

LINCOLN AT WAR

John Yoo*

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INTRODUCTION

This year presents an opportune moment to reexamine President Abraham Lincoln's approach to executive power. This year's 150th Civil War anniversaries are inextricably tied to Lincoln's exercise of his office. On January 1, 1863, President Lincoln issued perhaps his most sweeping invocation of presidential power: the Emancipation Proclamation, which freed the slaves in the South.¹ On July 1–3, 1863, almost two years after Lincoln's special message to Congress announcing the start of extraordinary wartime measures,² Union armies turned the tide at the Battle of Gettysburg. On November 19, 1863, Lincoln gave the Gettysburg Address and turned the Constitution's mission toward popular sovereignty.³ All of these acts drew deeply on Lincoln's broad vision of the President's Commander-in-Chief and executive powers in wartime.

A century-and-a-half later, our political system continues to struggle over the constitutional questions that vexed Lincoln. In June 2013, a former National Security Agency employee leaked classified information, including the surveillance of domestic phone call records and foreign electronic mail.⁴ Though President Barack Obama claimed that the searches provided vital intelligence in the war on terrorism,⁵ critics claimed that executive power had intruded too far upon civil liberties.⁶ Earlier that year, the Obama Justice Department came under fire for its surveillance of

1. Abraham Lincoln, Final Emancipation Proclamation (Jan. 1, 1863), in ABRAHAM LINCOLN, SPEECHES AND WRITINGS, 1859–1865, at 424, 424 (Don E. Fehrenbacher ed., 1989) [hereinafter LINCOLN, SPEECHES AND WRITINGS]; PHILLIP SHAW PALUDAN, THE PRESIDENCY OF ABRAHAM LINCOLN 155 (1994).

2. See Abraham Lincoln, Special Message to Congress (July 4, 1861), in LINCOLN, SPEECHES AND WRITINGS, *supra* note 1, at 246, 252–53 (justifying and describing the calling of the militia, the creation of a blockade, and the suspension of habeas corpus).

3. Abraham Lincoln, Address at Gettysburg, Pennsylvania (Nov. 19, 1863), in LINCOLN, SPEECHES AND WRITINGS, *supra* note 1, at 536. On the point of popular sovereignty, see HARRY V. JAFFA, A NEW BIRTH OF FREEDOM: ABRAHAM LINCOLN AND THE COMING OF THE CIVIL WAR 361 (2000) [hereinafter A NEW BIRTH]; HARRY V. JAFFA, CRISIS OF THE HOUSE DIVIDED: AN INTERPRETATION OF THE ISSUES IN THE LINCOLN-DOUGLAS DEBATES 347 (1959) [hereinafter JAFFA, HOUSE DIVIDED] (contrasting Lincoln's view of popular sovereignty as a threat to equality with Douglas's view of popular sovereignty as consistent with representative democracy).

4. Barton Gellman & Jerry Markon, *Edward Snowden Says Motive Behind Leaks was to Expose 'Surveillance State'*, WASH. POST, June 9, 2013, http://articles.washingtonpost.com/2013-06-09/politics/39856602_nsa-ron-paul-intelligence.

5. Kathleen Hennessey, *Obama Defends NSA Surveillance Program*, L.A. TIMES, June 19, 2013, <http://articles.latimes.com/2013/jun/19/world/la-fg-wn-obama-defends-nsa-surveillance-20130619>.

6. Daniel Ellsberg, *Edward Snowden: Saving Us from the United Stasi of America*, GUARDIAN (June 10, 2013, 6:30 AM), <http://www.theguardian.com/commentisfree/2013/jun/10/edward-snowden-united-stasi-america>.

Associated Press editors and reporters and, separately, of a Fox News reporter in order to find the source of leaked, classified information.⁷ Critics argued that the President's exercise of his authority to enforce the criminal laws, in this case to protect national security, violated the First Amendment's protection of a free press.⁸ In May 2013, President Obama defended his administration's use of unmanned aerial drones to conduct missile attacks on al Qaeda-linked targets abroad, which had not received any congressional approval other than the general authorization to use military force passed in the week after the September 11, 2001, terrorist attacks.⁹ In that same speech, President Obama also announced his desire to close the detention facility at the U.S. Naval Base in Guantanamo Bay, Cuba, despite a congressional funding ban on any transfer of prisoners from the base to the continental United States.¹⁰ Just as Lincoln had to navigate conflicts between the executive and legislative powers to win the Civil War, President Obama and his immediate predecessors have confronted the same questions in fighting a very different conflict today.

Lincoln's example should hold great sway in our understanding of those constitutional struggles today. No one stands higher in our nation's pantheon than Lincoln. Washington founded the nation—Lincoln saved it. Without him, the United States might have lost eleven of its thirty-six states, and ten million of its thirty million people.¹¹ He freed the slaves, ended Southern planter society, and ushered in a dynamic political system and market economy throughout the nation.¹² Building on Andrew Jackson's arguments against nullification,¹³ he interpreted the Constitution as serving a single nation, rather than existing to protect slavery. The Civil

7. Mark Sherman, *Gov't Obtains Wide AP Phone Records in Probe*, ASSOCIATED PRESS (May 13, 2013, 10:53 PM), <http://bigstory.ap.org/article/govt-obtains-wide-ap-phone-records-probe>; *Justice Department Affidavit Labels Fox News Journalist As Possible 'Co-conspirator'*, FOX NEWS (May 20, 2013), <http://www.foxnews.com/politics/2013/05/20/justice-department-obtained-records-fox-news-journalist/>.

