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

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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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1. U.S. CONST. art. II, § 2, cl. 1.
 2. Press Release, The White House (Dec. 19, 2005), <http://www.whitehouse.gov/news/releases/2005/12/20051219-2.html>.
 3. President’s Statement on Signing of H.R. 2863 (Dec. 30, 2005), <http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html>.
 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).
 5. Bruce Fein, *Electing the Supreme Court*, WASH. TIMES, Sept. 14, 2004, at A16.

war-making powers using an originalist approach.⁶ 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.⁷ Even those critical of expansive executive power, such as Dean Harold Koh, and Professors Michael Glennon and Louis Henkin, employ original intent arguments.⁸ 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."⁹ 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."¹⁰ 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.¹¹ Accordingly, this Note seeks to use the lens of

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6. See generally JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005) [hereinafter YOO, *WAR AND PEACE*]; JOHN YOO, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996) [hereinafter Yoo, *Continuation of Politics*].
 7. YOO, *WAR AND PEACE*, *supra* note 6, at 25; see, e.g., *Printz v. United States*, 521 U.S. 898, 944 (1997) (Souter, J., dissenting); *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779, 802-15 (1995); John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 1982 (1999) ("[T]he Supreme Court's renewed interest in the structural elements of the Constitution has relied in part upon the original understanding.").
 8. See generally MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* (1990); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* (1996); HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION* (1990).
 9. *C-Span Weekend*, (C-Span television broadcast Mar. 19, 2006) (comments of William Galston, Former Deputy Domestic Policy Advisor to President Clinton from 1993-95).
 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 Constitution¹² 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.”¹³ With his numerous communications as commander in chief and statesman, Washington kept the Framers well informed of his actions throughout the Revolution.¹⁴ In doing so, he also communicated his understanding of the role of the American commander in chief.¹⁵ This Note contends that the Framers’ understanding of the term “commander in chief” was shaped by their experiences with Washington.¹⁶ As a result, in

thority.”); see also William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 859 (1995).

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) (“[The Framers’] immediate role model for [President] was, of course, George Washington, who everyone knew would be the first president. The presidential office was designed with him in mind, and he in turn further defined the office by the precedents he set.”); Ronald D. Rotunda, *Original Intent, the View of the Framers, and the Role of the Ratifiers*, 41 VAND. L. REV. 507, 509-10 (1988); Gordon Wood, *President George Washington, Republican Monarch* 9 (Princeton University, James Madison Leadership Conference Paper, Feb. 2004), available at [http://web.princeton.edu/sites/jmadison/calendar/conferences/Washington%](http://web.princeton.edu/sites/jmadison/calendar/conferences/Washington%20)

writing Article II, Section 2, Clause 1, the Framers' concept of the powers the clause encompassed was based upon the Washington model.¹⁷ 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 for¹⁸ (1) the President's power under the Commander-in-

20Gordon%20Wood.pdf (“[T]he Convention had . . . gone on to make the new chief executive so strong, so king-like, precisely because the delegates expected George Washington to be the first president.”). See generally H. JEFFERSON POWELL, *THE PRESIDENT’S AUTHORITY OVER FOREIGN AFFAIRS: AN ESSAY IN CONSTITUTIONAL INTERPRETATION* (2002). See also primary sources, including Letter from Pierce Butler to Weedon Butler, in 3 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 302 (Max Farrand ed., 1966), available at [http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field\(DOCID+@lit\(froo3220\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(froo3220))). Washington himself saw his actions as precedent-setting. See Letter from George Washington to James Madison (May 5, 1789), in 30 *THE WRITINGS OF GEORGE WASHINGTON* 310-11 (John C. Fitzpatrick ed., George Washington Bicentennial Commission 1976) (1932).

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

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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.
 20. U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation").
 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.²⁴ 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.²⁵ He justified his

tations 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 of 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 monarch²⁶ (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.²⁷ "Although they threw off the weight of British political control, the Framers did not reject immediately the British system of government."²⁸ 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."²⁹ Yoo has argued that, in creating the federal

sider 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. COLO. 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 between 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 British 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 Framers 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 . . .

torical baseline established by the struggle between the Crown and Parliament.”).

