898 ed.).

14. This study draws 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. L. Rev. 2095, 2101 (1999) ("[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.").

15. See 1 Lodge, supra note 13, at 166 ("In the hours 'allotted to sleep,' [General Washington] 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.] The task of facing and fighting the enemy was enough for the ablest of men; but Washington was obliged also to combat and overcome the inertness and dullness born of ignorance, and to teach Congress how to govern a nation at war.").

16. Many legal scholars agree with the key assertion that Washington shaped the Framers' conception of the executive's powers. See, e.g., Akhil Reed Amar, America's Constitution 135 (2005); Max Farrand, The Framing of the Constitution of the United States 64-67 (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) ("[T]he 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 9 (Princeton University, James Madison Leadership Conference Paper, Feb. 2004), available at http://web.princeton.edu/sites/jmadison/calendar/conferences/Washington%
writing Article II, Section 2, Clause 1, the Framers' concept of the powers the clause encompassed was based upon the Washington model. Therefore, this model characterizes original intent for the powers of the American commander in chief.

This framework produces provocative conclusions about the war powers of the modern presidency. The Washington model provides original intent evidence for the President's power under the Commander-in-

17. At the start of the war, the Framers were indeed influenced by English history and political theorists John Locke, William Blackstone, and Montesquieu. John Yoo, Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation: Way Out There in the Blue: Reagan, Star Wars and the End of the Cold War, 89 CALIF. L. REV. 851, 883-84; John C. Yoo, Note, Marshall's Plan: The Early Supreme Court and Statutory Interpretation, 101 YALE L.J. 1607, 1609-10 (1992). This Note does not contend that this political theory was irrelevant. Instead, this Note asserts that the Washington model is an adaptation of these theories, as they were distilled through the Framers' firsthand, practical experience with Washington during the Revolution. See Flaherty, supra note 14, at 2112 ("More important in any case was the Founders' own experience."). See generally EDMUND S. MORGAN, THE BIRTH OF THE REPUBLIC, 1763-89 (1st ed. 1956). 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 16. For this reason, the Washington model holds great weight for the original intent (and meaning) of the Commander-in-Chief Clause.

18. This Note 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.
Chief Clause to refrain from ex ante congressional consultation regarding strategic military actions after initiation of hostilities; and (2) the President’s duty to,19 (A) keep Congress informed of his wartime actions whenever possible, (B) always defer to Congress when taking custody of non-enlisted American citizens, and (C) to refrain from attempting to infringe upon Congress’s Takings power without explicit congressional authorization.20

The ambitious range of the issues addressed by this Note is permitted by its narrow focus. Each of these issues is addressed from a purely originalist perspective. This Note restricts its scope to the evaluation of modern presidential powers under the Commander-in-Chief Clause based upon Washington’s Revolutionary War precedent.21 It examines what Washington’s war actions and writings imply for modern presidential war power. The weight that should be afforded to the conclusions of this Note depends upon each reader’s subjective convictions regarding the importance of original intent. 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.

Part I begins by establishing Washington as the Constitution’s model commander in chief. This Note then analyzes the consequences of this model for our contemporary understanding of commander-in-chief powers. While many scholars espouse the importance of original intent in their arguments and many others point to Washington as the model,22 current literature does not connect the two concepts in a comprehensive analysis.23

19. This Note only considers those powers inherent in the original intent of the Commander-in-Chief Clause. Because Washington possessed only commander-in-chief—and not executive—powers during the Revolution, it is beyond the scope of this Note to address whether the President has these limitations under the President’s “general residuum of ‘executive Power’... above and beyond” Article II, Section 2 of the U.S. Constitution. AMAR, supra note 16, at 185. This is further discussed infra note 137.


21. As this Note focuses purely on original intent evidence, it is beyond its scope to address subsequent legislation and treaties. Likewise, this Note does not seek to attend to modern moral and political arguments surrounding these issues. It is not the purpose of this Note to attend to each nuance of present debate.

22. See supra note 16 (citing works that back this assertion).

23. To date, “[f]or all its scavenging tendencies, the legal community has yet to consider this body of scholarship and relate it to modern federalism controversies. Even worse, legal professionals generally have failed to make any credible historical assertions about federalism, whether about the American Revolution or the Founding itself.” Flaherty, supra note 11, at 995 (internal ci-
Indeed, there is a surprising dearth of scholarship regarding the implications of a Washington model for presidential powers. This Note advances our understanding of the original intent of Article II, Section 2, Clause 1 by scrutinizing Washington's actions as commander in chief of the Continental Army. Part II provides the context of Washington's actions within the broader scope of the Revolutionary War and demonstrates their significance for the period. Part III delves into the specific events of the Revolutionary War most pertinent in analyzing the Washington model's implications for the modern presidency. This approach reveals striking and controversial conclusions in Part IV regarding the war-making powers of the presidency.

I. The Model Commander: George III vs. George Washington

Were the Framers basing their understanding of "commander in chief" upon the model against which they were rebelling (the monarchical government of King George III) or were they developing their own understanding of the phrase based upon their experiences with the Commander in Chief of their own forces? This Part contends that the Framers were forming their own notions alongside their own form of government. It begins by discrediting the use of the George III model and concludes by reinforcing the validity of the Washington model.

A. Modeled After George III?

John Yoo, while an attorney in the Justice Department, advised the White House that it was crucial to centralize authority in the executive regarding matters of national defense and foreign policy. He justified his

iblings omitted). See generally Martin S. Flaherty, The Most Dangerous Branch, 105 Yale L.J. 1725 (1996) (discussing the proper historical methods for analyzing the Framers' conceptions of separation of powers); Martin S. Flaherty, History "Lite" in Modern American Constitutionalism, 95 Colum. L. Rev. 523 (1995) ("[Historical scholarship] now provides unprecedented opportunities for informing our constitutional present with our constitutional past. Such, at any rate, is the case with the Founding and, no less important, the developments that led to it.").

24. See Morgan, supra note 17, at 135 (noting that the Convention succeeded "not simply because the members possessed a common economic or class interest but because they held common principles, principles learned in twenty years of British tyranny and American seeking").

25. Memorandum from John Yoo to Timothy Flanigan, Deputy Counsel to the President, The President's Constitutional Authority To Conduct Military Operations Against Terrorists and Nations Supporting Them (Sept. 25, 2001), http://www.usdoj.gov/olc/warpowers925.htm. ("The centralization of authority in the president alone is particularly crucial in matters of national defense, war and foreign policy, where a unitary executive can evaluate threats, con-
view of a powerful executive using an originalist approach. In *The Powers of War and Peace*, Yoo cites the powers of the British monarch (who, at the time of the Revolution, had been King George III for the last generation) as the Framers’ understanding of the executive and suggests “that the Framers did not wish to alter the constitutional authorities” known while under the British Crown. Although they threw off the weight of British political control, the Framers did not reject immediately the British system of government.” Citing backing from William C. Banks and Peter Raven-Hansen, he contends “[t]he Constitution’s provisions did not break with the tradition of their English, state, and revolutionary predecessors, but instead followed in their footsteps.” Yoo has argued that, in creating the federal

do consider policy choices, and mobilize national resources with a speed and energy that is far superior to any other branch.”).

26. It is not the purpose of this Note to rehash the George III Model but instead to focus on the model contended to be the relevant one: the Washington model. For a discussion on the King’s commander-in-chief powers, see William Blackstone, 2 Commentaries *249-62; see also Walter Bagehot, The English Constitution 21-96, 120-49 (Oxford Univ. Press 1963 ed.) (1915).

27. Yoo, War and Peace, supra note 6, 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 6, and John C. Yoo, Clio at War: The Misuse of History in the War Powers Debate, 70 U. Col. L. Rev. 1169, 1191-222 (focusing on the British model for the Declare War Clause). But see Gordon S. Wood, Creation of the American Republic (2d ed. 1998) (“[The resulting 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.”); Louis Fisher, Unchecked Presidential Wars, 148 U. Pa. L. Rev. 1637, 1637 (2000) (noting the Framers “specifically rejected the British model”); Ernest R. May, The President Shall Be Commander in Chief, in The Ultimate Decision 8 (Ernest May ed., 1960) (“Memories of the Revolution certainly influenced the generation of 1787. So did the fact that the former commander in chief was expected to be the first president. . . . [M]ost men were visualizing Washington not only in his old post but also in the new one. . . . Respect for Washington’s political as well as military capabilities thus had something to do with the framing of the commander-in-chief clause.”); supra note 16 (citing works that counter Yoo’s assertion).

28. Yoo, Continuation of Politics, supra note 6, at 197.

29. Id. (citing William C. Banks & Peter Raven-Hansen, National Security Law and the Power of the Purse (1994)); see also John C. Yoo, War Powers: War and the Constitutional Text, 69 U. Chi. L. Rev. 1639, 1649 (2002) (“During the ratifying conventions, . . . the Framers . . . understood the allocation of the war power between the President and Congress against the his-
democracy, “Madison drew upon British history . . . [of] the crown’s control
over the use of military force”30 since “the revolutionaries [had] decided to
mimic the British forms of government.”31 Arguing that even “Anti-
Federalists did not disagree about the workings of the British system,” he
concluded that the Framers believed that “the warmaking relationship be-
tween President and Congress would operate just as did the one between
Crown and Parliament.”32

Although Yoo concedes some possible innovation from the British
model,33 he nevertheless espouses the importance of looking to the Crown
in assessing Executive war power since “the war powers provisions of the
Constitution are best understood as an adoption, rather than a rejection, of
the traditional British approach to war powers.”34 He argues 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 Brit-
ish patterns.”35 He contends that because the King was the “generalissimo,
or the first in military command, within the kingdom,”36 so was the design
of the American executive since “[i]n adopting a new Constitution, the Fra-
mers consciously acted in the context of the British Constitution.”37

The Supreme Court has challenged this approach, insisting,
there is such a wide difference between the power conferred on the
President of the United States, and the authority and sovereignty
which belong to the English crown, that it would be altogether
unsafe to reason from any supposed resemblance between them . . .