8. Sherman, *supra* note 7; FOX NEWS, *supra* note 7.

9. Barack Obama, Remarks by the President at the National Defense University (May 23, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.

10. *Id.*

11. John Yoo, *Unitary, Executive, or Both?*, 76 U. CHI. L. REV. 1935, 2004 (2009) (reviewing STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008)) [hereinafter Yoo, *Unitary, Executive, or Both?*].

12. See *infra* Part I.F.

13. Andrew Jackson, Proclamation (Dec. 10, 1832), in 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, at 640, 640–41, 643 (James Richardson ed., 1897) [hereinafter Richardson]; see also SEAN WILENTZ, *ANDREW JACKSON 64–65* (2005) (“To deny the rights of the majority in Congress to govern as it saw fit was, in this instance, an absurd breach of the Framers’ explicit intentions.”).

War transformed the United States from a plural word into a singular noun.¹⁴ That nation no longer withheld citizenship because of race,¹⁵ and guaranteed to all men the right to vote¹⁶ and the equal protection of the laws.¹⁷ Where once the Constitution was seen as a limit on effective government, Lincoln transformed it into a charter that empowered popular democracy.

Part of Lincoln's greatness stems from his confrontation of tragic choices. As he famously wrote in 1864, "I claim not to have controlled events, but confess plainly that events have controlled me."¹⁸ He did not seek the war, but understood that there were worse things than war. Victory over the South came at an enormous cost to the nation. Close to 600,000 Americans lost their lives out of a population of thirty-one million¹⁹—about equal to American battle deaths in all of its other wars combined.²⁰ Approximately one-fifth of the South's white male population of military

14. Yoo, *Unitary, Executive, or Both?*, *supra* note 11, at 2004. *But cf.* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 846–47 n.1 (1995) (Thomas, J., dissenting) ("In the [original] Constitution . . . 'the United States' is consistently a plural noun." (citing U.S. CONST. art. I, § 9, cl. 8; art. II, § 1, cl. 7; art. III, § 2, cl. 1; art. III, § 3, cl. 1)).

15. U.S. CONST. amend. XIV, § 1.

16. U.S. CONST. amend. XV, § 1.

17. U.S. CONST. amend. XIV, § 1.

18. Letter from Abraham Lincoln to Albert G. Hodges (Apr. 4, 1864), in LINCOLN, SPEECHES AND WRITINGS, *supra* note 1, at 585, 586. There are a large number of sources on Lincoln; he is reportedly the subject of the most books in the English language after Jesus and Shakespeare. John Yoo, *Of Merryman and Milligan (and McCordle)*, 34 J. SUPREME CT. HIST. 243, 243 (2009) [hereinafter Yoo, *Merryman & Milligan*]. Yet, there are relatively few books on Lincoln's performance of his role as President and Commander-in-Chief. I have relied in this essay on a few outstanding works: DAVID HERBERT DONALD, LINCOLN (1995); DANIEL FARBER, LINCOLN'S CONSTITUTION (2003); HAROLD M. HYMAN, A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION (1975); JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA (1988); MARK NEELY, THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES (1991); PALUDAN, *supra* note 1; and J.G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN (rev. ed., 1951). There are also a number of important articles on Lincoln's exercise of his constitutional powers, and whether they amounted to a dictatorship. In the chapters of the books on the Presidency that discuss Lincoln in detail, political scientists generally argue that Lincoln exercised powers approaching a dictatorship. Historians, on the other hand, seem to conclude that Lincoln's policies rested within his executive powers, broadly construed. *See generally* HERMAN BELZ, LINCOLN AND THE CONSTITUTION: THE DICTATORSHIP QUESTION RECONSIDERED 1 (1984); Michael Les Benedict, *The Constitution of the Lincoln Presidency and the Republican Era*, in THE CONSTITUTION AND THE AMERICAN PRESIDENCY 45, 47–48 (Martin L. Fausold & Alan Shank eds., 1991); DAVID DONALD, LINCOLN RECONSIDERED: ESSAYS ON THE CIVIL WAR ERA 187 (2d ed. 1972) [hereinafter DONALD, LINCOLN RECONSIDERED]; and DON E. FEHRENBACHER, *Lincoln and the Constitution*, in LINCOLN IN TEXT AND CONTEXT: COLLECTED ESSAYS 113, 119–22 (1987).

