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# Don't Know Much About History: Constitutional Text, Practice, and Presidential Power

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**“Don’t’ Know Much About History:  
Constitutional Text, Practice, and Presidential Power  
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## **Introduction**

What is to be learned about the constitutional powers of the presidency from George Washington? As the first president, there is no question that Washington helped define the office, much in the same way that every president, by virtue of his personality, experiences, and decisions has defined the history and character of the position. This is true whether it be the impact that a Thomas Jefferson, Abraham Lincoln, or a Ronald Reagan had upon the office. The personality or psychological makeup of those serving as president have an enormous influence on the specific powers that a particular person exercises.<sup>1</sup>

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<sup>1</sup> *See*: JAMES DAVID BARBER, PRESIDENTIAL CHARACTER: PREDICTING PERFORMANCE IN THE WHITE HOUSE (1972) (*describing* how the psychological character of presidents affect their approach to their duties).

But George Washington seems unique. Maybe it is because surveys consistently rank Washington as the best or one of the best presidents ever.<sup>2</sup> Or perhaps it is because he is the first president and even if not necessarily the best. This means that he was able to define the office simply by being its first occupant. However, there are two additional reasons offered by John Yoo regarding the importance of Washington's presidency. First it was the claim that the framers of 1787 designed the office of the presidency with Washington in mind.

A singular factor influenced the ratification of the Constitution's article on the Presidency: All understood that George Washington would be elected the first President. It is impossible to understate the standing of the "Father of his Country" among his fellow Americans. He had established America's fundamental constitutional principle—civilian control of the military—before there was even a Constitution. Throughout his command of the Continental Army, General Washington scrupulously observed civilian orders and restrained himself when a Congress on the run granted him dictatorial powers. He had even put down, by his mere presence, a potential coup d'état by his officers in 1783. Washington cannot be quantified as an element of constitutional law, but he was probably more important than any other factor.<sup>3</sup>

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<sup>2</sup> MSNBC, *Lincoln Ranked Best President by Historians*, < <http://www.msnbc.msn.com/id/29211562/#slice-2> > (site last visited on October 15, 2010); *FDR Rated Best President in Survey of 238 Scholars*, The Huffington Post, < [http://www.huffingtonpost.com/2010/07/01/fdr-rated-best-president-\\_n\\_632182.html](http://www.huffingtonpost.com/2010/07/01/fdr-rated-best-president-_n_632182.html) > (site last visited on October 15, 2010).

In addition to asserting that the presidency was defined by Washington, Yoo also asserts that his eight years in office were critical in giving real meaning or definition to the formal powers of the office outlined in Article II. His presidency completed the picture of the presidency only briefly sketched out in the Constitution.

Washington filled these gaps with a number of foundational decisions—several on a par with those made during the writing and ratification of the Constitution itself. His desire to govern by consensus sometimes led him to seek cooperation with the other branches. He was a republican before he was a Federalist, but ultimately Washington favored an energetic, independent executive, even at the cost of political harmony.<sup>4</sup>

Assuming Yoo is correct, what does it say about the Constitution and the presidency if both were based upon a cult of personality? Should one really care about Washington's exploits? From a historical perspective, his presidency is important, but there is a deeper meaning and significance attached to the Washington presidency when it comes to the Constitution and the powers of the presidency.

Washington was the first president, serving at a time when framers of Constitution could observe actions. His actions set a constitutional mold in two ways. First, with his presidency coming so soon after the Constitutional Convention it offers one a possible test regarding intent of framers. Specifically, if no one (such as the framers and ratifiers of the Constitution) objected

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<sup>3</sup> JOHN YOO, *CRISIS AND COMMAND*, 53 (2009).

then his actions must be constitutional and therefore offer an operationalization of what the intent of the framers was. Second, his presidency sets precedent for defining the powers of the office and what it constitutionally is allowed to do. In effect, significant constitutional deference should be offered to what Washington did because his historical actions constitute legal precedent or evidence regarding the scope of Article II powers. Thus, there is a normative component here in terms of defining presidential power—the history of the Washington presidency is a source of constitutional argument.

Using history as a constitutional argument to support presidential power is not unusual,<sup>5</sup> at least for Yoo. In his capacity as White House Legal Counsel Yoo extensively cited presidential history as constitutional precedent for many of the legal actions of the Bush presidency.<sup>6</sup> Other legal memoranda defining the scope of presidential power to engage the war on terror similarly cited history.<sup>7</sup> Yoo also does the same in his *The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11*.<sup>8</sup> Even in his most recent book, *Crisis and*

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<sup>4</sup> *Id.* at 54.

<sup>5</sup> LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS, 26, 29 (1990) (“The life of the Constitution, too, has not been logic or textual hermeneutics, but experience, and constitutional history has supplied answers to some of the questions that constitutional text and ‘original intent’ left unanswered.”) (“history has given the President large powers”).

<sup>6</sup> John C. Yoo, The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them. Department of Justice, Office of Legal Counsel (September 25, 2001) (“Yoo Memorandum”).

<sup>7</sup> United States Department of Justice, Office of Legal Counsel, Legal Authorities Supporting the Activities of the National Security Agency Described by the President (January 19, 2005) (“Wiretapping Memorandum”); United States Department of Justice, Office of Legal Counsel, Application of Treaties and Laws to al Qaeda and Taliban Detainees (January 22, 2002) (“Detainee Memorandum”); United States Department of Justice, Office of Legal Counsel, Standards of Conduct for Interrogation under 18 U.S.C. §§2340-2340A (August 1, 2005) (“Torture Memorandum”).

<sup>8</sup> JOHN C. YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 (2005).

*Command: Executive Power from George Washington to George W. Bush*, out of which his comment on Washington for this conference are based, history is extensively referenced in support of constitutional authority.<sup>9</sup>

Finally, the Supreme Court on numerous occasions, including in *United States v. Curtiss-Wright Export Corporation*,<sup>10</sup> where the Sutherland thesis is used to defend presidential power, history is lent support to evidence constitutional argument. More recent Supreme Court cases testing the limits of presidential power in a post-9/11 world have also resorted to history to bolster constitutional arguments.<sup>11</sup> This is neither the invocation of the intent of the framers nor of the use of history in terms of discussing the historical facts of a past precedent and seeking to apply them to a present problem.<sup>12</sup> Instead it is citation or discussion of historical events to serve as constitutional precedent.<sup>13</sup>

Yet invocation of history for legal argument poses a problem.<sup>14</sup> Heidi Kitrosser raises the issue with Washington and his disputes with Congress, asserting that: “These early controversies thus do not necessarily stand for more than the notion that the executive can raise policy objections to inter-branch information requests, and that those objections are subject to responses

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<sup>9</sup> JOHN C. YOO, *CRISIS AND COMMAND: EXECUTIVE POWER FROM GEORGE WASHINGTON TO GEORGE W. BUSH* (2010).