30. John C. Yoo & Neil J. Kinkopf, What Are the Limits of Presidential Power?,
club_presidentialpower1105.msp.
31. Yoo, WAR AND PEACE, supra note 6, at 65.
32. Yoo, Constitutional Text, supra note 29, at 1658-59.
33. “The Framers were influenced not only by the theory and practice of British
war-making, but also by their own experiences with American government
prior to 1787.” Yoo, Continuation of Politics, supra note 6, at 218.
34. Id. at 242.
35. Yoo, WAR AND PEACE, supra note 6, at 66 (discussing state constitutions,
which were used in drafting the Federal Constitution). But see Louise Burn-
ham Dunbar, A Study of “Monarchical” Tendencies in the United States from
1776 to 1801, 10 U. ILL. STUD. SOC. SCI. 1, 27-75 (1923).
36. Yoo, Continuation of Politics, supra note 6, at 203 (quoting William Black-
stone, 1 Commentaries *254).
37. Id. at 197.
[regarding any] subject where the rights and powers of the executive arm of the government are brought into question. Our own Constitution and form of government must be our only guide.\textsuperscript{38}

This Note finds evidence to support such criticisms of Yoo’s premise; however, using the more firmly grounded Washington model, it nevertheless finds justification for broad executive authority over non-citizens.\textsuperscript{39} In effect, this study uncovers evidence to reject Yoo’s argumentation while nevertheless supporting some of his conclusions via an alternative approach.

\textbf{B. Rejecting George III}

“[Yoo’s] account is at odds with the ample evidence that the Founders decided quite deliberately to change the British system.”\textsuperscript{40} 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

\textsuperscript{38} Fleming v. Page, 50 U.S. 603, 618 (1850). This sentiment is echoed in current debate, where it is still frequently contended that to “argue that the American concept of executive war powers was formed largely by the British experience, despite the historical fact that the colonies’ revolt from Britain was partly a reaction to the Crown’s excessive executive power” is incorrect. Mark R. Shulman & Lawrence J. Lee, \textit{The Debate Over War Powers}, 30 Hum. Rts. 6, 6 (Winter 2003), available at http://www.abanet.org/irr/hr/winter03/debateoverwar.html; see also Flaherty, \textit{supra} note 14, at 2107 (“Whether the Founders did—or we should—view the President and Senate as presenting the same need for a popular check as a ‘Prince’ is not the open-and-shut case that Yoo implies.”); Jane E. Stromseth, \textit{Understanding Constitutional War Powers Today: Why Methodology Matters}, 106 Yale L.J. 845, 845 (1996) (reviewing Louis Fisher, \textit{Presidential War Power} (1995)) (“While Yoo is right to emphasize the importance of Congress’s power of the purse as its most powerful tool in restraining executive military action, his account is at odds with the ample evidence that the Founders decided quite deliberately to change the British system.”).

\textsuperscript{39} Yoo does mention Washington’s influence but focuses on the Crown as the Framers’ model for executive war power. Yoo, \textit{Continuation of Politics, supra} note 6, at 252 (agreeing 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 focusing 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”).

\textsuperscript{40} Stromseth, \textit{supra} note 38, at 961.
and the creation of a distinctly American system of politics." Throughout the Convention, "[d]oubtless most Founders looked forward to the leadership of George Washington." This Part contends that the Framers rejected the George III Model and instead understood their future leader's actions in the Revolutionary War to be the model for the President's commander-in-chief powers.

1. The War Years: Evolving Understanding

While the Crown's use of commander-in-chief powers certainly influenced the Continental Congress's initial understanding of the phrase, they did not seek to maintain the status quo. "More important in any case was the Founders' own experience" and, throughout the war, they experimented with defining the powers of the American Commander. The rebellion 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 . . . .

41. Wood, supra note 27, at ix.
42. AMAR, supra note 16, at 197.
43. See generally 2 BLACKSTONE, supra note 26, at *249-62.
44. Hamilton compared (and contrasted) the President with the Crown. See, e.g., THE FEDERALIST No. 69 (Alexander Hamilton).
45. Flaherty, supra note 14, 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. See generally MORGAN, supra note 17, at 62-87 (describing the various crises that arose leading up to, and during, the Revolution and how the Americans adapted to them); id. at 88-112 (describing the uniquely American issues that arose as the Framers were attempting to create a new government).
46. See infra Part II.
47. 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. On the contrary, they deeply feared that the perceived failings of the British system would re-emerge under their new government.

The colonists’ wariness of duplicating George III’s power over the military is, unsurprisingly, reflected in the Articles of Confederation. At the outset of war, in addition to appointing all U.S. officers of the land forces, “[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.” Even after the Continental Army was in the field, Congress initially retained principal 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.”

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. “Lacking a central executive, the Congress relied on various boards and committees to perform its executive functions.” 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.” Congress toiled with its own vision of a commander in chief, commencing the war with a weak one. Initially “[i]nspired by fear of seizure of political control by military leaders, Congress kept a suspiciously watchful eye on the

48. Yoo, War and Peace, supra note 6, at 65.
49. Bennet N. Hollander, The President and Congress—Operational Control of the Armed Forces, 27 MIL. L. REV. 49, 50 (1965) (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”).
50. Congress retained appointment authority over regimental officers. Id. at 51.
51. Id. (quoting Articles of Confederation, art. IX (1781)).
52. Id. at 53.
53. Jennings B. Sanders, Evolution of the Executive Departments of the Continental Congress 1774-1789, at 6 (1935). For further discussion on the Board of War’s development, see the first chapter of Sanders’s book.
55. 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 6; Yoo, Globalism and the Constitution, supra note 7, at 2009 n.252.
military force and its commanders," only gradually granting 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, 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." Throughout the Revolution, the Framers were developing their own concept of commander in chief based upon their experience with the beloved commander of their forces: George Washington. Having determinedly rejected the British monarchical notion of the commander in chief, it is this tried and tested notion of commander in chief that the Founders brought with them to the Constitutional Convention.

2. Framing the Constitution

Four years after Washington's famous surrender of power to Congress in 1783, he was asked to attend the Constitutional Convention in Philadelphia. At this point, Washington was "held in awe by the delegates and already the de facto leader of the country." As it was becoming evident that the Articles of Confederation were not a viable form of government, the delegates sought to amend the republic according to what they had learned

56. Hollander, supra note 49, at 53 (internal citation omitted).
57. See infra Part II.
60. Washington was so beloved that "it was widely thought that Washington could have become king or dictator [but] he wanted nothing of the kind." Wood, supra note 16, at 3.
61. Likewise, after the Revolution "the state constitutions reflected a sharp break from the royal prerogative model." Curtis A. Bradley & Martin S. Flaherty, Executive Power Essentialism and Foreign Affairs, 102 MICH. L. REV. 545, 584 (2004).
from the "grand experiment" thus far. In creating the executive branch, "[a]s 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."63

Senator William Maclay, a delegate from Pennsylvania, noted the intentions of the Framers and the American people. Quite far from looking to duplicate George III, Maclay noted, "[w]e have lately had a hard struggle for our liberty against kingly authority [and] everything related to that species of government is odious to the people."64 English history had taught the Framers that danger lurked in vesting command in a system like the British government.65 Likewise, in the debates, "Federalists such as Tench Coxe, Noah Webster, and Charles Cotesworth Pinckney contrasted America's former experience under the English Constitution with its prospective experience under the proposed Constitution."66 Indeed, Delegate John Wilson noted that he "did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers."67 Instead, they looked to the man whom Maclay described as "the greatest man in the world."68 Certainly, "[e]veryone at Philadelphia . . . understood, as did later 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 officer—the unanimously chosen 'president'—of the Philadelphia Convention itself."69

While Article II, Section 2, infused the presidency with the power to act decisively, "America’s president would wield a less threatening kind of ex-

63. AMAR, supra note 16, at 131.
64. JOURNAL OF WILLIAM MACLAY, UNITED STATES SENATOR FROM PENNSYLVANIA, 1789-1791, at 10 (Edgar S. Maclay ed., 1st ed. 1890); see also Flaherty, supra note 14, at 2125 (“Constitutionally-minded Americans . . . necessarily abandoned the dominant English mixed-government conceptions.”).
66. Flaherty, supra note 11, at 1007.
68. JOURNAL OF WILLIAM MACLAY, supra note 64, at 248.
69. AMAR, supra note 16, at 134-35 ("[H]is presence filled the room" in which the Convention was held); see also FARRAND, supra note 16, at 58 ("His presence in the convention was felt to be essential to the success of its work."); Rotunda, supra note 16, at 509-510; Letter from Pierce Butler to Weedon Butler, supra note 16.