30. John C. Yoo & Neil J. Kinkopf, *What Are the Limits of Presidential Power?*, LEGAL AFF., NOV. 14, 2005, http://www.legalaffairs.org/webexclusive/debateclub_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 Burnham Dunbar, *A Study of “Monarchical” Tendencies in the United States from 1776 to 1801*, 10 U. ILL. STUD. SOC. SCI. 1, 27-75 (1923).
36. Yoo, *Continuation of Politics*, *supra* note 6, at 203 (quoting WILLIAM BLACKSTONE, 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.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.³⁹ In effect, this study uncovers evidence to reject Yoo's argumentation while nevertheless supporting some of his conclusions via an alternative approach.

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."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

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, *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, *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, *Understanding Constitutional War Powers Today: Why Methodology Matters*, 106 YALE L.J. 845, 845 (1996) (reviewing LOUIS FISHER, *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.").

39. Yoo does mention Washington's influence but focuses on the Crown as the Framers' model for executive war power. Yoo, *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").

40. Stromseth, *supra* note 38, at 961.

and the creation of a distinctly American system of politics.”⁴¹ Throughout the Convention, “[d]oubtless most Founders looked forward to the leadership of George Washington.”⁴² 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 powers⁴³ certainly influenced the Continental Congress’s initial understanding of the phrase,⁴⁴ they did not seek to maintain the status quo. “More important in any case was the Founders’ own experience”⁴⁵ and, throughout the war, they experimented with defining the powers of the American Commander.⁴⁶ The rebeling 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 States⁴⁷

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.⁴⁸ On the contrary, they deeply feared that the perceived failings of the British system would re-emerge under their new government.⁴⁹

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,⁵⁰ “[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.”⁵¹ 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.”⁵² 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.⁵³ “Lacking a central executive, the Congress relied on various boards and committees to perform its executive functions.”⁵⁴ 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.”⁵⁵ 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.

54. Hollander, *supra* note 49, at 53.

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,⁵⁶ only gradually granting Washington power as they learned from the realities of war.⁵⁷

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,⁵⁸ 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."⁵⁹ 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.⁶⁰ Having determinedly rejected the British monarchical notion of the commander in chief,⁶¹ 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."⁶² 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.

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

59. The Continental Congress's Answer to George Washington's Resignation Address, in 25 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, *supra* note 58, at 838 (Dec. 23, 1783), available at <http://gwpapers.virginia.edu/documents/revolution/congress.html>.

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).

62. Rotunda, *supra* note 16, at 510.

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.”).

65. CONG. RESEARCH SERV., LIBRARY OF CONG., 1 THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 459 (Edward S. Cowin ed., 2006).

66. Flaherty, *supra* note 11, at 1007.

67. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 16, at 65; *see* Saikrishna B. Prakash & Michael D. Ramsey, *Foreign Affairs and the Jeffersonian Executive: A Defense*, 89 MINN. L. REV. 1591, 1654 (2005).

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.

ecutive power than Britain's king."⁷⁰ 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."⁷¹ 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."⁷² 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 *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.*⁷³

Throughout the Revolution and Constitutional Convention it is clear that the Framers actively sought to break with the precedent of the King⁷⁴ 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."⁷⁵

70. 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.

71. JAMES MADISON, *THE DEBATES IN THE FEDERAL CONVENTION OF 1787* (Galland Hunt & James Brown Scott eds., 2007).

72. MAY, *supra* note 27, at 7.

73. Letter from Pierce Butler to Weedon Butler, *supra* note 16, at 302 (emphasis added).

74. 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).

75. Calabresi, *supra* note 16, at 481.

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.⁷⁷ 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.”⁷⁸ 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,⁷⁹ and at the start of the war, Washington “believ[ed] that he was

77. 1 SIR GEORGE OTTO TREVELYAN, *THE AMERICAN REVOLUTION* 298 (1926).

78. Letter from Benjamin Rush to Thomas Rushton (Oct. 29, 1775), in *LETTERS OF BENJAMIN RUSH* 92 (L.H. Butterfield ed., Am. Philosophical Soc’y 1951).

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.”⁸⁰ Congress was wary of giving one military commander too much power. Therefore, at its commencement, the war was intended to be micromanaged by committees, with Congress having the final say in matters concerning mobilization, appointment of officers, and military strategy.⁸¹

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.”⁸² Washington wanted a “speedy finish,”⁸³ 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.”⁸⁴

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,⁸⁵ 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.

80. ROBERT MIDDLEKAUFF, *THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION* 309 (2005).
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.
82. Letter from George Washington to John Washington (Sept. 10, 1775), *in* 2 *PAPERS OF GEORGE WASHINGTON* 447 (W.W. Abbot, Dorothy Twohig & Philander D. Chase eds., 1983).
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).

men.⁸⁶ 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.⁸⁷ 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."⁸⁸ 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."⁸⁹

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 Mifflin and the survivors imprisoned on atrociously inhumane prisoner barges.⁹⁰ By November 1776, Washington retreated with what was

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).