<sup>10</sup> 299 U.S. 304 (1936).

<sup>11</sup> See e.g.: *Boumediene v. Bush*, 553 U.S. 723 (2008). See also: *District of Columbia v. Heller*, 554 U.S. \_\_\_\_\_, 128 S. Ct. 2783 (2008) as another example of using history to clarify constitutional meaning (Second Amendment).

<sup>12</sup> Richard A. Primus, *Judicial Power and Mobilizable History* 65 MD. L. REV. 171 (2006) (contrasting originalism with the “mobilizing of history to make constitutional arguments).

<sup>13</sup> Jeffrey S. Sutton, *the Role of History in Judging Disputes about the Meaning of the Constitution*, 41 TEX. TECH L. REV. 1173, 1176-7 (2009) (noting the increased reliance of the Court to appeal to history to address constitutional questions).

by the requesting parties.”<sup>15</sup> Kitrosser’s point is that assertions or decisions made by Washington might simply be policy or discretionary choices, and constitutional significance should not necessarily be attached to them. More broadly, uses of presidential history, especially that of the Washington administration, implicate what shall be called a translation problem. That problem is when do acts, instances, or facts of history translate into constitutional precedent? More simply put—when does historical practice count as the basis for constitutional law or precedent? Implicit in Yoo’s historical accounts is a normative claim or argument for broad presidential power.

This article raises some questions regarding what we can learn from history for constitutional argument. It concedes generally that historical facts can support or buttress constitution argument, but more specifically it contends that acts undertaken by George Washington are problematic assertions for presidential power, especially those that assert what Kitrosser would call “supremacist” or broad if not exclusive claims for presidential foreign policy authority.<sup>16</sup> To do that, this article first describes how history is employed as constitutional argument for presidential power. Then the piece critiques this type of argumentation, claiming that generalizations from practices, policies, or acts of discretion during the Washington presidency being used as constitutional argument are problematic on several grounds. The overall thesis here is that while history may be an appropriate tool for making or

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<sup>14</sup> David A.J. Richards, *Interpretation and Historiography*, 58 S. CAL. L. REV. 489 (1985) (contrasting legal and historical interpretation). See also: HANS-GEORG GADAMER, TRUTH AND METHOD, 289-304 (1986).

<sup>15</sup> Heidi Kitrosser, *Accountability, Transparency, and Presidential Supremacy*, 17 (2010). **How to cite**

sustaining constitutional arguments, what is needed is some rule of translation explaining why, when, and how the past is relevant to defending presidential power.

## **II. History, Practice, and Presidential Power**

Efforts to invoke history as constitutional argument for presidential power operate in two ways, especially when it comes to George Washington. First, practices confirm intent of framers and therefore strong presidential power is in line with Constitution. Second, practices create independent constitutional justification for strong presidential powers. In both cases, history or past practice defends strong presidential power. The importance of history to constitutional argument is underscored by Kelly, Harbison, and Belz, authors of one of the most famous books on this subject, when they declare:

Yet American constitutional history is more than an account of the written Constitution, important as that instrument has been in the national political life. Constitutional history goes beyond the history of constitutional law because the actual constitution of government has consisted in practices and understandings

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<sup>16</sup> Heidi Kitrosser, *Accountability, Transparency, and Presidential Supremacy*, 4 (2010) **How to cite?**



shaped as much by political exigency and constitutional theory as by the prescriptions of the documentary text.<sup>17</sup>

For these scholars, the actual constitution of the United States is more than mere parchment. It includes both the written text and practice. What is constitutional in the United States, and the limits of what American presidents can do, is explicated by combination of text and practice. Thus practice, tradition, and history are a constitutional guide.

But more generically, there is a basic question: What can one learn from history? At the most cynical extreme, Henry Ford is famously quoted for stating “History is bunk,”<sup>18</sup> meaning we can learn little if anything from it. But others have not similarly reduced the past to irrelevance. Historical scholarship has been replete with efforts to find a meaning or purpose in the past.<sup>19</sup> Christian history saw a progressive aspect to history,<sup>20</sup> one which St. Augustine saw as history unveiling God’s purpose or plan over time.<sup>21</sup> Hegel depicted history as the unfolding of reason,<sup>22</sup> Marx as a succession of class conflicts.<sup>23</sup> Still other writers or historians sought

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<sup>17</sup> ALFRED H. KELLY, WINFRED A. HARBISON, AND HERMAN BELZ, *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT*, vol. 1, xix (1991).

<sup>18</sup> See: <http://www.phrases.org.uk/meanings/182100.html> (site last visited on October 10, 2010).

<sup>19</sup> JOHN BURROW, *A HISTORY OF HISTORIES: EPICS, CHRONICLES, ROMANCES, AND INQUIRIES FROM HERODOTUS AND THUCYDIDES TO THE TWENTIETH CENTURY*, xv (2008).

<sup>20</sup> *Id.* at 170-173.

<sup>21</sup> AUGUSTINE, *CITY OF GOD*, 457, 487-490 (1972) (*criticizing cyclical theories of history and arguing that there is a linear purpose to it in revealing God’s plan. See also: CHARLES NORRIS COCHRANE, CHRISTIANITY AND CLASSICAL CULTURE*, 474-486 (1980).

<sup>22</sup> G.W.F. HEGEL, *PHILOSOPHY OF HISTORY*, 84 (1912).