278
ecutive power than Britain’s king.”\footnote{Amar, supra note 16, at 187-88. The Framers learned during the Revolution that “the absence of a strongly unified military-command structure had indeed compromised America’s military effectiveness” during the first years. Amar, supra note 38, at 142. Some derided the proposal of a three-man Presidency as “extremely inconvenient,” as the Framers did not want “a general with three heads.” 1 The Records of the Federal Convention of 1787, supra note 16, at 97. Reminiscent of their generous grant of power to Washington prior to their fleeing Philadelphia, they provided for a unitary President with a “supple textual mandate to act in various situations that might be impossible to define in advance.” Amar, supra note 16, at 186.}

In defining the powers of the President, the Framers appealed to their memories of the “situation during the late war, and . . . recollection of the appointment of the Commander in Chief.”\footnote{May, supra note 27, at 7.}

Indeed, “[m]emories of the Revolution certainly influenced the generation of 1787. So did the fact that the former commander in chief was expected to be the first president.”\footnote{Letter from Pierce Butler to Weedon Butler, supra note 16, at 302 (emphasis added).}

Senator Pierce Butler, a delegate from South Carolina, confirmed how central Washington was to the Framers’ understanding of the American commander in chief, writing that the presidential powers were greater than I was disposed to make them. Nor, Entre Nous, do I believe they would have been so great had not many of the members \textit{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.}\footnote{Responding to attacks that the new federal government would return the country to a system similar to that under the British, Hamilton repeatedly disclaimed the British Crown as a model for the president. See, e.g., The Federalist Nos. 67-77 (Alexander Hamilton).}

Throughout the Revolution and Constitutional Convention it is clear that the Framers actively sought to break with the precedent of the King\footnote{Calabresi, supra note 16, at 481.} and follow the model of the beloved man who was key to both winning the war and ratifying the Constitution. Indeed, “[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.”\footnote{James Madison, The Debates in the Federal Convention of 1787 (Galland Hunt & James Brown Scott eds., 2007).}
What precedents did Washington set as he conducted the war? Part II provides an overview of Washington’s actions throughout the Revolutionary War while focusing on those specific events most pertinent to modern debate.

II. The Washington Model: The Context of Washington’s Actions

Although Americans understood the Commander in Chief’s authority in wartime to be quite limited by Congress at the commencement of the Revolution, as the war waged on, the unsuitability of this setup became painfully apparent. Both Washington and Congress saw the necessity of granting the executive broader authority to strategize and wage the war. As Washington was able to use his expanded commander-in-chief powers to help turn the tide, the people readily approved of this latter model. This Part delves into the history of this transformation of the American understanding of their Commander in Chief.

A. Rule by Committee: A Weak Commander

In June 1775, there had been no declaration of war by the fifty-six members of the Continental Congress nor was there an official American army when Congress unanimously voted to name George Washington as their commander in chief. 76 Armed hostilities had commenced in April 1775 at

76. Congress resolved:

We, reposing special trust and confidence in your patriotism, valor, conduct, and fidelity, do, by these presents, constitute and appoint you to be General and Commander in chief, of the army of the United Colonies, and of all the forces now raised, or to be raised, by them, and of all others who shall voluntarily offer their service, and join the said Army for the Defense of American liberty, and for repelling every hostile invasion thereof: And you are hereby vested with full power and authority to act as you shall think for the good and welfare of the service.

And we do hereby strictly charge and require all Officers and Soldiers, under your command, to be obedient to your orders, and diligent in the exercise of their several duties.

And we do also enjoin and require you, to be careful in executing the great trust reposed in you, by causing strict discipline and order to be observed in the army, and that the soldiers be duly exercised, and provided with all convenient necessaries.

And you are to regulate your conduct in every respect by the rules and discipline of war, (as herewith given you,) and punctually to observe and follow such orders and directions, from time to time, as you shall receive from this, or a future Congress of these United Colonies, or committee of Congress.

2 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, supra note 58, at 96 (June 17, 1775).
Lexington, Massachusetts when a column of British regulars confronted a group of militia on Lexington Green. After years of smoldering discord between the government of George III and the American “rabble in arms,” the shooting had begun. By the time George Washington arrived to assume his command in July 1775, the British Army had been driven into Boston and was held in siege by twenty thousand American militiamen.

At the time, Washington had been retired from military life for fifteen years. His only military experience had been in backwoods warfare and he had done poorly by most standards. He had never commanded anything larger than a regiment, let alone led an army, in battle. Nevertheless, Benjamin Rush observed that Washington had “so much martial dignity in his deportment that you would distinguish him to be a general and soldier from among ten thousand people.” Referred to as “His Excellency,” Washington was tremendously respected by Congress and the citizenry alike. In fact, he was seen by many recruits as the main inspiration for joining the American cause. Washington personified the Revolution and was pivotal in gaining public support for the war.

In this context of overwhelming support, Washington could have wielded great power from the start, had he wished. However, while entrusted with the title of commander in chief, Washington accepted the fact that he was the servant of the fifty-six delegates of Congress. He had served in the Congress and knew how it operated. In an example of Congress’ initial attempt to democratize command, Washington was required by Congress to consult a Council of War concerning any military action of consequence, and at the start of the war, Washington “believe[ed] that he was

79. Congress resolved:

And whereas all particulars cannot be foreseen, nor positive instructions for such emergencies so before hand given but that many things must be left to your prudent and discreet management, as occurrences may arise upon the place, or from time to time fall out, you are therefore upon all such accidents or any occasions that may happen, to use your best circumspection and (advising with your council of war) to order and dispose of the said Army under your command as may be most advantageous for the obtaining the end for which these forces have been raised, making it your special care in discharge of the great trust committed unto you, that the liberties of America receive no detriment.

2 Journals of the Continental Congress, 1774-1789, supra note 58, at 101 (June 20, 1775) (emphasis added). Washington’s Council was not an arm of Congress but a group of generals that Congress nevertheless obliged him to
bound by congressional instruction not to act without the[ir] approval." With the American militiamen blocking the land escape routes, the approximately eight thousand men of the British Army were trapped in Boston. The only means to break out of the trap was by sea. Washington saw this as an opportunity to end the conflict, at least temporarily, by attacking and defeating the British in Boston before a sea evacuation could be accomplished or reinforcements from Britain arrived. He understood a strike on Boston could mean the destruction of the town, but standing and waiting was not the way to win a war in Washington’s opinion. At this point in the war, however, the decision was not his alone to make. Expressing his frustration with waging the war via committee, he wrote to his brother John, “the inactive state we lye in is exceedingly disagreeable.”

Washington wanted a “speedy finish,” so in September 1775 he called a meeting of the Council of War, questioning “to know whether in [their] judgments [the Continental Army] cannot make a successful attack upon the troops in Boston, by means of Boats.”

Washington’s request to attack was declined by the Council as too risky. Although Major General Charles Lee was the only professional soldier on the Council, Washington, cognizant of his role as a republican commander, nevertheless followed the decision of the largely inexperienced consult. Their power to block Washington’s action is discussed in the following paragraph.

81. “The 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.” Hollander, supra note 49, at 50 (quoting ARTICLES OF CONFEDERATION art. IX (1781)); see also SANDERS, supra note 53, at 6. This concept evolved throughout the war.
83. Circular to the General Officers (Sept. 8, 1775), in 2 PAPERS OF GEORGE WASHINGTON, supra note 82, at 433.
84. Id. at 432.
85. Lee, as a former British Officer, was the only member of the counsel with formal military training. DAVID MCCULLOUGH, 1776, at 51 (2005).
However, he continued the construction of the flat bottom boats, which he had planned to use in the attack. Between March 1775 and March 1776, Washington asked four times to attack Boston but the action was voted down each time. On March 17, 1776, the British evacuated by sea and sailed to Halifax to await reinforcements. The rescued British troops would later be part of the force that nearly destroyed the Continental Army and the American cause months later.

Following the standstill at Boston, Washington knew that New York City was a target, as did many in Congress. However, the city was indefensible from the American military's perspective. General Lee questioned, "What to do with the city I own puzzles me. It is so encircled with deep navigable waters that whoever commands the sea must command the Town." Nevertheless, John Adams, who headed the Board of War in the Continental Congress, urged Washington to defend the city. He expressed the view that New York was "a kind of key to the whole continent... [and] [n]o effort to secure it ought to be omitted."

Washington's decision to make a stand in New York was more of a political judgment than one of military strategy. It was his political sense that Congress expected every effort to hold the city. Anything else would have a devastating effect on the people and the American cause. The decision to stand and fight at New York, however, was a disastrous one. Washington observed hopelessly from across the East River as his troops were cut down at Fort Washington and the survivors imprisoned on atrociously inhumane prisoner barges. By November 1776, Washington retreated with what was

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86. "For advice on strategy and operations, Washington relied on a council of war made up of his principal subordinate commanders... conforming to his original instructions from Congress." 1 RICHARD W. STEWART, AMERICAN MILITARY HISTORY 61 (2005).


89. "Your commission constitutes you commander 'of all the Forces... and [you] are vested with [the] full Power and Authority to act as you shall think for the good and well fare of the service.'" Letter from John Adams to George Washington (Jan. 6, 1776), in 3 PAPERS OF GEORGE WASHINGTON, supra note 82, at 37.