87. "Gen. [Washington] intend[ed] to bombard the Town . . . but a Council of War ha[d] determined it [was] not . . . expedient." Richard Smith's Diary, in 3 *LETTERS OF DELEGATES TO CONGRESS*, 346, 346 (Paul M. Smith ed. 1978).

88. Letter from Charles Lee to George Washington (Feb. 19, 1776), in 3 *PAPERS OF GEORGE WASHINGTON*, *supra* note 82, at 340.

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."⁹¹ Washington, while exceedingly 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."⁹² 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 Establishment 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 Continental Army. On November 21, 1776, Cornwallis and an army of ten thousand 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 Congress.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 approach did not work. Almost concurrently with Washington's symbolically inspiring victory at Trenton, New Jersey, they passed the following resolution:

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 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 16, at 138.
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 (Richard K. Showman et al. eds., 1976) (emphasis added).
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 them⁹⁵

From this time through the end of the War, Congress looked to Washington as the war strategist and allotted him great authority.⁹⁶

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.”⁹⁷ 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. 6 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.

97. The Library of Congress, The Continental Congress Grants Washington Greater Powers, <http://rs6.loc.gov/learn/features/timeline/amrev/contarmy/powers.html> (last visited Mar. 12, 2006).

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

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98. Letter from George Washington to Robert Morris, George Clymer, and George Walton (Jan. 1, 1777), in 6 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 16, at 464.
 99. Letter from George Washington to the President of Congress (Aug. 20, 1780), in 19 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 16, at 402 n.52.
 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.
 101. Letter from George Washington to Major General Heath (Jul. 27, 1777), in 8 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 16, at 482.
 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 Courrese 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.

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 Waggon. . . . *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.

105. Letter from Nathanael Greene to George Washington (Mar. 24, 1777), in 7 PAPERS OF GEORGE WASHINGTON, *supra* note 82, at 627.

106. Letter from George Washington to Continental Congress (Sept. 8, 1780), in THE GEORGE WASHINGTON PAPERS 1741-99, at 299, (Library of Congress, Series 3a Varick Transcripts), *available at* http://memory.loc.gov/cgi-bin/query/P?mgw:1:/temp/~ammem_YHQr::

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.

109. GLENN A. PHELPS, GEORGE WASHINGTON AND AMERICAN CONSTITUTIONALISM 41 (1993) (emphasis added).

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.”¹¹⁰ 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.¹¹¹ 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.”¹¹² It was clear that in dealing with his troops and the enemy, the Commander in Chief exercised full control.¹¹³

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,¹¹⁴ 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.¹¹⁵ Washington instead chose a strategy of “not obeying their orders [and] the expedition against Canada was entirely, though reluctantly, given up.”¹¹⁶

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

110. Letter from George Washington to Benjamin Harrison (Mar. 21, 1781), in 21 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 16, at 342.

111. See, e.g., George Washington, Powers of Officers to Collect Clothing, Etc. (Nov. 1777), in 10 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 16, at 124, 124-25.

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.¹¹⁷ 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."¹¹⁸ He was hailed as "the great soldier of liberty—a man whose exceptional virtue and patriotism assured final triumph."¹¹⁹ 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."¹²⁰ 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.¹²¹ 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.¹²² 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.¹²³ 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.¹²⁴ 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.¹²⁵

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."¹²⁶ While much of the War Powers Resolution deals with initiation of hostilities,¹²⁷ this Note addresses section 3, which "requires the

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.

126. RICHARD F. GRIMMETT, CONG. RESEARCH SERVICE, WAR POWERS RESOLUTION: PRESIDENTIAL COMPLIANCE 2 (2004), <http://www.fas.org/man/crs/IB81050.pdf>.

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.*”¹²⁸

At the time of his commission, Congress kept Washington on a short leash.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.”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.”¹³¹ Congress soon concluded that their “arrangement failed miserably, and . . . surrendered their powers to the field commander.”¹³²

“Experience taught the framers [an] important lesson during this period: the war powers needed to be fixed to guarantee effective common defense.”¹³³ To remedy the situation, Congress passed the aforementioned December 27, 1776 resolution¹³⁴ 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.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.”¹³⁶

tilities. MARSHALL, *supra* note 103, at 22. See Major Michael P. Kelly, *Fixing The War Powers*, 141 MIL. L. REV. 83 (1993), for a general discussion of the historical context of the Resolution.