<sup>23</sup> Karl Marx and Friedrich Engels, *Communist Manifesto* In. ROBERT C. TUCKER EDS. *THE MARX-ENGELS READER*, 469, 473 (1978).

meaning and significance in the past,<sup>24</sup> whether it be Tolstoy who found meaning in the everyday private activities of people,<sup>25</sup> or Thomas Carlyle who saw it residing in the actions of great individuals.<sup>26</sup>

Constitutional arguments to defend presidential power based on history often invoked it first to confirm intent of framers.<sup>27</sup> Intent of framers is a well-accepted technique for constitutional interpretation.<sup>28</sup> Efforts to invoke intent of framers often are used in conjunction with textualism, seeking to provide clarification regarding what certain words mean, such as “commander-in-chief” in Article I, Section 2 of the Constitution.<sup>29</sup> Additionally, characteristic of this logic is invoking Alexander Hamilton, especially Federalist 70,<sup>30</sup> for arguments of strong presidential power.<sup>31</sup> Often quoted is Hamilton’s statement: “The ingredients which constitute

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<sup>24</sup> See: E.H. CARR, WHAT IS HISTORY?, 109-133 (1967); HAYDEN WHITE, THE HISTORICAL IMAGINATION IN NINETEENTH-CENTURY EUROPE, 2-4, 427-30 (1975); R.G. COLLINGWOOD, THE IDEA OF HISTORY, 9-13 (1980); LEON J. GOLDSTEIN, THE WHAT AND WHY OF HISTORY, 81-92 (1996); LEON J. GOLDSTEIN, HISTORICAL KNOWING, xi-xiv (1976) (*describing* history in part as a form of knowledge seeking to make sense of the past).

<sup>25</sup> ISAIAH BERLIN, RUSSIAN THINKERS, 22-34 (1978).

<sup>26</sup> THOMAS CARLYLE, ON HEROES AND HERO WORSHIP AND THE HEROIC IN HISTORY (2010).

<sup>27</sup> See generally: LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMER’S CONSTITUTION (1988); PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION, 12 (1991); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980).

<sup>28</sup> Bobbitt at 13, 25. However, Bobbitt notes that history is invoked in terms of intent of framers as one of the modalities of constitutional argument. He does not describe history as a modality in terms of looking at post-ratification deeds or acts by actors such as presidents as a basis of a historical argument sustaining constitutional precedent.

<sup>29</sup> Brest at 206; Bobbitt at 56.

<sup>30</sup> JAMES MADISON, THE FEDERALIST, no. 70., 454, 455 (1937). See also: JOHN YOO, CRISIS AND COMMAND, 40-51 (2009) (*invoking* Hamilton to justify presidential war powers).

<sup>31</sup> Henkin at 21 (*describing* how “Alexander Hamilton early set forth an executive view of the grand design of the Constitution for the conduct of foreign affairs.”).

energy in the Executive are, first, unity; secondly, duration; thirdly, an adequate provision for its support; fourthly, competent powers.”<sup>32</sup> In *Federalist* no. 74 Hamilton also states:

Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of common strength; and the power of directing and employing the common strength forms [ [a] vital and essential part of the definition of the executive authority.<sup>33</sup>

In *Federalist* no. 70 Hamilton also relies upon historical examples—often to Rome—to defend his gloss on presidential power and the constitution.<sup>34</sup> The lessons of history are invoked as constitutional argument. But Hamilton is not alone in resorting to history to make a constitutional argument about presidential power. The best example of this resides with Justice Sutherland and the *United States v. Curtiss-Wright* case.<sup>35</sup>

In *Curtiss-Wright* Congress had passed a joint resolution empowering the President to embargo the shipment of articles of war to countries engaged in armed conflict when, in his judgment, such action would be in the interest of the resolution, which applied to sales within the United States. The President forbade sales to the principals in the Chaco war between Bolivia

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<sup>32</sup> Madison at 455.

See also: Yoo Memorandum 2-3, where he cites to Alexander Hamilton and the *FEDERALIST* as support for broad presidential foreign policy powers; Detainee Memorandum at 12 (citing Alexander Hamilton’s *Pacificus* No. 1 for this proposition); Wiretapping Memorandum at 6-7;

<sup>33</sup> Madison at 482.

<sup>34</sup> *Id.* at 456-7.

<sup>35</sup> 299 U.S. 304 (1936).

and Paraguay. The Curtiss-Wright Export Corp. sold arms of war [aircraft machine guns] to Bolivia and was charged with violation of the act of Congress and the President's order. The corporation challenged the validity of the act claiming it to be an illegal delegation of power to the President. The Supreme Court rejected this claim.

In writing for the Court, Justice Sutherland first distinguished between constitutional arrangements and presidential power in domestic versus foreign affairs.

The two classes of powers are different, both in respect of their origin and their nature. The broad statement that the Federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs.<sup>36</sup>

Thus for Sutherland, the normal restrictions on delegation which would apply to domestic issues does not have the same force in international or foreign relations. Congress can delegate to the president in foreign affairs ways that it could not do so domestically. But beyond setting up a dichotomy between domestic and foreign affairs, Sutherland also constructs a theory about foreign policy power, suggesting a genealogy from the British crown to the United States.

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<sup>36</sup> 299 U.S. at 315-16.

As a result of the separation from Great Britain by the colonies, acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. Even before the Declaration, the colonies were a unit in foreign affairs, acting through a common agency—namely, the Continental Congress, composed of delegates from the thirteen colonies. That agency exercised the powers of war and peace, raised an army, created a navy, and finally adopted the Declaration of Independence. Rulers come and go; governments end and forms of government change; but sovereignty survives. A political society cannot endure without a supreme will somewhere. Sovereignty is never held in suspense. When, therefore, the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed to the Union. That fact was given practical application almost at once. The treaty of peace, made on September 3, 1783, was concluded between his Britannic Majesty and the “United States of America”. 8 Stat.—European Treaties—80.

The Union existed before the Constitution, which was ordained and established among other things to form “a more perfect Union.” Prior to that event it is clear that the Union, declared by the Articles of Confederation to be “perpetual,” was the sole possessor of external sovereignty, and in the Union it remained without change save in so far as the Constitution in express terms qualified its exercise . It results that the investment of the Federal government

with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution.<sup>37</sup>

Having established that sovereign power passed from the Crown to the United States, Sutherland then contends that much of this power passed to the president, stating that the “exclusive power of the President as the sole organ of the Federal government in the field of international relations—[is] a power which does not require as a basis for its exercise an act of Congress.”<sup>38</sup> This lineage of foreign policy power from the crown to the president provides the history to support the constitutional authority of Roosevelt to issue the embargo order.

*Curtiss-Wright* and the Sutherland thesis provide powerful precedent for significant or exclusive presidential power in foreign affairs. The basis of that claim rests tremendously on historical practice—the passing of sovereign power—and other acts that seem to confirm presidential power.

Conversely, *Youngtown v. Sawyer*<sup>39</sup> is normally thought of as a case sharply limiting presidential power—here the authority of Truman to seize steel mills to avert a strike.<sup>40</sup> But even in Justice Jackson’s famous concurrence, he too both cites *Curtiss-Wright* and references history or historical examples to support his opinion.<sup>41</sup> While generally Jackson is cited to reference his

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<sup>37</sup> 299 U.S. at 316-17.