90. Letter From John Adams to Abigail Adams (Feb. 17, 1777), in 2 ADAMS FAMILY CORRESPONDENCE 163, 163 (Lyman Butterfield ed., Cambridge ed. 1963) (citing a letter to his wife Abigail, in which he wrote, "I who am always made miserable by the Misery of every sensible being, am obliged to hear continual accounts of the barbarities, the cruel Murders in cold blood... committed by
left of his battered army, confiding in his brother, "I am wearied almost to
death with the retrograde Motions of things." Washington, while exceed-
ingly deferential, did express his frustration with his lack of power. Unable
to even create a standing army, he "assured [Congress] that the longer they
delayed raising a standing army, the more difficult and chargeable would
they find it to get one." But his hands were tied. Greene urged Congress:

Greater Powers must be lodged in the Hands of the General than he
has ever yet exercised. It is impossible . . . for him to be in Readiness
so early as General Howe . . . unless you delegate to him full Power
to take such Measures as he may find Necessary to promote the Es-
tablissement of the New Army. Time will not admit nor Circumstance
allow of a reference to Congress.93

From their experiences with Washington and the Revolution, it became
increasingly evident that Congress needed to adapt their understanding of
American commander-in-chief powers according to the realities of war. While Congress debated, British forces, under the lead of General Charles
Cornwallis, sought to destroy the American cause by finishing off the Con-
tinental Army. On November 21, 1776, Cornwallis and an army of ten thou-
sand set off to catch Washington. The Pennsylvania Journal announced very
good intelligence that the British intended to push for Philadelphia and
Richard Henry of Virginia reported "much alarm" in the city and in Con-
gress.94 If captured by the British, the members of the Continental Congress
would surely be hanged as traitors to the King.

By December 1776, Congress concluded that the rule-by-committee ap-
proach did not work. Almost concurrently with Washington’s symbolically
inspiring victory at Trenton, New Jersey, they passed the following resolu-
tion:

This Congress, having maturely considered the present crisis;
and having perfect reliance on the wisdom, vigour, and uprightness
of General Washington, do, hereby,

our Enemies. . . . These accounts harrow me beyond Description"). It is
within this context that Washington wrote to Howe in the letters discussed
infra in Subsection III.B.ii.

91. Letter from George Washington to John Augustine Washington (Nov. 19,
1776), in 7 PAPERS OF GEORGE WASHINGTON, supra note 82, at 105.

92. Letter from George Washington to Lund Washington (Sept. 30, 1776), in 6

93. Letter from General Greene to John Hancock, the President of Congress (Dec.
21, 1776), in 1 THE PAPERS OF GENERAL NATHANAEL GREENE 370, 372 (Rich-

94. McCollough, supra note 85, at 255.
Resolve, That General Washington shall be, and he is hereby, vested with full, ample, and complete powers to raise and collect together, in the most speedy and effectual manner, from any or all of these United States, 16 battalions of infantry.; to appoint officers for the said battalions; to raise, officer, and equip troops . . . and to establish their pay; to apply to any of the states for such aid of the militia as he shall judge necessary; to form such magazines of provisions, and in such places, as he shall think proper; to displace and appoint all officers under the rank of brigadier general, and to fill up all vacancies in every other department in the American armies; to take, wherever he may be, whatever he may want for the use of the army, if the inhabitants will not sell it, allowing a reasonable price for the same; to arrest and confine persons who refuse to take the continental currency, or are otherwise disaffected to the American cause; and return to the states of which they are citizens, their names, and the nature of their offences, together with the witnesses to prove them . . . .

From this time through the end of the War, Congress looked to Washington as the war strategist and allotted him great authority.

B. Washington's War: A Strengthened Commander

The powers Congress granted Washington in this December 1776 resolution 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." Most importantly, Washington himself understood his wartime powers to be sweeping. In his response to Congress, he wrote:

[T]hey have done me the honor to intrust [sic] me with powers, in my Military Capacity, of the highest nature and almost unlimited in extent. Instead of thinking myself free’d from all civil Obligations, by this mark of their Confidence, I shall constantly bear in mind, that as the Sword was the last Resort for the preservation of our Lib-

95. JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, supra note 58, at 1045-46.

96. See infra Section III.A for a discussion of the most pertinent information.

erties, so it ought to be the first thing laid aside, when those Liberties are firmly established.98

Washington was finally the master of his troops and the conduct of the war. One of Congress's final holds on Washington was removed when, in 1780, Congress reconsidered a resolution that restricted the fighting to the United States theater and voted "the restriction taken off."99

When it came to supplies, however, Washington continually deferred to Congress. In an instance when Major General Heath sent Washington a memorandum that he might "order the Stores to be supplied,"100 Washington answered "[a]s I am not acquainted by Congress with what steps they have taken in the affair, nor with their present intentions concerning it, I do not think myself authorized to comply with the requisition."101 While eager to have these forces properly supplied to fight against British General John Burgoyne, a strategy which he made known to Congress, he did not view himself as empowered to take action in this regard, instead referring the matter for congressional consideration.102 While Washington viewed his powers over strategy as broad, he nevertheless saw requisition of supplies—whether obtained from the local populace or elsewhere—as Congress's domain.

After another victory on January 1, 1777, at Princeton, Washington adopted a strategy of conducting small "hit and run" battles and then continually retreating in order to protect his army.103 In attempting to avoid full confrontation, Washington acquiesced to General William Howe's capture

100. Letter from George Washington to The President of Congress (Jul. 27, 1777), in 8 The Writings of George Washington, supra note 16, at 487.
102. At other times, Congress did provide Washington with some discretion. They had to approve the arms, but after this authorization, they would rely upon Washington's judgment. Letter from George Washington to The Board of War (Jul. 16, 1777), 8 The Writings of George Washington, supra note 16, at 416 n.51.
103. John Marshall, The Life of George Washington 84 (Robert Faulkner & Paul Courreuse eds., Liberty Fund 2000) (1838). This is known as a Fabian Strategy and is based upon Rome's Quintus Fabius Maximus's strategy to wear down the stronger Carthaginian forces in the First Punic War. Like Fabius Maximus's army, Washington's forces were also relatively weak.
GEORGE VS. GEORGE VS. GEORGE: COMMANDER-IN-CHIEF POWER

of the seat of the Continental Congress at Philadelphia. In contrast to what occurred in New York, while “[p]ublic opinion . . . and the opinion of Congress, required a battle[,] . . . Washington came to the wise determination of avoiding one.” 104 While he had previously received orders from Congress, Washington now dispatched Major General Nathaniel Greene to brief Congress on his revised strategy. Greene reported back to Washington, “I explained to the House your Excellency’s Ideas of the next Campaign [and] it appear’d new to them.” 105 Washington had switched from asking Congress to informing them of his actions. More empowered, Washington engaged Howe in smaller battles through the Middle Colonies, retreating before Howe could confront him with the full British force.

While Congress still controlled the purse, Washington’s tone regarding such matters switched to a more commanding one. At one point, he wrote:

I also take the liberty to request to be informed whether Congress in two or three Months from the present period can rely on being able to furnish Specie, or Bills on Europe . . . . I should also be glad if Congress will have the goodness to assist me with some lights how far the States of South and North Carolina have ability to contribute to the Support of an Army in the Articles of Bread, Meat, Forage, Horses and Waggons. . . . I entreat as speedy an answer as possible to these points, which are of the greatest consequence in determining our future plans, particularly I wish for immediate information on the Subject of the money. 106

Such decisions as those pertaining to inoculations, 107 military trials, and troop deployment and recruitment were now his alone.

Throughout the war, “[t]he situation of General Washington[‘s army] was . . . perilous in the extreme.” 108 Many walking barefoot, the encamped troops did not receive near the amount of support they needed and, consequently, many perished. 109 Indeed supply was “[t]he problem that most

104. Id. at 98.
107. While initially hesitant, Washington inoculated his troops from smallpox after the outbreak of February 1777. MARSHALL, supra note 103, at 84.
108. Id. at 81.
vexed Washington,” yet he did little more than complain to Congress that if the “[States] cannot provide me with the means; it is in vain for them to look to [him] for the end, and accomplishment of their wishes.” Despite the dire lack of supplies, Washington steadfastly adhered to his understanding of his commander-in-chief power, confiscating only with congressional approval and a plan for repayment. When mutiny erupted in New Jersey over lack of these supplies, however, it was Washington’s domain to make the decision to “suppress the uprising with decisive force.” It was clear that in dealing with his troops and the enemy, the Commander in Chief exercised full control.

Over the years, the small battles of Washington’s Fabian strategy wore upon Cornwallis’s army, bolstering American optimism and the Continental Army’s ranks. Although Major General Horatio Gates’s victory at Saratoga in 1777, which prompted France and then Spain to declare war on Britain, was the turning point of the war, Washington was still seen as the personification of the fight for liberty. Choosing to personally remain at Valley Forge alongside the troops and repeatedly lead the charges in the heat of battle, Washington served as a symbol of hope that held the army together. While continuing smaller scale campaigns into the northeast, Washington eagerly awaited French support, which was slow to arrive. When French troops and naval forces finally began to build, Congress “revived the latent wish to annex” Canada. Washington instead chose a strategy of “not obeying their orders [and] the expedition against Canada was entirely, though reluctantly, given up.”

The British switched their focus to the Southern theater, where they enjoyed greater loyalist support. After the defeat of Gates in South Carolina, all who remained to harass British General Charles Cornwallis were guerrilla


112. PHELPS, supra note 109, at 41.

113. While Congress still controlled the supplies sent to the prisoners, when Howe suggested a prisoner exchange in January 1778, “[o]n application of General Washington, Congress acceded.” MARSHALL, supra note 103, at 147 (emphasis added).