19. Yoo, *Unitary, Executive, or Both?*, *supra* note 11, at 2004 (citing FARBER, *supra* note 18, at 92–114).

20. C. Vann Woodward, *Introduction* to MCPHERSON, *supra* note 18, at xix.

age were killed.²¹ While the total value of Northern wealth rose 50% during the 1860s, Southern wealth declined by 60%.²²

The human cost weighed heavily upon Lincoln, but he believed it was necessary to atone for the wrong of slavery. “Fondly do we hope, fervently do we pray, that this mighty scourge of war may speedily pass away,” Lincoln wrote in his Second Inaugural Address.²³ “Yet, if God wills that it continue until all the wealth piled by the bondsman’s two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash shall be paid by another drawn with the sword,” he continued, “as was said three thousand years ago, so still it must be said ‘the judgments of the Lord are true and righteous altogether.’”²⁴ One of the lives lost would be Lincoln’s—the first President to be assassinated.

Lincoln’s greatness is inextricably linked to his broad vision of presidential power. He invoked his authority as Commander-in-Chief and Chief Executive to conduct war, initially without congressional permission, when many were unsure whether secession meant war.²⁵ He considered the entire South the field of battle, and read his powers to attack anything that helped the Confederate war effort.²⁶ While he depended on congressional support for the men and material to win the conflict, Lincoln made critical decisions on tactics, strategy, and policy without input from the Legislature.²⁷ The most controversial was the Emancipation Proclamation.²⁸ Only Lincoln’s broad interpretation of his Commander-in-Chief authority made that sweeping step of freeing the slaves possible.²⁹

Some have argued that part of Lincoln’s tragedy is that he had to exercise unconstitutional powers in order to save the Union. In their classic

21. Maris Vinovskis, *Have Social Historians Lost the Civil War? Some Preliminary Demographic Speculations*, in *TOWARD A SOCIAL HISTORY OF THE AMERICAN CIVIL WAR: EXPLORATORY ESSAYS* 1, 7 (1990) (18% of southern white males aged 13 to 43 died in the Civil War). Data on injured soldiers is considerably less reliable than data on deaths. *Id.* at 7 n.8.

22. Yoo, *Unitary, Executive, or Both?*, *supra* note 11, at 2004–05. Those deaths had a much greater impact than other wars, such as World Wars I and II, because the casualties represented a much larger share of the nation’s smaller population in 1861 than more recent conflicts.

23. Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), in 6 Richardson, *supra* note 13, at 276, 277.

24. *Id.*

25. See MCPHERSON, *supra* note 18, at 274–75 (providing additional details about Lincoln’s call to arms). Compare *infra* Part I.A (describing Buchanan’s belief that the Constitution prevented him from acting against secession), with *infra* Part II.B (discussing Lincoln’s view that the Constitution empowered him to address secession and chronicling Lincoln’s call to arms following the attack on Fort Sumter).

26. See *infra* notes 219–35 and accompanying text.

27. See *infra* Part I.E.

28. See *infra* Part I.F.

29. See *infra* Part I.F.

studies of the Presidency, Arthur M. Schlesinger called Lincoln a “despot,” and both Edward Corwin and Clinton Rossiter considered Lincoln to have assumed a “dictatorship.”³⁰ These views echo arguments made during the Civil War itself, even by Republicans who believed that the Constitution could not address such an unprecedented conflict.³¹ Lincoln surely claimed that he could draw on power beyond the Constitution in order to preserve the nation. As he wrote to a Kentucky newspaper editor in 1864, “Was it possible to lose the nation, and yet preserve the constitution?”³² To Lincoln, common sense supplied the answer: “By general law life *and* limb must be protected; yet often a limb must be amputated to save a life; but a life is never wisely given to save a limb.”³³ Lincoln believed necessity could justify unconstitutional acts: “I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation.”³⁴

Lincoln, however, was no dictator. While he used his powers more broadly than any previous President, he was responding to a crisis that threatened the very life of the nation.³⁵ He flirted with the idea of a Lockean prerogative,³⁶ but his actions drew upon the same mix of executive authorities that had supported Washington, Jefferson, and Jackson.³⁷ He relied on his power as Commander-in-Chief to give him control over decisions ranging from tactics and strategy to reconstruction policy.³⁸ Like his predecessors, Lincoln interpreted his constitutional duty to execute the laws, his role as Chief Executive, and his presidential oath as grants of power to use force, if necessary, against those who opposed the authority of

30. See, e.g., EDWARD S. CORWIN ET AL., *THE PRESIDENT: OFFICE AND POWERS, 1787–1984*, at 20, 23–24 (5th rev. ed. 1984); CLINTON ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES* 224 (2002); ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 59 (1973).

31. See *infra* notes 314–20 and accompanying text.

32. Letter from Abraham Lincoln to Albert G. Hodges, *supra* note 18, at 585.

33. *Id.* (emphasis in original).

34. *Id.*

35. Letter from Abraham Lincoln to Erastus Corning and Others (June 12, 1863), in *LINCOLN, SPEECHES AND WRITINGS*, *supra* note 1, at 454, 459.

36. See CORWIN ET AL., *supra* note 30, at 7–8, 23–24 (discussing the Lockean prerogative and Lincoln’s actions as President); FARBER, *supra* note 18, at 128 (“Locke is often cited as support for th[e] doctrine [that the president has extraconstitutional powers] because he argued that the executive had inherent power to take steps to preserve society.”); ROSSITER, *supra* note 30, at 224 (suggesting Lincoln may have reasoned that “[i]f the Union and the Government cannot be saved out of this terrible shock of war constitutionally, a Union and a Government must be saved unconstitutionally.” (quoting S.G. FISHER: *THE TRIAL OF THE CONSTITUTION* 199 (1862)) (internal quotation marks omitted)).