<sup>38</sup> 299 U.S. at 319.

<sup>39</sup> 343 U.S. 579 (1952)

<sup>40</sup> Roy E. Brownell, *The Coexistence of United States V. Curtiss-Wright and Youngstown Sheet & Tube V. Sawyer in National Security Jurisprudence*, 16 J. L. & POL., 1, 8-9 (2000).

<sup>41</sup> 343 U.S. at 641-3.

trifold classification of presidential power in foreign affairs,<sup>42</sup> he does so in the context of stating that: “I have heretofore, and do now, give to the enumerated powers the scope and elasticity afforded by what seem to be reasonable practical implications instead of the rigidity dictated by a doctrinaire textualism.”<sup>43</sup> History or practice help justify the constitutional classification of power they president possesses.

In sum, constitutional arguments on presidential power, especially it seems in foreign affairs, depart from the text. The constitutional power of the presidency encompasses extra textual powers, often sourced in past practice. As a result, there is almost an Edmund Burke like quality to the arguments here. In commenting on the nature of society, Burke stated:

Society is indeed a contract. . .It is a partnership in all science; a partnership in all art,; a partnership in every virtue, and in all perfection. As the ends of such a partnership cannot be obtained in many generations, it becomes a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born.<sup>44</sup>

As Russell Kirk describes Burke’s constitutionalism, it is something more than a written document but instead the product of “long-established practices, customs, beliefs, and

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<sup>42</sup> Brownell at 47; Anthony Simones, *The Reality of Curtiss-Wright*, 16 N. ILL. U. L. REV. 411, 419 (1996).

<sup>43</sup> 343 U.S. at 640.

<sup>44</sup> EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE, 194-5 (1969).

interests.”<sup>45</sup> The constitution is in fact a living document, one connecting the past to the present, with the former serving as precedent for current deeds or actions. Thus, history or practice can serve as constitutional argument or justification, as if laying an edifice for the present.

### **III. The Limits of Historical Argument**

But here is the problem. How does history or past practice translate into constitutional argument? Is every act or a decision of a president, especially Washington, equivalent to a constitutional claim, especially when no manifest or expressed statement makes such an assertion (and when there is no indication that others similarly construed such a meaning)? How do we distinguish some choices made by Washington as merely examples of policy being made or discretion exercised versus them rising to the level of constitutional argument? Yoo does not say or address this concern in any of his writings, rendering a problem. There must be some useful rule, tool, or technique to clarify when history or practice in fact is an appropriate constitutional argument. Short of constructing this rule, there are some points that can be raised to question the limits of historical argument.

First, invoking Hamilton, especially the *Federalist*, is problematic. Of course there is the question of whether the *Federalist Papers* are rightfully considered an appropriate or definitive gloss on the intent of the constitutional framers, as opposed to being political propaganda simply

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<sup>45</sup> Russell Kirk, *Edmund Burke and the Constitution*, THE INTERCOLLEGIATE REV., 3 (Winter, 1985-86).



to urge the New York legislature to ratify the Constitution.<sup>46</sup> Second, even if they are appropriate to ascertaining intent, Hamilton's role as a constitutional framer is questionable, especially in terms of presidential power. Hamilton gave an "inflammatory" speech<sup>47</sup> at the Convention advocating that the president should serve for life.<sup>48</sup> The speech was not well received by the other delegates, especially his praise for the British government.<sup>49</sup> After giving this speech he silently remained at the convention for a few more weeks, returned to New York, never to return.<sup>50</sup> Thus, both his extreme arguments for presidential power which were rejected by the Convention,<sup>51</sup> and his absence from the deliberations, question the value of invoking him.

But there is a clear problem in using history practice under the Washington administration either as confirmation of framers' intent or as independent justification for presidential power. One problem is simply the issue of historical accuracy. For example, many scholars have questioned Sutherland's historical account in *Curtiss-Wright*.<sup>52</sup> The passing of sovereignty from the crown to the presidency has been heavily criticized. Additionally, historical facts are not given.<sup>53</sup> Facts are facts when placed into a context and explanation for

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<sup>46</sup> JACOB E. COOKE, ALEXANDER HAMILTON, 54-5 (1982).

<sup>47</sup> Ron Chernow, Alexander Hamilton, 233 (2004); Levy at 34-5.

<sup>48</sup> MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, vol 1., 289 (1966); JAMES MADISON, NOTES ON THE DEBATES IN THE FEDERAL CONVENTION OF 1787, 137-39 (1966).

<sup>49</sup> Chernow at 233.

<sup>50</sup> *Id.* at 235.

<sup>51</sup> Henkin at 22; Levy at 34-8.

<sup>52</sup> *See*: CHARLES A. LOFGREN, THE FOREIGN RELATIONS POWER: UNITED STATES V. CURTISS-WRIGHT EXPORT CORPORATION: AN HISTORICAL REASSESSMENT, IN GOVERNMENT FROM REFLECTION AND CHOICE, 167 (1986); L. Fisher, *Evolution of Presidential and Congressional Powers in Foreign Affairs*, in LOUIS W. KOENIG ET AL., CONGRESS, THE PRESIDENCY, AND THE TAIWAN RELATIONS ACT, 20 (1985); David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467 (1946).

<sup>53</sup> Carr at 8-30; Collingwood at 133.

something.<sup>54</sup> History and facts must be interpreted and they are viewed through the horizon of the present interpreter.<sup>55</sup> This means that events of Washington's administration are not "brute facts" that stand on their own.<sup>56</sup> They must be interpreted. Some events are selected from among others to construct a historical explanation or narrative, of which then the latter is framed into a constitutional argument. Simply put, history just does not exist, it is reconstructed and there are problems in culling occurrences into relevant legal claims.<sup>57</sup>

But another and equally serious problem deals with the problem of the language of politics. Even if Sutherland were accurate in his history, he misses something far more important. Specifically, it is how terms and concepts that were used by the British changed meanings when they were imported to the colonies and then eventually used in American political discourse, including in the Constitution.

Historian Bernard Bailyn writes in his *The Ideological Origins of the American Revolution*<sup>58</sup> that as the American colonies pressed their grievances to England via the First and then Second Continental Congresses, one of the problems was that the Americans and the British were using the same language but talking past one another. At root, the American Revolution was one where three political terms were in dispute—representation,<sup>59</sup> constitutionalism,<sup>60</sup> and

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<sup>54</sup> Collingwood at 133.