114. While not leading the charge, Washington did play a role. “General Washington made great exertions to reinforce the northern army” and it paid off in Gate’s decisive defeat of Burgoyne. MARSHALL, supra note 103, at 120.

115. Id. at 170.

116. Id. at 172.
bands under Francis Marion, Andrew Pickens, and Thomas Sumter. Nathaniel Greene, who assumed command of the southern force from Gates and helped to regroup the army, was able to drive Cornwallis into Virginia. The Franco-American force led by Washington south from New York combined with Greene’s forces and was decisive in trapping the British in Yorktown in 1781. With French naval support blocking their escape, the British surrendered, ending the war.

C. Approval of Washington’s Wartime Conduct

Some may question whether Washington’s wartime actions were supported by the Framers and voters ex post. To answer this, it is important to note that Washington emerged from the war an even greater hero, to the point of “near deification.” He was hailed as “the great soldier of liberty—a man whose exceptional virtue and patriotism assured final triumph.” 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.” It is no stretch to say that virtually all of the Framers respected his virtuous leadership. Indeed, their approval of his wartime actions is evidenced by his unanimous election to the presidency of the Convention. In fact, few debate that Washington could have made himself King. Instead, he abided by certain rules of conduct, developed during the war, which served as the precedent for the Framers’ understanding of the American commander in chief. Part III delves into what that conduct means for the modern presidency.

117. See id. at 228-43.
118. Phelps, supra note 107, at 24.
119. Id.
120. Id.
121. See Wood, supra note 16, at 3 (“Though it was widely thought that Washington could have become king or dictator, he wanted nothing of the kind.”). In the famous conversation with American painter Jonathan Trumbull, 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.” Seymour Martin Lipset, George Washington and the Founding of Democracy, 9 J. Democracy 24 (1998) (quoting Gordon S. Wood, The Radicalism of the American Revolution (1993)). Indeed, “the god-like Washington was certain to be the first President.” Henry P. Monaghan, The Protective Power of Presidency, 93 Col. L. Rev. 1, 20 n.94 (citation omitted) (1993).
122. Pierce Butler, supra note 69, at 302.
III. IMPLICATIONS OF THE WASHINGTON MODEL: THE POWERS OF GEORGE WASHINGTON VS. THE ACTIONS OF GEORGE W. BUSH

Having established Washington as the appropriate model for understanding the powers inherent in the American commander in chief and provided the context of the circumstances in which he was operating throughout the Revolution, this Part draws out the implications that are most relevant to contemporary debate. It is not the purpose of this Part to compare Washington and Bush as individuals. Instead, in the forthcoming Parts, this Note evaluates George W. Bush's actions based on George Washington's Revolutionary War precedent. This narrow perspective enables the ambitious new analysis of hotly debated issues. This Note does not purport to address the many nuances of each debate, but rather to focus purely on the original intent support for executive wartime authority, or lack thereof. Comparison of the first commander's actions to the contemporary's provides insight into the broader nature of constitutional commander-in-chief powers.

A. Congressional Consultation During Times of War

Since its enactment over President Nixon's veto in 1973, every President has taken the position that the War Powers Resolution is an "unconstitutional infringement by the Congress on the President's authority as Commander-in-Chief." While much of the War Powers Resolution deals with initiation of hostilities, this Note addresses section 3, which "requires the

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123. See Symposium, The President's Powers as Commander-in-Chief Versus Congress' War Power and Appropriations Power, 43 U. MIAMI L. REV. 17, for a background debate during the Reagan Administration on war powers.

124. It may be argued that Washington was confronting a much 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 Note does not attempt any such assessment and merely purports to address whether there is original intent evidence for various commander-in-chief powers.

125. Each Part is structured in the same manner: introduction to the present debate, discussion of the relevant historical evidence, and relation of the Washington model to the Bush Administration's inherent powers.


127. As discussed in Part II, hostilities had commenced prior to Washington's actions, rendering inapplicable any questions regarding the initiation of hos-
President ‘in every possible instance’ to consult with Congress before introducing U.S. armed forces into situations of hostilities and imminent hostilities, and to continue consultations as long as the armed forces remain.’”\(^\text{128}\)

At the time of his commission, Congress kept Washington on a short leash.\(^\text{129}\) The Commander was obliged “punctually to observe and follow such orders and directions, from time to time, as [he] shall receive from this, or a future Congress of these United Colonies, or committee of Congress.”\(^\text{130}\) As discussed in Part II, Congress attempted to manage strategic and even tactical aspects of the war by committee. However, in restricting Washington, the “Continental Congress’s best attempts to make war were essentially failures.”\(^\text{131}\) Congress soon concluded that their “arrangement failed miserably, and . . . surrendered their powers to the field commander.”\(^\text{132}\)

“Experience taught the framers [an] important lesson during this period: the war powers needed to be fixed to guarantee effective common defense.”\(^\text{133}\) To remedy the situation, Congress passed the aforementioned December 27, 1776 resolution\(^\text{134}\) and reaffirmed Washington’s powers in votes throughout the war. Both Congress and Washington understood the commander’s authority over strategy and troops to be necessarily complete in order to effectively conduct a war.\(^\text{135}\) 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.”\(^\text{136}\)


\(^{129}\) 2 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, supra note 58, at 96 (reprinting General Washington’s June 17, 1775 Commission).

\(^{130}\) Id.

\(^{131}\) Id.

\(^{132}\) Id.

\(^{133}\) Id.

\(^{134}\) See supra note 95.

\(^{135}\) See supra text accompanying notes 94-97.

Although the Continental Congress relinquished control over strategy, it still required that it be informed.\footnote{137} Washington was obliged “to appoint a proper person at headquarters to write to the president [of the Congress] twice a day, or oftener if necessary, advising the position and movements of the armies.”\footnote{138} Although there were gaps in communication during crucial junctures of intense fighting, Washington conscientiously sought to comply.\footnote{139} This would suggest that while the commander in chief has broad discretion in deciding tactics and strategy, he is obliged to communicate his decisions to Congress as the situation permits. This parallels current debate. President Bush has contended that the War Powers Resolution only requires that he notify Congress of his decisions ex post.\footnote{140} President Bush is not the only President to approach the War Powers Resolution in this fashion, how-

\footnote{137. An important caveat is that Washington’s status during the Revolution was as an agent of Congress. This Note 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 in the Commander-in-Chief Clause. Bennett, \textit{supra} note 123, at 27-28.}

\footnote{138. Letter from George Washington to the President of Congress (Sept. 11, 1777), \textit{in 9 The Writings of George Washington}, \textit{supra} note 16, at 207-08 n.1.}

\footnote{139. Washington was unable to write Congress at crucial junctures, evidenced by gaps in the dates of his writings during times of intense fighting. For example, Washington writes Congress on January 1, 1777, without informing them of any strategy, and then conducts his route of the British at Princeton, during which he interrupts his usual constant communication with the President of Congress for four days, and then notifies Congress of his sneak attack after the fact. \textit{6 The Writings of George Washington}, \textit{supra} note 16, at 460-71.}

\footnote{140. President Bush has made several reports to Congress pursuant to the War Powers Resolution. On January 22, 2004, he reported that the United States was continuing to deploy combat equipped military personnel Bosnia and Herzegovina. About 1,800 U.S. personnel were participating. On February 25, 2004, he reported that, on February 23, he had sent a “security force” of about fifty-five U.S. troops to Haiti to reinforce the U.S. Embassy security forces there. On March 2, 2004, he reported that on February 29 he had sent about “200 additional U.S. combat-equipped, military personnel from the U.S. Joint Forces Command to Port-au-Prince, Haiti.” And on March 20, 2004, he reported details of multiple on-going military deployments and operations “in support of the global war on terrorism.” \textit{Grimmett}, \textit{supra} note 126, at 14-15.}
ever. Certainly, the Washington model supports the Presidents' conduct described in the Congressional Research Service's conclusion that

[a] review of instances involving the use of armed forces since passage of the Resolution, listed above, indicates there has been very little consultation with Congress under the Resolution when consultation is defined to mean seeking advice prior to a decision to introduce troops. Presidents have met with congressional leaders after the decision to deploy was made. . . .

The Washington model suggests that Presidents have been acting properly according to the original intent of their commander-in-chief powers. As evidenced by Washington's actions and writings described supra in Part II, by the end of the Revolutionary War, the Continental Congress had developed the understanding that their commander in chief possessed strategic control and discretion. The Constitution "make[s] clear that within an authorized field of . . . war, the President is made the responsible agent of conducting that war as Commander-in-Chief . . . [and] prohibit[s] Congress from meddling in the particulars or minutia of tactics in the combat zone." However, Washington was—and, according to the originalist approach, so is President Bush today—obligated to notify Congress of his actions.

Congress has contended that "consultation in [section 3 of the War Powers Resolution] means that a decision is pending on a problem and that Members of Congress are being asked by the President for their advice and opinions and, in appropriate circumstances, their approval of action contemplated." Approaching this issue from a purely originalist understanding would suggest that Congress is overstepping its bounds. Just as the

141. Id. at 15 (emphasis added).

142. Bennett, supra note 123, at 37 (discussing declared wars). What constitutes a "declared war" is beyond the scope of this Note. The Revolutionary War was not declared in exactly the same way that World War Two was, but did have the backing of the Continental Congress since they were the ones running the war. Likewise, Iraq was not declared like World War Two but had Congressional authorization. This quote is merely meant to show the parallels between Washington’s congressionally authorized war and Bush’s congressionally authorized wars in Afghanistan and Iraq.