37. Yoo, *Unitary, Executive, or Both?*, *supra* note 11, at 2006.

38. See *infra* Part I.E.

the United States.³⁹ Lincoln wrote: “[M]y oath to preserve the constitution to the best of my ability, imposed upon me the duty of preserving, by every indispensable means, that government—that nation—of which that constitution was the organic law.”⁴⁰ It seems clear that Lincoln believed that the Constitution vested him with sufficient authority to handle secession and civil war without the need to resort to Jefferson’s prerogative.

Lincoln refused to believe that the Constitution withheld the power for its own self-preservation. Rather than seek a greater power outside the law to protect the nation, he found it in the Chief Executive Clause. That gave Lincoln the authority to decide that secession justified military coercion, and the wide range of measures he took in response: raising an army, invasion and blockade of the South, military government of captured territory, suspension of the writ of habeas corpus, and tough internal security measures.⁴¹ Lincoln consistently maintained that he had not sought the prerogative, but that the Constitution gave him unique war powers to respond to the threat to the nation’s security.⁴² Lincoln’s political rhetoric invoked Jefferson, but his constitutional logic followed Hamilton.⁴³

Perhaps the most important defense to the charge of dictatorship is that the normal political process operated in the North throughout the War. An opposition party continued to challenge Lincoln’s wartime policies, and regular elections were held in the state and national governments,⁴⁴ with the crucial 1864 election giving voters a choice between more of Lincoln’s war or a cessation of hostilities.⁴⁵ While the administration took vigorous, sometimes extreme, steps to prevent assistance to the Confederacy from behind the lines, the administration refused to interfere with the normal workings of politics at home.⁴⁶ Full-throated competition for elections and debate over the War continued between Republicans and Democrats, to the

39. See *infra* Part I.B.

40. Letter from Lincoln to Albert G. Hodges, *supra* note 18, at 585.

41. See *infra* Part I.B.

42. Yoo, *Unitary, Executive, or Both?*, *supra* note 11, at 2007 (citing FARBER, *supra* note 18, at 193–94).

43. *Id.*

44. See ALLAN NEVINS, *ORDEAL OF THE UNION: WAR BECOMES REVOLUTION, 1862–1863*, at 169 (1960); Jamie L. Carson et al., *The Impact of National Tides and District-Level Effects on Electoral Outcomes: The U.S. Congressional Elections of 1862–63*, 45 AM. J. POL. SCI. 887, 893–94 (2001) (analyzing the results of congressional elections during the Civil War).

45. See PALUDAN, *supra* note 1, at 279, 283 (explaining the competing political goals of the two parties: Lincoln would continue the war while the opposing party, led by Gen. George McClellan, would end the war).

46. *Id.* at 275–76, 283 (examining how Louisiana shows Lincoln’s reluctance to interfere with state politics for fear that it would lead to division within the Republican party).

point where Lincoln worried that he would have to hand over the Presidency to his opponent, retired General George McClellan.⁴⁷

Throughout the War, the institutions of government kept their characteristic features. Congress controlled the power of the purse and initiated most domestic policies, such as the Homestead Act, a protective tariff, land grant colleges, and subsidies for railroad construction.⁴⁸ Lincoln followed a hands-off approach on domestic priorities and disclaimed any right to veto laws because of disagreements on policy.⁴⁹ He rarely interfered with legislation,⁵⁰ often consulted with members of Congress in making important appointments,⁵¹ and displayed little interest in the work of agencies with domestic responsibilities.⁵² He was profoundly aware that members of Congress and his cabinet enjoyed many more years of public service and experience than he.⁵³ Initially, he spoke in the language of deference to Congress and sought its ex post approval of his actions at the start of the War.⁵⁴

Nonetheless, Lincoln was not reluctant to disturb relations with the other branches of government in pursuit of his war aims. From the very beginning, he had set the stage to make it difficult, if not impossible, for Congress to reverse his initial military decisions.⁵⁵ He excluded Congress from important war policies⁵⁶ and vetoed early congressional efforts to dictate the course of Reconstruction.⁵⁷ But Lincoln could not rule out all congressional participation in the War. Congress's cooperation was critical to any sustained war effort, for it alone controlled taxing and spending, the size and shape of the military, economic mobilization, and the regulation of domestic society.⁵⁸ Lincoln did not refuse to obey any congressional laws, but he maintained his independent right to act in areas of executive competence, such as the management of the War, and to act concurrently with Congress in areas that might usually be thought to rest within the

47. *Id.* at 284.

48. Homestead Act of 1862, ch. 75, § 1, 12 Stat. 392; Morrill Land Grant Colleges Act, ch. 130, 12 Stat. 503 (1862); Pacific Railway Act, ch. 120, 12 Stat. 489 (1862).