128. GRIMMETT, *supra* note 126, at 12 (citing War Powers Resolution of 1973 (Pub. L. 93-148, 88 Stat. 555)) (emphasis added).
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. Kelly, *supra* note 127, at 110.
132. *Id.*
133. *Id.*
134. See *supra* note 95.
135. See *supra* text accompanying notes 94-97.
136. Julian G. Ku, *Is There an Exclusive Commander-in-Chief Power?*, 115 YALE L.J. POCKET PART 84, 84 (2006), <http://www.thepocketpart.org/2006/03/ku.html>.

Although the Continental Congress relinquished control over strategy, it still required that it be informed.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.”¹³⁸ Although there were gaps in communication during crucial junctures of intense fighting, Washington conscientiously sought to comply.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*.¹⁴⁰ President Bush is not the only President to approach the War Powers Resolution in this fashion, how-

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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, *supra* note 123, at 27-28.
138. Letter from George Washington to the President of Congress (Sept. 11, 1777), in 9 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 16, at 207-08 n.1.
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. 6 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 16, at 460-71.
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.” GRIMMETT, *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. . . .¹⁴¹

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."¹⁴² However, Washington was—and, according to the originalist approach, so is President Bush today—obligated to notify Congress of his actions.¹⁴³

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*."¹⁴⁴ Approaching this issue from a purely originalist understanding would suggest that Congress is overstepping its bounds.¹⁴⁵ 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 way¹⁴⁶—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.”).

148. Scott Shane, *Report Questions Legality of Briefings on Surveillance*, N.Y. TIMES, Jan. 19, 2006, at A19.

149. *Id.*

ing to certain members of Congress¹⁵⁰ 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.”¹⁵¹ Historically, it is acceptable to withhold information when completely necessary, as Washington found it to be while in the heat of certain battles.¹⁵² 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.¹⁵³ Additionally, Washington addressed his briefings

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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/crs11806.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.¹⁵⁴ While limited correspondence was mostly due to practical necessity¹⁵⁵ and the information was usually then referred to other members of Congress at the receiving parties' discretion,¹⁵⁶ 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."¹⁵⁷ 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 with 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).

157. Hearing on the Nomination of Judge Samuel Alito to the U.S. Supreme Court Before the S. Comm. on the Judiciary, 109th Cong. (2006) (statement of Samuel A. Alito, Jr., Judge, United States Court of Appeals for the Third Circuit).

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.¹⁵⁸ 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.”¹⁵⁹ 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.”¹⁶⁰ 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.¹⁶¹ As indicated by the Supreme

158. *Padilla v. Hanft*, 547 U.S. 1062 (2006).

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/doj121803.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."¹⁶² 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."¹⁶³ 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.¹⁶⁴

common order to things; but in the . . . unsettled State of government, the distinction between Civilian and Military power, cannot be upheld with that exactness which every friend to Society must wish." Letter from Washington to Governor Jonathan Trumbull (Apr. 21, 1777), in 7 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 16, at 450 n.90. In modern times, this defense holds little weight, as a person's citizenship may be much more easily ascertained, as Padilla's was.

162. Letter from George Washington to the New York Legislature (Dec. 16, 1776), in 6 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 16, at 382-83.
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. BIRCHIME, *MILITARY GOVERNMENT AND MARTIAL LAW*, 371 (3d rev'd ed. 1914)).
164. Letter from George Washington to Philip Livingston et al. (July 19, 1777), in 8 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 16, at 439, 444-45.

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.¹⁶⁵ 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.”¹⁶⁶ 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.¹⁶⁷ 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.¹⁶⁸ 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.¹⁶⁹ What is significant about the Tory cases is that the Commander in Chief had jurisdiction over

165. The details of the crime are unclear.

166. Letter from George Washington to Brigadier General Preudhomme De Borre (Aug. 3, 1777), in 9 *THE WRITINGS OF GEORGE WASHINGTON*, *supra* note 16, at 6-7.