143. While not in contention in this debate, it is worth noting that the contemporary Congress, similar to the Continental Congress, also has the power over supplies via their funding power.

144. GRIMMETT, supra note 126, at 12 (emphasis added).

145. It is not the purpose of this Note to delve into how subsequent statutes, enacted according to Congress’s constitutional powers, have altered the President’s obligations.
Continental Congress learned—the hard way\(^{146}\)—that an effective commander in chief needed to have discretion in his military decisions rather than being micromanaged by committee, the modern Congress should understand the original intent of the Commander-in-Chief Clause to support President Bush’s claim to such authority.

President Bush has also been faulted for not keeping Congress better informed of his decisions after the fact.\(^{147}\) In 2006, the bipartisan Congressional Research Service concluded that “the Bush administration’s limited briefings for Congress on the National Security Agency’s domestic eavesdropping . . . are ‘inconsistent with the law.’”\(^{148}\) The analysis faulted the Administration with only informing the “Gang of Eight” leading Republican and Democratic leaders of the House and Senate.\(^{149}\) There is a historical record of Presidents, regardless of party, limiting sensitive information shar-

\(^{146}\) See supra Part II for a discussion of the military blunders experienced while Congress attempted to micromanage the war via committee.

\(^{147}\) President Bush has been accused repeatedly by his (typically partisan) opponents of not properly reporting the intelligence used as justification for invading Iraq and not promptly reporting to Congress evidence against Iraq’s possession of weapons of mass destruction after the invasion. See Jimmy Carter, Our Endangered Values: America’s Moral Crisis 150 (2005) (faulting the Bush administration for using “false and distorted claims after 9/11.”); Kerry Responds to Bush Attacks: White House Misleading Public on Prewar Iraq Intelligence (Nov. 14, 2005), http://kerry.senate.gov/v3/cfm/record.cfm?id=248761 (“The White House has admitted that the President told Congress and the American public in the State of the Union address that Saddam was attempting to acquire fuel for nuclear weapons despite the fact that the CIA specifically told the Administration three times, in writing and verbally, not to use this intelligence. . . . This is not relying on faulty intelligence, as Democrats did; it is knowingly, and admittedly, misleading the American public on a key justification for going to war.”); Ron Martz, Embed Catches Heat, Editor & Publisher, May 15, 2003, http://www.editorandpublisher.com/eandp/news/articledisplay.jsp?vnu_content_id=1886508 (“There must have been two wars in Iraq. There was the war I saw and wrote about as a print journalist embedded with a tank company of the Army’s 3rd Infantry Division (Mechanized). Then there was the war that many Americans saw . . . .”); Paul R. Pillar, Intelligence, Policy, and the War in Iraq, 85 FOREIGN AFF. 15, 15 (2006) (“In the wake of the Iraq war, it has become clear that . . . intelligence was misused publicly to justify decisions already made, that damaging ill will developed between policymakers and intelligence officers, and that the intelligence community’s own work was politicized.”).


\(^{149}\) Id.
ing to certain members of Congress and the Washington model provides some limited potential original intent arguments in support of this practice.

"Clearly, the Constitution envisions... regular involvement by the Congress in military affairs." Historically, it is acceptable to withhold information when completely necessary, as Washington found it to be while in the heat of certain battles. While this exception is seemingly most applicable when it is impossible to transmit the information—and it is therefore unacceptable to only inform all of Congress when it is politically convenient—it nevertheless leaves open a window for the argument that the sensitivity of information makes full disclosure an impossibility without negative security repercussions. Additionally, Washington addressed his briefings

150. The National Security Act of 1947, 50 U.S.C. § 413 (2000), "contemplates more limited disclosure in the case of exceptionally sensitive matters... It has long been the practice of both Democratic and Republican administrations to inform [just] the Chair and Ranking Members of the Intelligence Committees about exceptionally sensitive matters." Letter from William E. Moschello, Assistant Attorney General to the Honorable Dianne Feinstein, Committee on the Judiciary, United States Senate (Feb. 28, 2006), http://www.usdoj.gov/ag/readingroom/surveillance20.pdf. The Congressional Research Committee determined that Intelligence Committee leaders "over time have accepted the executive branch of limiting notification of intelligence activities in some cases." This is because "the President is [under the National Security Act of 1947] legally authorized to limit congressional access to a covert action finding if he determines that it is essential to do so in order "to meet extraordinary circumstances affecting vital interests of the United States." Alfred Cumming, Cong. Research Serv., Statutory Procedures Under Which Congress Is To Be Informed Of U.S. Intelligence Activities, Including Covert Actions 10 (2006), http://www.epic.org/privacy/terrorism/fisa/crs1806.pdf.

151. Kirk L. Davies, The Imposition of Martial Law In The United States, 49 A.F.L. Rev. 67, 78 (2000). But see Major Geoffrey S. Corn, Presidential War Power: Do the Courts Offer any Answers?, 157 MIL. L. Rev. 180, 183 (1998) (noting that although the Constitution understood there to be "congressional predominance[,...] primary authority over the war power has shifted from that representative body to the executive branch").

152. Such as when Washington was planning on staging his sneak attack on the British at Princeton and did not communicate it Congress, as discussed supra note 140, or when President Bush has information that is so sensitive that a leak—if found to be likely to occur—would endanger his military strategy. See 6 The Writings of George Washington, supra note 16, at 460-67.

153. The Congressional Research Service Report concedes this possible argument. See Shane, supra note 148 ("The executive branch may assert that the mere discussion of the N.S.A. program generally could expose certain intelligence sources and methods to disclosure.").
primarily to the President of Congress or just the Board of War. While limited correspondence was mostly due to practical necessity and the information was usually then referred to other members of Congress at the receiving parties' discretion, this may be analogous to only informing a select group (i.e. the Gang of Eight) on certain military matters. These possible precedents for argument aside, the general takeaway from the Washington model is that Congress is within its right to demand that it be regularly informed of military actions after the fact, and the President is obliged to obey except under specific circumstances.

This is not the only issue of current debate for which the Washington model provides pointed original intent. The following Section delves into facets of the commander in chief's wartime decision-making power over American citizens. While this Note finds originalist evidence for deferring to the Commander's authority when engaging foreigners, it finds the Commander's power to be heavily curtailed when engaging American citizens.

B. Rights of Americans

At his Senate confirmation hearings, Justice Alito said, "our Constitution applies in times of peace and in times of war, and it protects the rights of Americans under all circumstances." George Washington's Revolutionary precedent for the Commander-in-Chief Clause largely supports this notion. Washington's actions as commander in chief depict a stark contrast

154. See generally The Writings of George Washington, supra note 16, in which Washington repeatedly writes to the President and not the full Congress.

155. Dealing mutinies and staggering losses to the British, see, e.g., Marshall, supra note 103, at 245, the young republic was too busy holding the Continental Army together to have separate letters delivered by courier to each member of Congress. See supra note 138 (reporting that, rather than having letters delivered to all members of Congress or even the entire Board of War, Congress only requested that Washington write to the President of Congress, who would presumably disseminate as prudent).

156. Presidents presided over the United Colonies/States of America's unicameral government executing congressional laws, treaties, and military orders, called for congressional assembly and adjournment, signed military commissions including George Washington's commander-in-chief appointment, received foreign dignitaries, received, read, answered, and at their own discretion held or disseminated the official mail addressed to them as the President of the United States and President of Congress. A Founding Presidential Exhibit, http://uspresidency.com/ (last visited Mar. 12, 2006).

between the powers he possessed over non-citizens versus those over Americans. Even to the detriment of the Continental Army, he was incredibly careful not to infringe upon the rights of Americans. Article I, Section 9’s reservation to Congress of the power to suspend habeas corpus and the Takings Clause both strongly reflect Washington’s notion of the laws by which he was operating as commander in chief. Based upon the Washington model, it is no surprise that these powers were specifically addressed in the Constitution—and in the case of the suspension of habeas corpus, explicitly granted to Congress—rather than viewed as inherent under the Commander-in-Chief Clause. The following two subsections analyze the original intent of commander-in-chief powers over Americans.

1. Suspending Habeas Corpus

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. 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.” The Supreme Court’s basis for dismissing the case rested on the fact that Padilla has been released from 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.” Based upon Washington’s actions during the revolution, this Section argues that Padilla’s three-year military detention was inconsistent with the Washington model and the original intent of commander-in-chief powers. As indicated by the Supreme

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159. Rumsfeld v. Padilla, 542 U.S. 426, 433 (2004); see also Press Release, Department of Justice, Statement of Mark Corallo, Director of Public Affairs, on the Padilla Decision (Dec. 18, 2003), http://www.fas.org/irp/news/2003/12/doi121803.html (arguing 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”).

160. Padilla, 547 U.S. at 1064.

161. 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
Court, only now that the Administration released Padilla to the jurisdiction of the federal courts is President Bush back within the limits of his commander-in-chief powers.

The Continental Congress’s experiences with their commander in chief reflected Washington’s view of his own powers over fellow Americans. This view can be summarized by a letter to Congress in which he explained: “whatever Military Powers shall be intrusted to me, shall ever be exerted first to establish and then protect the Civil.” Indeed, “[u]nlike 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.” 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 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 tryed by a Genl. Court Martial . . . and punished as a Spy. In modern times, this defense holds little weight, as a person’s citizenship may be much more easily ascertained, as Padilla’s was.