49. *See* DONALD, LINCOLN RECONSIDERED, *supra* note 18, at 192–93.

50. *Id.* at 191.

51. *Id.* at 191–92.

52. *Id.* at 193–94.

53. Yoo, *Unitary, Executive, or Both?*, *supra* note 11, at 2010.

54. Lincoln, Special Message to Congress, *supra* note 2, at 252–53.

55. *See infra* Part I.B.

56. Yoo, *Unitary, Executive, or Both?*, *supra* note 11, at 2010.

57. *See infra* notes 397–401, 421–28 and accompanying text.

58. *See generally* JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11, at 13, 22 (2005).

legislature's purview.⁵⁹ Lincoln, not Congress, decided the goals of the War, the terms of the peace, and the means to win both.⁶⁰

Lincoln's attitude toward the judiciary is even more at odds with today's conventional wisdom. He lost confidence in the courts after *Dred Scott v. Sanford*, which recognized slave ownership as a property right and made it unconstitutional for Congress to restrict slavery's spread in the territories.⁶¹ Challenging the legitimacy of *Dred Scott* defined the young Republican Party. In his famous, losing debates with Stephen Douglas, Lincoln rose to national prominence by arguing that *Dred Scott* applied only to the parties in the case.⁶² In other words, the Supreme Court's decisions could not bind the President or Congress, who had the right to interpret the Constitution too, or, most importantly, the people.⁶³ "[N]or do I deny that such decisions must be binding in any case, upon the parties to a suit, as to the object of that suit," Lincoln explained in his First Inaugural Address.⁶⁴ Decisions of the Court should receive "very high respect and consideration, in all paral[l]el cases, by all other departments of the government."⁶⁵ It might even be worth following erroneous decisions at times because the costs of reversing them might be high.⁶⁶ But "if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court," Lincoln argued, "the people will have ceased, to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal."⁶⁷

Lincoln laid the foundations of his Presidency on a vigorous and dynamic view of his right to advance an alternative vision of the Constitution. If Lincoln and the Republican Party had accepted the supremacy of the judiciary's interpretation of the Constitution, *Dred Scott* would have foreclosed their core position that the federal government should stop the spread of slavery. Likewise, Lincoln's Presidency could not have achieved its successes without a proactive exercise of his

59. See *infra* Part I.B.

60. Yoo, *Unitary, Executive, or Both?*, *supra* note 11, at 2010.

61. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 393–94 (1856), *superseded by constitutional amendment*, U.S. CONST. amend. XIII, § 2.

62. Abraham Lincoln, First Debate with Stephen A. Douglas at Ottawa, Illinois (August 21, 1858), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 1, 16, 29 (Roy P. Basler ed., 1953) (hereinafter COLLECTED WORKS).

63. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in LINCOLN, SPEECHES AND WRITINGS, *supra* note 1, at 215, 221.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

constitutional powers. A passive attitude that conceded to Congress the leading role in setting policy, or one that waited on the Supreme Court to decide matters, would have led to a sundered nation or military disaster. Lincoln became America's savior because he preserved the Union, freed the slaves, and launched a new birth of freedom. He set in motion a political, social, and economic revolution, but one that had the conservative goal of restoring the nation's constitutional system of government. He could have achieved none of this without a broad vision of his office.

I. WAGING WAR

One of Lincoln's most remarkable exercises of presidential authority often goes unremarked. His decision that secession was unconstitutional and that the Union could oppose it by force was fundamental to the beginning of the Civil War.⁶⁸ Today, most accept Lincoln's view, but they forget that the Constitution does not explicitly address the question, nor does it spell out who has the right to decide it.⁶⁹ In today's environment of judicial supremacy, we have grown accustomed to the idea that constitutional questions are for the Supreme Court to decide.⁷⁰ The Court, however, would not reach the question of secession until the Civil War had ended.⁷¹

A. James Buchanan's Trepidations: The Constitution as a Restraint

One need only contrast Lincoln's approach to that of his predecessor, James Buchanan, usually thought to be the nation's worst President. The South had ensured Lincoln's election by walking out of the Democratic convention and nominating its own candidate for the Presidency, sitting Vice President John Breckinridge.⁷² Senator Douglas, who became the nominee of the Democratic Party in the North, took the position that the

68. FARBER, *supra* note 18, at 19; *see infra* I.B.

69. Yoo, *Unitary, Executive, or Both?*, *supra* note 11, at 2007.

70. *See, e.g.*, *United States v. Windsor*, 133 S. Ct. 2675, 2688 (2013) (stressing "the Supreme Court's primary role in determining the constitutionality of a law" and suggesting that the executive should not be allowed to "nullify" a statute "on its own initiative and without any determination from the Court").

71. *See Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1869) ("The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."), *overruled in part by*, *Morgan v. United States*, 113 U.S. 476 (1885); *see also id.* at 726 (finding Texas's secession ordinance invalid, and inferring that Texas remained a state in the Union despite the ordinance).