<sup>55</sup> Gadamer at 268-273.

<sup>56</sup> See: G.E.M. Anscombe, *Brute Facts*, 18 ANALYSIS, 69 (1958) (discussing how facts are not given but are defined by theories).

<sup>57</sup> Collingwood at 242.

<sup>58</sup> BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1977).

<sup>59</sup> Bailyn at 161.

<sup>60</sup> *Id.* at 175.

sovereignty.<sup>61</sup> The real revolution was over the meaning of these three terms and how they affected how Americans thought about political and governance.<sup>62</sup>

Begin with the concept of representation. One of the primary objections the American colonists had with the British taxing tea and other goods was the famous claim “No taxation without representation.” In making this claim American asserted that the colonies did not vote for anyone serving in the British Parliament, the body that voted on taxes and other policies affecting America. Thus, the claim was that there was no one directly elected by the people in the colonies and therefore there was no representation.<sup>63</sup> The British, however, did not understand this argument. Instead, they asserted that the American colonies were virtually represented in the British parliament; that the MPs who were serving there, even though not elected by anyone in the colonies, virtually could represent the interests of those back in North America.<sup>64</sup> This debate over direct versus virtual representation was one of the first political disagreements between the American colonies and England. The two sides were using the same word—representation—but they meant very different things when invoking the concept. Americans demanded a direct and real voice in parliament and over their own affairs, and the British were not providing that in the way the colonists demanded.

A second concept over which there was debate involved the concept of sovereignty. Sovereignty refers to who holds political power.<sup>65</sup> Political sovereignty refers to ultimately who is in charge in a state or nation. For the British, sovereignty resided in Parliament, it was the

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<sup>61</sup> *Id.* at 198.

<sup>62</sup> Bailyn at 161.

<sup>63</sup> Bailyn at 166.

<sup>64</sup> Bailyn at 167.

<sup>65</sup> GEORGE H. SABINE AND THOMAS L. THORSON, A HISTORY OF POLITICAL THEORY, 377 (1973).

ultimate source of political authority and power, including in and over the colonies.<sup>66</sup> British thinkers such as John Locke had argued against claims by the king that sovereignty was lodged in the monarchy. This was essentially the argument between Sir Robert Filmer and John Locke.<sup>67</sup> Locke's arguments invoking the social contract metaphor to explain the origin of government were at the heart of this claim.<sup>68</sup> The Glorious Revolution of 1688 had essentially validated John Locke's claim and therefore parliament was viewed as the sovereign body in England.<sup>69</sup>

However, the colonists had a different sense of whom or what was sovereign. Instead of accepting the British view or perspective that saw Parliament as sovereign,<sup>70</sup> they argued that ultimate sovereignty resided with the people.<sup>71</sup> This is the assertion that the American Founding Fathers adopted.

Thus, they both accepted the argument that the people were sovereign, and they also took Locke true to his word that the people created civil society and government. Together, that meant that the people ruled or were sovereign, and that did not simply mean the people of England. Instead, the colonies, especially as a result of all of the self-rule that they had experienced, at least up until recently, were also sovereign and were entitled to a say over their own affairs.<sup>72</sup> The colonies were entitled to a say over taxation, over the control of their own

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<sup>66</sup> Bailyn at 201.

<sup>67</sup> Sabine and Thorson at 485, 494; JOHN LOCKE, *TWO TREATISES OF GOVERNMENT*, intro. Peter Laslett, 64-5 (1965).

<sup>68</sup> JOHN LOCKE, *TWO TREATISES OF GOVERNMENT*, 366-378 (para. 86-100) (1965).

<sup>69</sup> Locke at 412-3 (para.149); RICHARD ASHCRAFT, *REVOLUTIONARY POLITICS & LOCKE'S TWO TREATISES OF GOVERNMENT*, 577 (1986).

<sup>70</sup> Bailyn at 201.

<sup>71</sup> Bailyn at 227.

<sup>72</sup> Bailyn at 203-5.

representatives, the selection of their governors, judges, and all the other affairs that affected their governance in North America. They resented the way Parliament and King George III treated them—like, well, a colony.

Instead, as it became clear on July 4, 1776, the 13 states in North America were actually sovereign, they were their own country and entitled to rule themselves.

Finally, there is the notion of constitutionalism. Constitutionalism is an ancient term, going back to at least Aristotle in terms of its first use.<sup>73</sup> Aristotle would use term constitution to refer to forms of government depending on who ruled.<sup>74</sup> Over time the concept of constitutionalism retained that basic meaning, but it evolved to reference the basic structures, “Grundnorm,” or rules that constitute a government.<sup>75</sup> As the term evolved in Western Europe and North America, constitutionalism referred to a government of limited powers, one which often must adhere to rule of law, procedural due process or regularity, and eventually to a commitment to the protection of individual rights.<sup>76</sup> At the time of the American Revolution the British equated the Parliament with the Constitution.<sup>77</sup> Since England lacked a written constitution, someone or something had to define what was constitutional. This was a task set for Parliament. It defined what was constitutional. It did not make sense or the idea of saying

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<sup>73</sup> CHARLES HOWARD MCILWAIN, *CONSTITUTIONALISM: ANCIENT AND MODERN* (Ithaca, NY: Great Seal Books, 1958); PENNOCK, J. ROLAND AND JOHN W. CHAPMAN, *CONSTITUTIONALISM* (NY: NYU Press, 1979).

<sup>74</sup> Aristotle, *Politics*, In., ed. RICHARD MCKEON, *THE BASIC WORKS OF ARISTOTLE*, 1113, 1184-5 (1941).

<sup>75</sup> HANS Kelsen, *PURE THEORY OF LAW* (1967).

<sup>76</sup> JAMES T. MCHUGH, *COMPARATIVE CONSTITUTIONAL TRADITIONS* (NY: Peter Lang Publishing, 2002).

<sup>77</sup> Bailyn at 178-9.

that Parliament was acting unconstitutional was a non sequitur. Parliament was the final word on what was constitutional and whatever it said went in terms of what was permitted.<sup>78</sup>

The American concept of constitutionalism departed from this British notion. A constitution, for Americans, was something distinct from the government.<sup>79</sup> The constitution served to define the powers of the government and to place limits upon it. Parliament or the government could act unconstitutionally; that could happen when they failed to follow the limits prescribed upon them by the constitution. In this case, one, as the Americans came to prefer, a written constitution. Thus, when the American colonies began to argue that the King and Parliament were acting unconstitutionally, violating the rights of British citizens as Thomas Jefferson originally argued, they were again making a claim that the British just did not understand. How could the British government act unconstitutionally when the government, especially the Parliament, decided what was constitutional?