167. In reading through Benedict Arnold’s papers, Washington found evidence of the trials of Jonathan Loverberry, Nathaniel Ackesly, and Reuben Weeks. Interestingly, each of these three trials was initiated by Benedict Arnold, not Washington. Washington learned of these trials while reading through Arnold’s papers after he was discovered to be a spy, and did not confirm the sentences as he usually did in other cases. 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 Washington steadfastly adhered to his subservience to civil authority when dealing with Americans.¹⁷⁰ Aside from charges of spying, Loyalists were to be tried in civilian courts, with fair trials and representation as decided by Congress.¹⁷¹ Showing great deference to Congress and the states, Washington clarified the basis for his conduct, writing, “It is not my desire, neither indeed is it within my power, [to interfere with] the Civil Power. [Civil authorities] best know the Charge and Merit of the Case, [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 intent evidence suggests that his power over private Americans is heavily curtailed. Washington made it quite clear that “[t]he establishment of military law where the civil prevails, is a measure of extreme necessity, and which [the commander in chief has] no authority to recommend.”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.virginia.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 ARNOLD: PATRIOT AND TRAITOR 427 (1990).

172. Letter from George Washington to Brigadier General Thomas Mifflin (Feb. 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 15 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 16, at 119.

174. *Padilla v. Hanft*, 547 U.S. 1062, 1063 (2006) (Mem.) (Kennedy, J., concurring 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.

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.¹⁷⁶ In response to the committee's seventy four suggestions for improving the U.S. intelligence effort, Bush issued Executive Order 13,382.¹⁷⁷ This order provided for the seizure of "all property and interests in property . . . in the United States" of

[a]ny . . . 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].¹⁷⁸

Some were immediately alarmed by Bush's broad new power to "seize the assets of any person [including Americans]."¹⁷⁹ 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,"¹⁸⁰ 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.¹⁸¹ It

176. Comm'n on the Intelligence Capabilities of the U.S. Regarding Weapons of Mass Destruction, About the Commission, <http://www.wmd.gov/about.html> (last visited Apr. 5, 2007).

177. Exec. Order No. 13,382, 70 Fed. Reg. 38,567 (July 1, 2005).

178. *Id.*

179. *Bush Sets up Domestic Spy Service*, BBC NEWS, June 30, 2005, <http://news.bbc.co.uk/2/hi/americas/4636117.stm>.

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

182. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 583 (1952).

183. *Id.* (quoting Executive Order 10,340).

184. 343 U.S. 579 (1952).

185. *Id.* at 584.

186. Peter S. Canellos, *The Truman Precedent for Bush's Eavesdropping*, BOSTON GLOBE, Dec. 20, 2005, at A3. The *Steel Seizure Case* is also invoked by Senator Russ Feingold, *Introducing a Resolution to Censure President George W. Bush* (Mar. 13, 2006), <http://www.feingold.senate.gov/statements/06/03/2006313-.html>. See also William C. Banks & M.E. Bowman, *Executive Authority for National Security Surveillance*, 50 AM. U.L. REV. 1, 74 (2001); Douglas C. McNabb & Matthew R. McNabb, *Of Bugs, the President, and the NSA: National Security Agency Intercepts Within the United States*, 30 NAT'L ASSOC. OF CRIM. DEF. LAWYERS: CHAMPION 10 n.578 (2006).

private property, to [the military's] own use."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."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."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 purpose¹⁹⁰

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 Employ their Mills, by which means the Army under my Command is like to suffer for want of Bread."¹⁹¹ Faced with this crisis, and fighting to save the Continental Army, the manner in which he handles the miller is

187. George Washington, General Orders (Sept. 6, 1776), in 6 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 16, at 24, 25.

188. *Id.* at 88, 91.

189. Letter from George Washington to the President of Congress (Sept. 24, 1776), in 6 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 16, at 106, 115.

190. 8 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, *supra* note 58, at 752-53 (Sept. 17, 1777).

191. Letter from George Washington to Carpenter Wharton (Dec. 14, 1776), in 6 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 16, at 409.

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 Imploy 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.

193. Powers of Officers to Collect Clothing, Etc. (Nov. 1777), in 10 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 16, at 124.

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.¹⁹⁶

It was the Continental Congress and state legislatures who often ordered the confiscations¹⁹⁷ while the Commander in Chief merely obliged,¹⁹⁸ taking special care to avoid “greatly distressing the[] families” and ensure for means of proper reimbursement.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.”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.*”²⁰¹ He added teeth to

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196. 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).
197. *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).
198. 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.
199. *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 vending [sic] of Plunder taken from the Enemy, in any other manner than these Orders direct, may expect to be punished in the severest manner.”).
200. 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.
201. George Washington, General Orders (Jan. 21, 1777), *in* 7 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 16, at 46-47.

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.”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.”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,²⁰⁴ likewise, the more modern Congress should provide for executive seizure.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.”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.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).

CONCLUSION

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.