72. *See* DANIEL CARROLL TOOMEY, *THE CIVIL WAR IN MARYLAND* 6–7 (1983) (noting that the Democratic Party was "shattered" when delegates left the convention in Charleston and nominated Vice President John Breckinridge in a separate convention).

people of each territory should decide the slavery question for themselves—the doctrine of *popular sovereignty*.⁷³ This was not good enough for Southern Democrats, who wanted Congress to enact a code making slavery sacrosanct throughout the territories.⁷⁴ When it became clear that Lincoln had won, South Carolina led the Deep South toward secession.⁷⁵

Buchanan believed that secession was illegal but that he lacked the constitutional authority to stop it. In the waning days of his administration, his Attorney General concluded that the Executive only had authority to defend federal property, and that he could not call in the militia to enforce federal law because no federal law enforcement officials remained in the South.⁷⁶ The Constitution gave neither the President nor Congress, the Attorney General’s opinion reasoned, the power to “make war” against the seceding states to restore the Union.⁷⁷ In his December 1860 annual message to Congress, Buchanan blamed the crisis on Northern agitation to overturn slavery.⁷⁸ Even though the South could not secede, he could not “make war against a State,” leaving the federal government powerless.⁷⁹ After the rest of the Deep South seceded and formed the Confederate States of America, Buchanan again declared that the executive power did not include the use of force against a state, and humbly requested that Congress, “the only human tribunal under Providence possessing the power to meet the existing emergency,” do something.⁸⁰ Buchanan’s narrow understanding of the constitutional powers of the office meant that the federal government was helpless before the greatest threat to the nation in its history.

73. ROBERT W. JOHANNSEN, *THE FRONTIER, THE UNION, AND STEPHEN A. DOUGLAS* 96 (1989).

74. See FARBER, *supra* note 18, at 12; see also MCPHERSON, *supra* note 18, at 252–53 (describing the push for a constitutional amendment that would prevent the federal government from interfering with slavery).

75. EMORY M. THOMAS, *THE CONFEDERATE NATION: 1861–1865*, at 45 (1979).

76. Power of the President in Executing the Laws, 9 Op. Att’y Gen. 516, 523 (1860); see also FARBER, *supra* note 18, at 75–76 (describing the influence of the Attorney General’s advice).

77. *Power of the President*, 9 Op. Att’y Gen. at 524; see also FARBER, *supra* note 18, at 75–76 (describing the Attorney General’s rationale).

78. James Buchanan, Fourth Annual Message (Dec. 3, 1860), in 5 Richardson, *supra* note 13, at 626, 626; see also FARBER, *supra* note 18, at 76 (quoting Buchanan’s speech).

79. James Buchanan, Fourth Annual Message, *supra* note 78, at 636; see also FARBER, *supra* note 18, at 76 (explaining Buchanan’s position).

80. James Buchanan, Special Message to Congress (Jan. 8, 1861), in 5 Richardson, *supra* note 13, at 654, 656.

B. Lincoln's Decisiveness: The Constitution as a Source of Power

Lincoln understood that the Constitution empowered him to do much more than issue a polite invitation that the South return home. The Confederacy made his case easier by seizing federal property and attacking Fort Sumter first.⁸¹ He had no need to address Calhoun's nullification arguments, or even those of Jefferson and Madison against the Alien and Sedition Acts that states had a right to resist obviously unconstitutional actions by the federal government.⁸² The Confederate States were frustrating the constitutional system and denying the results of nationwide democratic elections.⁸³ They had seceded from a national government that had yet to pass any law prohibiting slavery in the territories or the South itself. In his First Inaugural Address, Lincoln promised not to interfere with the bargain reached in the Constitution that the Southern states could decide on slavery as a matter of their own "domestic institutions."⁸⁴ He construed his constitutional duty to require enforcement of the Fugitive Slave Clause and to refrain from any interference "with the institution of slavery in the States where it exists."⁸⁵

Secession, however, was an unconstitutional response to his election by the democratic process. Echoing Jackson, Lincoln declared that the Union, as a nation, was perpetual.⁸⁶ It preexisted the Constitution; it preexisted the Articles of Confederation.⁸⁷ Even the Constitution recognized this fact by providing, in its Preamble, for a more perfect Union.⁸⁸ Because secession was illegal, Lincoln reasoned, the Southern states were still part of the nation, and "the Union [wa]s unbroken."⁸⁹

81. See BERN ANDERSON, *BY SEA AND BY RIVER: THE NAVAL HISTORY OF THE CIVIL WAR* 18 (1962) ("As each Southern state seceded from the Union it seized the Federal Ships and buildings within its limits."); *id.* at 20 (noting that the bombardment on Fort Sumter began before the Union resupplied it); see also *infra* notes 95–100 and accompanying text.

82. THOMAS JEFFERSON, *KENTUCKY RESOLUTIONS (1798-1799)*, reprinted in 5 *THE FOUNDERS' CONSTITUTION* 131, 131–35 (Phillip B. Kurland & Ralph Lerner eds., 1987); JAMES MADISON, *VIRGINIA RESOLUTIONS AGAINST THE ALIEN AND SEDITION ACTS (1798)*, reprinted in 5 *THE FOUNDERS' CONSTITUTION*, *supra*, at 135, 135–36; see James H. Read, *Madison's Response to Nullification*, in JAMES MADISON: *PHILOSOPHER, FOUNDER, AND STATESMAN* 269, 270 (John R. Vile, William D. Pederson, and Frank J. Williams eds., 2008) (describing Calhoun's argument).