Taken together, Bailyn argues that the real American Revolution was a political one involving a dramatic change in meaning of the concepts of representation, sovereignty, constitutionalism, and the idea of rights.<sup>80</sup> Americans came to believe that they were sovereign, that they were entitled to their own choice in representatives, and that a government was limited by a constitution that defined how it operated and what rights the people had. The Declaration of Independence, as already noted, encapsulated and summarized the emerging new political vocabulary of the United States of America.

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<sup>78</sup> *Id.*

<sup>79</sup> Bailyn at 181.

<sup>80</sup> Bailyn at 189.

It should be easy to see how the Americanization of these three political concepts eventually affected the ideas behind the drafting of the Constitution in 1787. Ideas such as first having a written constitution that defines the powers of the government are of course the starting point for understanding the document. But growing out of the idea that the Constitution stands about the government to limit it, subject to the sovereign rights of the people to decide what the document means and how the government should operate, ideas such as separation of powers, checks and balances, and even the notion of judicial review emerged. All of these ideas are part of the process of placing constitutional checks upon the power of the government. Moreover, because of the abuses of power that the colonists saw with Parliament and King George, the constitution that eventually emerged in 1787 sought to place limits upon the exercise of authority; it sought to prevent any one branch of government or person from exercising too much power that was not subject to checks. This idea of a constitution as a check upon government, as a document that defines and limits power, is at the heart of any notion of an American public service ethic even to this day. So too are ideas that the people are ultimately sovereign. The first three words of the Constitution—"We the people"—capture this notion. Finally, the concept of representation, that individuals deserve a voice in their government, would be powerful in the writing of the Constitution. While the 1787 document did not expressly grant people the right to vote, it did set up mechanisms for public officials to be chosen by some of the people or by their representatives.

But it was not only the experiences with England and George III that framed the ideas that would eventually be incorporated into the Constitution of 1787. There was also the Articles of Confederation, America's first constitution, which was adopted in 1781, that too framed the

backdrop for the 1787 Constitutional Convention.<sup>81</sup> The Articles created more of a decentralized political system to govern the United States. There was a national Congress that gave each state equal representation, but there was no Supreme Court or federal court system. Additionally, there was no independent president, instead there was a rotating one picked by Congress. Action in Congress required unanimity, and the national government had limited authority to raise revenue. While some would argue that the Articles government was one that respected local control and rights, many criticized it as weak and ineffective. Its lack of ability to raise revenue, weak control over commerce, and ability of states to veto actions, all lead a growing chorus of individuals such as Alexander Hamilton and James Madison to believe that revisions to the Articles were needed. Finally, events such as Shay's rebellion in Massachusetts, a skirmish by Revolutionary war veterans, led others to conclude that perhaps the Article government was ineffective.

It was against this backdrop that the 1787 Philadelphia constitutional convention took place. There was the fear of creating too strong of a national government or power, less a return to the abuses experienced with England. Conversely, the Articles government had insufficient authority to act. A balance was needed. This was clearly true when it came to presidential power, including that dealing with foreign affairs.

Sutherland has been rightly criticized for his views on sovereignty and its genealogy from the British crown to effectively the president.<sup>82</sup> If Bailyn is correct, American concepts of sovereignty shift it from the crown to the people, not the government, let alone the president.

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<sup>81</sup> Henkin at 23.



Second, while British notions of constitutionalism might have a Burkean flavor that blends text and practice, the American conception of the term subordinated the practices of the government to the constitution. This too would include the practices of the president. Thus, practice or tradition as a supplement to defining what is constitutional can be questioned in the American context as a viable basis for forging presidential power.

Language philosophers note how words garner meaning in part due to their context or use in relation to other words.<sup>83</sup> The same is true with political concepts. Not only did the British concepts take on a new meaning when applied to the American setting but there is also a gap between the rhetoric and application of the words.

Efforts in recent years to understand colonial and early America have often taken two if not more disconnected paths. There is a body of literature in political science and history seeking to ascertain the nature and origin of American political values and to define the "Founding" principles of American politics and political thought. This body of literature, in defining American political values as primarily Lockean-Liberal<sup>84</sup> or Harringtonian-Republican<sup>85</sup>

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<sup>82</sup> Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L. J. 1, 32 (1973); David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L. J. 467 (1946). Simones at 414-15.

<sup>83</sup> LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS*, para. 43 (1968) (*describing how the meaning of words are located in their use within a language*).

<sup>84</sup>. *See*: CARL BECKER, *THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF IDEAS* (1970); LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA* (1955); JOHN PATRICK DIGGINS, *THE LOST SOUL OF AMERICAN POLITICS* (1986); STEVEN DWORETZ, *THE UNVARNISHED DOCTRINE: LOCKE, LIBERALISM, AND THE AMERICAN REVOLUTION* (1990).

(and to a lesser extent indebted to Scottish Enlightenment or Christian-Religious values),<sup>86</sup> has taken somewhat of a rhetorical or linguistic turn<sup>87</sup> and focused almost exclusively upon the political rhetoric, political writings,<sup>88</sup> or concepts used by key Founders including Madison, Hamilton, Jefferson, Wilson, and Morris, among others.<sup>89</sup>

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<sup>85</sup>. See: J.G.A. Pocock, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLIC TRADITION* 506-553 (1975); J. G.A. Pocock, "*Republicanism and Ideologia Americana*," 1987 *J. Hist. Ideas*, 325-346 (1987).

<sup>86</sup>. See: W.C. McWilliams, *THE IDEA OF FRATERNITY IN AMERICA* (1974); P. Miller, *Errand into the Wilderness* (1956); and GARY WILLS, *EXPLAINING AMERICA: THE FEDERALIST* (1982). Other authors have noted the appearance of other "tongues" or influences in early American political thought. See: I. Kramnick, "*The 'Great National Discussion': The Discourse of Politics in 1787*," 45 *Wm. & Mary L.Rev.* 3 (1988).

<sup>87</sup>. Terrence Ball, *TRANSFORMING POLITICAL DISCOURSE: POLITICAL THEORY AND CRITICAL CONCEPTUAL HISTORY*, 4 (1988), notes this linguistic turn in much of the methodology of political theory, including the methodology of many who study American political thought and the American political founding.