163. 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 151, 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[s] to secure the proper objects of the government.” Id. at 86-87 (quoting William E. Birchme, Military Government and Martial Law, 371 (3d rev’d ed. 1914)).
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. 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." There is indeed evidence of other occasions in which other Tories were tried by military court-martial, but Washington's concern was that such trials only be held in strict adherence to the civil power's directives. When it came to the crime of spying, Congress explicitly granted court-martial jurisdiction and only by such a Congressional Resolution did the military have such control over an American's trial. As was the case with Joshua Smith, an American implicated in the famous Andre Affair for spying and only therefore tried by military court martial, the civil power rather than military leaders was supposed to decide the appropriate trials. What is significant about the Tory cases is that the Commander in Chief had jurisdiction over

165. The details of the crime are unclear.


167. In reading through Benedict Arnold's papers, Washington found evidence of the trials of Jonathan Loverberry, Nathaniel Acesly, 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. Letter from George Washington to Major General William Heath, General Orders (Oct. 24, 1780), in 20 THE WRITINGS OF GEORGE WASHINGTON, supra note 16, at 252-53; see also WALLACE BROWN, THE GOOD AMERICANS: THE LOYALISTS IN THE AMERICAN REVOLUTION 138 (1969) (describing journalist accounts of Tory executions).

168. 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 et al., supra note 164, at 444-45.

169. Loyalists like Smith were indeed tried in courts-martial on occasions throughout the war, but this is due to the "Civil Power," that is, Congress, telling Washington to try spies in this manner. See Resolution of the Continental Congress (Aug. 21, 1776), in 5 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1778, at 693 (1906) ("[A]ll 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.")
Loyalists only due to a explicit Congressional authorization, and Washing-
ton steadfastly adhered to his subservience to civil authority when dealing
with Americans.170 Aside from charges of spying, Loyalists were to be tried
civilian courts, with fair trials and representation as decided by Con-
gress.171 Showing great deference to Congress and the states, Washington
clarified the basis for his conduct, writing, “It is not my desire, neither in-
deed is it within my power, [to interfere with] the Civil Power. [Civil au-
thorities] best know the Charge and Merit of the Case, [and] consequently
should ultimately determine it.”172

Analogously, 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, original in-
tent evidence suggests that his power over private Americans is heavily cur-
tailed. 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.”173 This strongly
supports Justice Kennedy’s assertion that Padilla should be afforded “the
protection, including the right to a speedy trial, guaranteed to all federal
criminal defendants.”174 From an originalist perspective, it is beyond Bush’s
commander-in-chief powers to direct otherwise.175 In a matter tangential to
Padilla’s case, but representative of Washington’s actions regarding the

170. Id; see also The Continental Congress’s Answer to George Washington’s
Resignation Address Annapolis, Maryland, Dec. 23, 1783, http://gwpapers.vir-
ginia.edu/documents/revolution/congress.html (“You have conducted the
great military contest with wisdom and fortitude invariably regarding the
rights of the civil power through all disasters and changes.”).

171. John Ross successfully represented “Loyalists prosecuted by [Congressman
Joseph] Reed in the state courts.” WILLARD STERNE RANDALL, BENEDICT AR-

14, 1777), in 7 THE WRITINGS OF GEORGE WASHINGTON, supra note 16, at 151.

173. Letter from George Washington to Colonel Daniel Brodhead (May 21, 1779),

in denial of certiorari).

175. 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 16, 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.
GEORGE VS. GEORGE VS. GEORGE: COMMANDER-IN-CHIEF POWER

rights of his fellow Americans, the remainder of this Section discusses Washington’s treatment of American property rights.

2. Seizure of American Property

After the intelligence failings surrounding the second war in Iraq, President Bush, by Executive Order No. 13,328, established the Silberman-Robb Commission to assess the state of the United States’ intelligence capabilities. In response to the committee’s seventy-four suggestions for improving the U.S. intelligence effort, Bush issued Executive Order 13,382. This order provided for the seizure of “all property and interests in property . . . in the United States” of

[any . . . United States person determined by the Secretary of the Treasury, in consultation with the Secretary of State, the Attorney General, and other relevant agencies, to have provided, or attempted to provide, financial, material, technological or other support for, or goods or services in support of, any activity or transaction [to a list of suspected terrorist organizations].

Some were immediately alarmed by Bush’s broad new power to “seize the assets of any person [including Americans].” While President Bush claims this power stems from “the authority vested in me as President by the Constitution and the laws of the United States of America,” it is only within the scope of this Note to examine the original intent of the constitutional commander-in-chief powers with respect to the seizure of assets. It

178. Id.
180. “By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. §1701 et seq.) (IEEPA), the National Emergencies Act (50 U.S.C. §1601 et seq.), and section 301 of title 3, United States Code . . . .” Exec. Order No. 13,382, 70 Fed. Reg. 38,567 (July 1, 2005). This reference to the Constitution may merely be form language which is found in numerous executive orders, and President Bush may be leaning more on power stemming from the cited acts rather than constitutional authority. Regardless, this allusion to constitutional power invites academic research into the question of the sufficiency of constitutional authority to seize property.
181. The authority stemming from acts of Congress subsequent to the Constitution are therefore beyond the scope of this Note.
is unclear whether the President is referring to anything other than his Constitutional Authority to execute the laws, but the debate surrounding this order urges the question of whether the Commander-in-Chief Clause can be used as a basis for seizing American assets. Indeed, while the President may very well possess the power via statute, the Washington model suggests that he lacks the power to seize American citizens’ property under the Commander-in-Chief Clause.

This current debate is somewhat reminiscent of President Harry Truman’s actions during a crisis during the Korean War. Facing the threat of a nationwide strike in the national steel industry, Truman issued an Executive Order commanding the “Secretary of Commerce to take possession of most of the steel mills [to] keep them running.”182 He contended that the “work stoppage would immediately jeopardize” national security.183 In Youngstown Sheet & Tube Co. v. Sawyer,184 the steel companies brought proceedings against the Secretary. The administration argued that the strike “would so endanger the well-being and safety of the Nation that the President had ‘inherent power’ to do what he had done—power ‘supported by the Constitution.’”185 The ramifications of this case pertain to contemporary debate. It is speculated that “when Congress holds hearings on whether the president has exceeded his powers [in strengthening U.S. intelligence capabilities], the Supreme Court’s ruling in the steel seizure case will be the closest thing to settled law on the matter.”186 This Section specifically determines that seizure or conversion of American property is not inherent in the original understanding of the Commander-in-Chief Clause.

Much of Washington’s correspondence involves his attempts to compel his army to respect the property of other Americans. Indeed, “[t]he General [was] resolved to put a stop to plundering, and converting either public, or

183. Id. (quoting Executive Order 10,340).
185. Id. at 584.
private property, to [the military's] own use.\footnote{187} He reacted swiftly and strictly when it came to his attention that anyone in his army went against this resolve. Washington expelled Colonel Serjeant's regiment from the army after the court-martial found them "guilty of the infamous Crime of plundering."\footnote{188} Disapproving of any leniency in this regard, after the court-martial found Ensign Matthew Macumber innocent for taking looking glasses and women's clothes, Washington "ordered a Reconsideration of the matter, upon which, . . . they made Shift to Cashier him."\footnote{189}

Congress authorized Washington
to take, wherever he may be, all such provisions and other articles as may be necessary for the comfortable subsistence of the army under his command, paying or giving certificates for the same: to remove and secure, for the benefit of the owners, all goods and effects which may be serviceable to the enemy . . . .

Resolved, That the public faith be pledged for the payment of the provisions or other articles to be taken, and for which certificates shall have been given, at such prices as are expressed in the certificates; or, if the prices are not expressed, to be paid for as the same shall be valued by commissioners for that purpose . . . .

Throughout the war, Washington meticulously insisted that the troops in his command abide by the repayment principle expressed in the second paragraph of the above resolution.

Even with his Continental Army starving, Washington was still unwilling to compromise his principles regarding the sanctity of private property. Only under very specific circumstances, and providing adequate restitution (echoed in the Takings Clause) would Washington confiscate supplies for the good of the nation. In one notable case, Washington reasoned, "[i]t being represented to me that the Millers, either from an unwillingness to part with their Flour, or the difficulty of obtaining Wheat from the Farmers, do not Imply their Mills, by which means the Army under my Command is like to suffer for want of Bread."\footnote{191} Faced with this crisis, and fighting to save the Continental Army, the manner in which he handles the miller is

\footnote{187. George Washington, General Orders (Sept. 6, 1776), in \textit{6 The Writings of George Washington}, \textit{supra} note 16, at 24, 25.}

\footnote{188. \textit{Id.} at 88, 91.}

\footnote{189. Letter from George Washington to the President of Congress (Sept. 24, 1776), \textit{in \textit{6 The Writings of George Washington}, supra note 16, at 106, 115.}}

\footnote{190. \textit{8 Journals of the Continental Congress, 1774-1789, supra note 58, at 752-53 (Sept. 17, 1777).}}

telling: "I do hereby Authorize and Instruct you to enquire into the State of this matter; with full powers if it should be found that the default is in the Miller, to Sieze [sic] the Mill and grain, and Imply it for the use of the Public... paying the full Value..." 192 Rather than taking the grain to save his troops, he instead used a process that respected the miller's property and allowed for compensation. Similarly, when much of the army was unclothed, Washington ordered "I hereby Authorize to collect all such Blankets, Shoes, Stocking and other Clothing... as the Inhabitants can spare without greatly distressing their Families." 193 However, as always, Washington viewed compensation as mandatory. He ordered, "[Y]ou are to give Certificates to the Inhabitants of the Quantity and Value of each Species you receive from them," 194 which the Americans could later use for reimbursement.