83. See Abraham Lincoln, *Message to Congress in Special Session (July 4, 1861)*, in *COLLECTED WORKS*, *supra* note 62, at 439 (arguing that the election was "fairly, and constitutionally, decided" and that the rebels wrongly used "bullets" to attempt to overcome the result).

84. Lincoln, *First Inaugural Address*, *supra* note 63, at 215.

85. *Id.*

86. *Id.* at 217–18.

87. *Id.*

88. *Id.* at 218.

89. *Id.*

Resistance to federal law and institutions was the work not of the states themselves, but a conspiracy of rebels who were illegally obstructing the normal operations of the national government.⁹⁰ The Constitution called upon Lincoln to use force, if necessary, against these rebels in order to see “that the laws of the Union be faithfully executed in all the States.”⁹¹ Though on a much greater scale, the Civil War triggered the same presidential power invoked by Washington during the Whiskey Rebellion and Jefferson during the Embargo.⁹² Lincoln did not believe he had any choice; the Constitution required him to put down the rebellion.⁹³ “You have no oath registered in Heaven to destroy the government,” Lincoln told the South, “while I shall have the most solemn one to ‘preserve, protect and defend’ it.”⁹⁴

Where Buchanan and previous Presidents found only constitutional weakness, Lincoln discovered constitutional strength. He patiently maneuvered circumstances so that Jefferson Davis’s troops would fire the first shot.⁹⁵ Federal officials who sympathized with the Confederacy handed over armories, treasuries, and property, but federal installations in several ports remained in Union hands.⁹⁶ Fort Sumter in Charleston Harbor held symbolic importance as a flashpoint again, just as it did during the nullification crisis.⁹⁷

On April 4, 1861, exactly one month into his term, Lincoln ordered the navy to resupply the Union fort and to use force only if fired upon.⁹⁸ Jefferson Davis ordered bombing to begin before the ships could arrive, and Union forces surrendered on April 14.⁹⁹ Lincoln did not consult Congress,

90. *See id.* (“[A]cts of violence, within any State or States, against the authority of the United States, are insurrectionary or revolutionary . . .”); *see also id.* at 219 (referring to “persons in one section, or another who seek to destroy the Union” (emphasis added)).

91. *Id.* at 218.

92. *See* John Yoo, *Jefferson and Executive Power*, 88 B.U. L. Rev. 421, 450–51 (2008) (noting that both Washington and Jefferson used military force to suppress insurrections during the Whiskey Rebellion and the Embargo respectively).

93. Lincoln, First Inaugural Address, *supra* note 63, at 224; *see also* Michael Stokes Paulsen, *The Civil War as Constitutional Interpretation*, 71 U. CHI. L. REV. 691, 706–07 (2004) (book review) (explaining Lincoln’s belief in a duty to defeat secession).

94. Lincoln, First Inaugural Address, *supra* note 63, at 224 (emphasis omitted).

95. MCPHERSON, *supra* note 18, at 271–72.

96. *See id.* at 262–63 (Southern states seized federal property but the Union maintained control of a small number of coastal forts, including Fort Sumter).

97. WILLIAM W. FREEHLING, *PRELUDE TO CIVIL WAR: THE NULLIFICATION CONTROVERSY IN SOUTH CAROLINA, 1816–1836*, at 323, 359 (1965).

98. MCPHERSON, *supra* note 18, at 271.

99. Stephen Vladeck, *The Field Theory: Martial Law, The Suspension Power, and the Insurrection Act*, 80 TEMP. L. REV. 391, 398 (2007); FARBER, *supra* note 18, at 7.

which was not in session, nor did he call Congress into session,¹⁰⁰ as he could “on extraordinary Occasions” under the Constitution.¹⁰¹ He did not launch offensive operations against the South, but he placed American forces in harm’s way, which carried a strong risk of starting a war between the states.

The North was woefully unprepared. Its small army was deployed primarily along the western frontiers; its navy had only a few warships ready for action in American waters.¹⁰² After the fall of Fort Sumter, Lincoln sprung to action. On April 15, he declared a state of rebellion and called forth 75,000 state troops under the Militia Act.¹⁰³ He proclaimed that groups in the South were obstructing the execution of federal law beyond the ability of courts and federal officials to overcome.¹⁰⁴

Lincoln’s proclamation prompted the upper Southern states to secede, led by Virginia.¹⁰⁵ The President issued a call for volunteers, increased the size of the regular army, and ordered the navy to enlist more sailors and purchase additional warships.¹⁰⁶ He also removed millions from the Treasury for military recruitment and pay.¹⁰⁷ Article I, Section 8 of the Constitution expressly vests in Congress the power to raise an army and navy and to fund them; the President has no authority to exercise either power.¹⁰⁸

Lincoln put the army and navy to immediate use. He ordered a blockade of Southern ports and dispatched troops against rebel-held territory.¹⁰⁹ Lincoln called Congress into special session but, significantly, not until July 4.¹¹⁰ While of obvious symbolic importance, the July 4 date ensured that the executive branch, not Congress, would set initial war policy.¹¹¹ Lincoln had three months to establish a status quo that would be difficult for Congress to change.¹¹² This was remarkable leadership for a President who had been the underdog to win his party’s nomination, who

100. FARBER, *supra* note 18, at 7.

101. U.S. CONST. art. II, § 3.

102. MCPHERSON, *supra* note 18, at 313.

103. Abraham Lincoln, Proclamation Calling Militia and Convening Congress (April 15, 1861), in 4 COLLECTED WORKS, *supra* note 62, at 331, 331–32.