<sup>88</sup>. Among the major compilations of political writings include multi-volume edition works of the writings of the major Founding Fathers as well as writings of the Anti-Federalists, pamphlets from early America, and sermons of the this time period. See: CHARLES HYNEMAN AND

There is another body of scholarship and inquiry that has been concerned with a series of questions including the sources of the American legal system,<sup>90</sup> the transition in America from British (common) law to American statutory law,<sup>91</sup> the "legal" nature of the American Revolution,<sup>92</sup> the emergence of the American legal system in the post-revolutionary period,<sup>93</sup> and

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DONALD LUTZ, *AMERICA POLITICAL WRITING DURING THE FOUNDING ERA: 1760-1805* (1983); HERBERT J. STORING, *THE COMPLETE ANTI-FEDERALIST* (1981); BERNARD BAILYN, *PAMPHLETS OF THE AMERICAN REVOLUTION, 1750-1776* (1965); and E.SANDOZ, *POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA: 1730-1805* (1991).

<sup>89</sup>. JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM* (1990).

<sup>90</sup>. J.P.GREENE, *PERIPHERIES AND CENTER: CONSTITUTIONAL DEVELOPMENT IN THE EXTENDED POLITICS OF THE BRITISH EMPIRE AND THE UNITED STATES* (1986); J.R.POLE, *PATHS TO AMERICAN PAST* (1979).

<sup>91</sup>. E.G.BROWN, *BRITISH STATUTES IN AMERICAN LAW: 1776-1836* (1974); S.C.STIMSON, *THE AMERICAN REVOLUTION IN LAW* (1990).

<sup>92</sup>. T.C.Grey, "*Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*," 30 Stan. L. Rev. 843 (1978); S.N.Katz, "*Republicanism and the Law of Inheritance in the American Revolutionary Era*," 76 Mich. L. Rev. 1, 2-3 (1977); J.P.REID,

the role of British legal scholars including Cooke, Bracton, and Blackstone as influencing all this.<sup>94</sup> These questions are predominantly asked by legal historians who, for the most part, do not approach the questions of the political founding in the rhetorical way raised by the first group noted here, but instead address the topic more from an institutional slant. Moreover legal

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CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS (1986); R.B.Morris, "*Legalism versus Revolutionary Doctrine in New England*," New. Eng. Q. 195 (April, 1931).

<sup>93</sup>. W.P.ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA (1980); G.DARGO, LAW IN THE NEW REPUBLIC: PRIVATE LAW AND THE NEW ESTATE (1983); A.NEVINS, THE AMERICAN STATES DURING AND AFTER THE REVOLUTION: 1775-1789 (1927); MORTON J.HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: 1780-1860 (1977); WILLIAM NELSON, THE AMERICANIZATION OF THE COMMON LAW (1979); S. C.STIMSON, THE AMERICAN REVOLUTION IN LAW (1990).

<sup>94</sup>. KERMIT HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY, 52 (1989); M.J.Horwitz, "*The Conservative Tradition in the Writing of American Legal History*," 17 AM. J. LEGAL. HIST. 275, 286 (1973); ROSCOE POUND, THE FORMATIVE ERA OF AMERICAN LAW, 25 (1938); B.ZWEIBEN, HOW BLACKSTONE LOST THE COLONIES: ENGLISH LAW, COLONIAL LAWYERS, AND THE AMERICAN REVOLUTION (1990).

analysis of early America often examines documents, such as case law and statutes, that are different from those studied in the first group.

The divergent paths of these two groups raises interesting questions for the study of early America and its Founding. Among these questions are whether the two approaches to the Founding are distinct because of their contrasting objects of inquiry or whether or not the work done in one field can inform the other. There is also the question of how the evidence of one field supports or contradicts conclusions reached in the other. The significance of this gap between rhetorical versus legal approaches to studying the founding are especially acute when it comes to understanding terms such as “property.” While the rhetoric of property suggested its protection and linkage to liberty, the colonial and its extensive regulation of it question the viability of relying simply on statements about it to determine how it was actually valued or viewed by the Framers.

The changed meaning of British legal concepts in the American setting, as well as the gap between the rhetoric and reality of what these terms meant call into question the viability of simply referencing historical words—such as commander-in-chief—without also understanding what they meant in a new American context. The problem with meaning or text extends beyond constitutionalism, representation, sovereignty (for Bailyn), and property, but also encompasses commander-in-chief.

Barron and Lederman examine the historical context and meaning of “commander-in-chief.”<sup>95</sup> Their analysis reveals that the earliest uses of the term “apparently derives from the reign of King Charles I in the seventeenth century, when it denoted a purely military post under

the command of political superiors.”<sup>96</sup> They note also how in the this British context the title commander in chief gave its holder little discretion and authority beyond direction from Parliament.<sup>97</sup> During the Revolutionary War, this narrow understanding of the term also framed and limited General Washington’s command of the troops as he took direction from the Continental Congress.<sup>98</sup>

Moreover, the term commander-in-chief or similar phrasing appear in many post-independence state constitutions. There was little consensus regarding what substantive powers it conferred,<sup>99</sup> although Barron and Lederman conclude that the consensus was that the powers of these person who held this title would be strictly limited by law.<sup>100</sup> A similar understanding was present at the 1787 constitutional convention, although the paucity of the debates makes it difficult to ascertain the exact understanding of the term. However, Barron and Lederman again conclude that: “Evidence from the Constitutional Convention.—Suffice it to say, then, that as the constitutional convention commenced in the summer of 1787, there was no clear and common understanding of the title “Commander in Chief” that necessarily included a power to disregard validly enacted laws regulating the conduct of war.”<sup>101</sup>

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<sup>95</sup> David J. Barron and Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008).

<sup>96</sup> Barron and Lederman at 772.

<sup>97</sup> *Id.* at 773.

<sup>98</sup> Barron and Lederman at 774-5.

<sup>99</sup> Barron and Lederman at 781-2.

<sup>100</sup> *Id.* at 783.

<sup>101</sup> Barron and Lederman at 785-6.