Throughout the war, extensive loyalist property was seized by the revolting colonists; however, Washington sought to stop these actions. In June 1778, Washington ordered his troops "to preserve tranquility and order... and give security to individuals of every class and description [from] every species of persecution, insult or abuse, either from the soldiery to the inhabitants or among each other." 195 As with "patriot" Americans, Washing-

192. Id. Only by the desire of Congress did Washington take a harsher stance at one point, writing "I have, by [Congress's] desire, issued a Proclamation ordering the Farmers to Thresh out their Wheat and prepare it for Mill, and that in case of Noncompliance within certain Periods, it shall be Siezed upon for the use of the Army and only paid for as Straw." Letter from George Washington to Major General John Armstrong, (Dec. 28, 1777), in 10 The Writings of George Washington, supra note 16, at 216.


194. Id. at 124-25.

195. Letter from George Washington to the President of Congress (June 18, 1778), in 7 The Writings of George Washington, supra note 16, at 69 n.3. Although he sought to protect Loyalists, Washington was more inclined to give his troops' discretion the benefit of the doubt, such as when Major Ballard was faced with felony charges in New York for confiscating Loyalist property. Washington wrote to New York Governor George Clinton, that "the good of the service sometimes requires things to be done in the military line, which cannot be supported by the civil law." Letter from George Washington to Governor George Clinton (Dec. 13, 1779), in 17 The Writings of George Washington, supra note 16, at 252-53. Washington, however, made clear to Clinton that he would nevertheless not tolerate any confiscations where there were "appearances of oppression or fraud" or "spirit of plunder." Id. at 253.
ton made provisions to protect—and, if confiscated, for repayment of—Tory property.\textsuperscript{196}

It was the Continental Congress and state legislatures who often ordered the confiscations\textsuperscript{197} while the Commander in Chief merely obliged,\textsuperscript{198} taking special care to avoid “greatly distressing the[] families” and ensure for means of proper reimbursement.\textsuperscript{199} After Congress ordered loyalists out of their homes in Philadelphia in 1778, Washington sent a letter of protest, contending that “[a] proscribing system of Laws having the same effect, when carried to a great extent, ever appeared to [him] to be impolitic; and . . . to exile many of its Inhabitants cannot be the interest of any State.”\textsuperscript{200} While disagreeing with some of their actions, Washington understood confiscation of loyalist property as under the discretion of the legislatures’, and not the commander’s, powers ordering that “the persons who are known to be enemies to their Country, be seized and confin’d, and their Property disposed of, as the Law of the State directs.”\textsuperscript{201} He added teeth to

\begin{footnotesize}
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\item Repayment was indeed authorized by Congress after the war, see 26 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, supra note 58, at 26 (Jan. 14, 1784) when it ratified the Treaty of Paris (Art. V), although the question of how many of the Loyalists were actually reimbursed is debatable. “The Chronology of Mifflin’s presidency is as follows . . . January 14 Ratifies definitive treaty of peace, ‘nine states being present’; recommends that the states ‘provide for the restitution of confiscated loyalist property.” Stanley L. Klos, Thomas Mifflin: 5th President of the United States in Congress Assembled November 3, 1783 to June 3, 1784, http://www.virtualology.com/uspresidents/thomasmifflin.org/mifflinct/ (last visited Mar. 12, 2007).
\item See, e.g., 5 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, supra note 58, at 605-06 (July 24, 1776) (discussing Congressional actions); Letter from George Washington to the President of Congress (Jan. 30, 1776), in 4 THE WRITINGS OF GEORGE WASHINGTON, supra note 16, at 287 n.57 (referencing confiscation by the state of New York).
\item Washington noted that he was acting “by the virtue of the powers vested in [Washington] by the Honorable Congress” rather than an assumed commander-in-chief power. 10 THE WRITINGS OF GEORGE WASHINGTON, supra note 16, at 124.
\item Id. See also George Washington, General Orders (Jan. 21, 1777), in 7 THE WRITINGS OF GEORGE WASHINGTON, supra note 16, at 46-47 (“plundering the Inhabitants under the notion of their being Tories, or venduing [sic] of Plunder taken from the Enemy, in any other manner than these Orders direct, may expect to be punished in the severest manner.”).
\item Letter from George Washington to the President of Congress (June 2, 1778), in 12 THE WRITINGS OF GEORGE WASHINGTON, supra note 16, at 8-9.
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this conviction, explaining "plundering the Inhabitants under the notion of their being Tories, or venduing [sic] of Plunder taken from the Enemy, in any other manner than these Orders direct, may expect to be punished in the severest manner."\(^\text{202}\) According to Washington, the property of the domestic enemy was to be dealt with according to the laws of Congress and the states. It was not the commander who had the power to decide.

This original intent evidence supports the Supreme Court’s holding in *Youngstown* that President Truman’s order was unconstitutional. In the majority opinion, Justice Blackman explains “The power of Congress . . . can authorize the taking of private property for public use . . . . The Constitution does not subject this lawmaking power of Congress to presidential or military supervision or control.”\(^\text{203}\) As discussed, during the American Revolution, it was Congress that authorized confiscations, not Washington. Just as it was the Continental Congress in 1777 that “Resolved, That it be earnestly recommended to . . . confiscate and make sale of all the real and personal estate therein, of such of their inhabitants and other persons who have forfeited the same” due to their loyalty to Britain,\(^\text{204}\) likewise, the more modern Congress should provide for executive seizure.\(^\text{205}\) Only once authorized can the commander in chief confiscate. Indeed, based upon the aforementioned evidence from the Washington model, “to recall the historical events . . . would but confirm [the Court’s] holding that this seizure order cannot stand.”\(^\text{206}\)

Washington’s actions depict a strong standard of respect for the rights of American citizens. While Washington had tremendous powers in dealing with enemy combatants, he was extremely conscious of his limitations in impinging upon the rights of fellow citizens.\(^\text{207}\) Whether the matter involved trials or property, Washington was steadfast in his convictions regarding the limits of his commander-in-chief powers. This understanding was communicated to the Continental Congress on numerous occasions and eventually incorporated into the text of the Constitution. Therefore, original intent evidence suggests that President Bush lacks the power to seize or convert a U.S. citizen’s private property under the Commander-in-Chief Clause.

\(^{202}\) *Id.*

\(^{203}\) *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952).

\(^{204}\) 1 *Journals of the Continental Congress, 1774-1789* (Nov. 27, 1777), *supra* note 58, at 971.

\(^{205}\) *Youngstown*, 343 U.S. at 597 (stating that indeed it is “Congress [that] has . . . frequently specifically provided for executive seizure”).

\(^{206}\) *Id.* at 589.

\(^{207}\) For further discussion of Washington’s refusal to confiscate property or suspend habeas corpus, see Bruce Chadwick, *George Washington’s War* 227-30 (2002).
Professor Gordon Wood noted that he could “make little or no sense of the various institutional or other devices written into the constitution” until he understood “the assumptions from which the constitution-makers acted.”208 George Washington’s actions and writings throughout the Revolutionary War reveal much about the original understanding of the Commander-in-Chief Clause. 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 understanding of the commander in chief, the Continental Congress experimented with the only commander in chief the United States ever had.

Based upon its failed attempts to manage the Revolution by committee, the Continental Congress granted its commander increasing power and deference as the necessities arose. Principled and ever aware that his actions were setting historic precedents for the new nation, Washington was exceedingly careful to only exercise those powers understood to be properly allocated to him. He commenced the war with few powers. They were broadened, however, as the Founding Fathers learned what their commander needed in order to effectively wage the war. Specifically, these powers expanded most greatly with regard to Washington’s autonomy in determining battle tactics and strategy as well as his treatment of foreign enemies. Notably, however, Washington understood his powers to remain rather constrained with regard to Americans.

With Washington presiding as President of the Convention, the Constitutional Convention determined to grant the powers inherent in this tried and tested concept of “commander in chief” to the President of the United States. This study utilizes the Washington model in order to better understand the implications of the Framers’ original intent. As modern Presidents invoke their commander-in-chief powers, the original understanding of the phrase is widely recognized as at least a starting point for determining the legitimacy of certain executive action. This Note has determined a striking dichotomy between the commander in chief’s powers over foreign enemies and Americans. Its conclusions suggest original intent evidence for granting broad discretion to President Bush regarding war strategy and Congressional consultation. At the same time, purely analyzing the original intent of commander-in-chief powers and not other elements of executive authority, this Note finds historical evidence for President Bush possessing diminished powers in his domestic action. When it comes to Americans, it was the firm belief of Washington, as well as the understanding of the Framers, that the

208. Wood, supra note 27, at viii.
commander was obliged to defer to the legislative bodies and civil courts. In these ways, the Washington model provides original intent justification for thirty-three years of presidential disregard of certain provisions of the War Powers Resolution, as well as the Supreme Court's holdings in *Padilla* and *Youngstown*.

This Note views contentious contemporary issues through a specific yet significant lens. Examining the war powers of the first Commander in Chief yields originalist support for certain presidential powers, rights, and obligations based upon Washington's actions during the Revolutionary War. Harnessing this originalist approach, this Note advances present scholarship on presidential war powers by grounding its insights into modern debate in the historical background of the original intent of the Commander-in-Chief Clause.