The point in reciting this brief history is to establish that whatever meaning there was attached to commander-in-chief in Great Britain, its meaning had changed once imported to the United States and viewed in the context and experiences of King George III and the Articles of Confederation government. Underscoring the changed meaning or context for the term was reflected in state conventions held to adopt the Constitution. For example, in North Carolina one speaker noted:

A very material difference may be observed between this power, and the authority of the king of Great Britain under similar circumstances. The king of Great Britain is not only the commander-in-chief of the land and naval forces, but has power, in time of war, to raise fleets and armies. He has also authority to declare war. The president has not the power of declaring war by his own authority, nor that of raising fleets and armies. These powers are vested in others hands.<sup>102</sup>

George Tucker, in his gloss on the clause similarly stated:

The first is, That he 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 service of the United States. A power similar to that of the king of England and of the stadtholder of Holland, before the late revolution; yet qualified, by some

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<sup>102</sup> Debate in North Carolina Ratifying Convention, 28 July 1788, In THE FOUNDERS' CONSTITUTION, vol. 4, 7,7-8 (Philip B. Kurland and Ralph Lerner eds., 1987).

important restrictions, which I believe were not found in either of those governments.<sup>103</sup>

Justice Story also noted the important differences between thinking about the commander-in-chief in England versus the United States.

Yet the clause did not wholly escape animadversion in the state conventions. The propriety of admitting the president to be commander-in-chief, so far as to give orders, and have general superintendency, was admitted. But it was urged, that it would be dangerous to let him command in person without any restraint, as he might make a bad use of it.<sup>104</sup>

Finally, even Hamilton noted differences,<sup>105</sup> stating in *Federalist* No. 69: “in this article, therefore, the power of the President would be inferior to that of either the Monarch or governor.”<sup>106</sup>

The term commander-in-chief, similar to the concepts of constitutionalism, representation, sovereignty, and property, has acquired unique meanings in the United States

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<sup>103</sup> Sir George Tucker, Blackstone’s Commentaries, in *THE FOUNDERS’ CONSTITUTION*, vol. 4, 10 (Philip B. Kurland and Ralph Lerner eds., 1987).

<sup>104</sup> JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, para. 1486 located at < [http://www.constitution.org/js/js\\_337.htm](http://www.constitution.org/js/js_337.htm) > (site last visited on October 17, 2010).

<sup>105</sup> Madison at 448.

<sup>106</sup> *Id.*



compared to their understanding in England. While history may be a guide to how the term was understood, such a history is not definitive. Moreover, it is not clear how historical argument factors into constitutional understanding, argument, or precedent. This is true whether it be British history, American colonial experiences, that practices under the Washington administration.

Another problem with drawing upon the practices of the Washington administration resides in claims that suggest that because no one objected to what he did it therefore must be constitutional. There are several problems here. First, if in fact as Yoo stated the Constitution and the presidency was designed with Washington in mind such a cult of personality may have foreclosed individuals from challenging his decisions, whether they were thought to be constitutional or not. Second, it is not clear that either Washington or others understood his actions or claims to be constitutional assertions as opposed to being matters of policy or discretion. Finally, silence cannot be equated with granting of constitutional legitimacy or acquiescence, especially when options to challenge a use of discretion or policy may be limited.<sup>107</sup>

Third, and perhaps most importantly, arguments that his practices either confirm intent of frames or establish constitutional precedent because no one objected assume that there were mechanisms to challenge alleged unconstitutional actions that are similar to what exist now. Keep in mind that *Marbury v. Madison* was the first case where the Court asserted its authority

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<sup>107</sup> Similarly, the Court has recognized a difference between congressional silence (and assent) in terms of its statutory v. constitutional interpretations. *See e.g.*: *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 629, n. 7 (1987); Ann Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 319-21 (2005).

to declare laws unconstitutional.<sup>108</sup> This was in 1803. Prior to that date the concept of judicial review, at least as actually exercised by the Court, did not exist. There was no clear forum for challenging acts that were thought to be unconstitutional. The Virginia and Kentucky Resolutions, authored by Jefferson and Madison, speak to how two founders (and at least one constitutional framer) thought about how states could veto laws they thought unconstitutional in the absence of other mechanisms to address this concern.<sup>109</sup> Hence, the Washington presidency was a pre-*Marbury* era where the ability to contest constitutionality was in doubt, at least compared to today.

There is also one more argument that one can raise against elevating the activities and deeds of the Washington administration into constitutional precedent. This is the argument that past practices, even if endured for years, do not equate with constitutionality. Justice Scalia at one time sought to defend “long-standing traditions” and grant them constitutional protection.<sup>110</sup> The Court generally rejected this deference.<sup>111</sup> Simply put—just because something has always been done in a certain way, or was once done in a specific way, does not render it constitutional

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<sup>108</sup> 5 U.S. 137 (1803).

<sup>109</sup> DUMAS MALONE AND BASIL RAUCH, *EMPIRE FOR LIBERTY: THE GENESIS AND GROWTH OF THE UNITED STATES OF AMERICA*, 320 (1960) (*stating* that at the time of the Virginia and Kentucky Resolutions “the doctrine of judicial review was not yet firmly established”); Kelly, Harbison, and Belz at 132-37 (*describing* the political and legal context of the Resolutions as implicating a constitutional challenge to the legislation); WILLIAM J. WATKINS, JR., *RECLAIMING THE AMERICAN REVOLUTION: THE KENTUCKY AND VIRGINIA RESOLUTIONS AND THEIR LEGACY*, 66-7 (2004), (*indicating* how the Resolutions sought to address concerns about unconstitutional acts).

<sup>110</sup> *See*: David Schultz, *Scalia on Democratic Decision Making and Long-standing Traditions: How Rights Always Lose*, 31 SUFFOLK L. REV. 319 (1998).

<sup>111</sup> *Id.* *See*: *Romer v. Evans*, 517 U.S. 620 (1996) (*rejecting* Scalia’s appeal to long-standing traditions when it struck down a Colorado anti-gay rights initiative).

or right. Discrimination against Blacks, women, gays, and members of specific religious faiths were once accepted and could have been considered long-standing traditions, but that does not make such practices constitutionally permissible today.

#### **IV. Conclusion**

The Washington presidency established many firsts. But do practices, decisions, or deeds undertaken by him establish constitutional precedence? It is not clear that they do. However, for scholars such as Yoo who seem to place significant stock in recounting the deeds of Washington and other presidents, history has constitutional significance. They may be correct, yet they do not specify how and under what circumstances. Their argument seems to be that constitutional text, as informed by intent of framers and then confirmed or supplemented or confirmed by subsequent deeds by presidents, defines the constitutional precedent for the authority of the chief executive. However, bald assertion of history as precedent fails as a satisfactory theory of constitutional argument for the reasons offered in this Article unless some guidance or rules are offered for how one can actually explain how the past serves as a constitutional precedent for the present or future.