104. *Id.*

105. FREEHLING, *supra* note 97, at 503.

106. Abraham Lincoln, Proclamation Calling for 42,034 Volunteers (May 3, 1861), in 4 COLLECTED WORKS, *supra* note 62, at 353, 353–54.

107. FARBER, *supra* note 18, at 117–18.

108. U.S. CONST. art. I, § 8.

109. ANDERSON, *supra* note 81, at 288.

110. Abraham Lincoln, Special Session Message (July 4, 1861), in 6 Richardson, *supra* note 13, at 20.

111. Yoo, *Unitary, Executive, or Both?*, *supra* note 11, at 2010.

112. *Id.*

had not won a majority of the popular vote, whose cabinet was filled with men with far more distinguished records of public service, and who did not have close relationships with the congressional leaders of his party.¹¹³

Rapid events forced Lincoln to exercise broad authorities on defense as well as offense. Maryland was a slave-holding state, and the state legislature was pro-Confederacy.¹¹⁴ If it seceded, the nation's capital would be utterly isolated.¹¹⁵ Mobs in Baltimore attacked the first military units from Massachusetts and Pennsylvania to reinforce the capital, and rebel sympathizers cut the telegraph and railroad lines to Washington.¹¹⁶

C. Ex Parte Merryman: *Executive Suspension of the Writ of Habeas Corpus*

Lincoln interpreted his constitutional powers to give him the initiative in responding to the emergency. On April 27, 1861, he unilaterally suspended the writ of habeas corpus on the route from Philadelphia to Washington and replaced civilian law enforcement with military detention without trial.¹¹⁷ Suspension prevented rebel spies and operatives detained by the military from petitioning the civilian courts for release.¹¹⁸ The Constitution surely describes this power in the passive tense: “The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”¹¹⁹ But it is located in Article I, which enumerates Congress's powers and its limits.¹²⁰ But Congress would not meet until July 4. Had Lincoln seized the powers of another branch?

A case presented Chief Justice Roger Taney, Jackson's Attorney General and author of *Dred Scott*, with the perfect opportunity to answer this question. Union officers arrested John Merryman, an officer in a secessionist Maryland militia, for participating in the destruction of the

113. *Id.*

114. FARBER, *supra* note 18, at 16.

115. Yoo, *Unitary, Executive, or Both?*, *supra* note 11, at 2010 (citing FARBER, *supra* note 18, at 16).

116. MATTHEW PAGE ANDREWS, HISTORY OF MARYLAND 514–15, 517 (1929); FARBER, *supra* note 18, at 16, 117.

117. Letter from Abraham Lincoln to Winfield Scott (Apr. 27, 1861), in 4 COLLECTED WORKS, *supra* note 62, at 347, 347.

118. Yoo, *Unitary, Executive, or Both?*, *supra* note 11, at 2010 (citing PALUDAN, *supra* note 1, at 73–75).

119. U.S. CONST. art. I, § 9, cl. 2.

120. *See id.* art I, §§ 8–9 (describing the powers and limits of Congress); *see also Ex parte Merryman*, 17 F. Cas. 144, 148 (C.C.D. Md. 1861) (noting that the Suspension Clause is located in Article I, along with other legislative powers).

railroads near Baltimore.¹²¹ Upon the petition of Merryman's lawyer, Taney issued a writ of habeas corpus ordering the commander of Union forces in Maryland to produce Merryman in court.¹²² The general refused to appear and instead sent an aide to notify Taney that Merryman had been detained under the President's suspension of habeas corpus.¹²³ Taney held the general in contempt, but the marshal serving the order could not gain entry to Fort McHenry.¹²⁴

Taney was left to issue an opinion, which sought to pull the heart out of Lincoln's energetic response to secession.¹²⁵ He held in *Ex Parte Merryman* that the Suspension Clause's placement in Article I, and judicial commentary since ratification, recognized that only Congress could suspend the writ.¹²⁶ If military detention without trial were permitted to continue, Taney wrote, "the people of the United States are no longer living under a government of laws."¹²⁷ Under presidential suspension, "every citizen holds life, liberty and property at the will and pleasure of the army officer in whose military district he may happen to be found."¹²⁸ Taney's opinion clearly questioned the legal basis for Lincoln's other responses to secession.¹²⁹ Beyond suspending habeas corpus, he wrote, the Lincoln administration "has, by force of arms, thrust aside the judicial authorities and officers to whom the constitution has confided the power and duty of interpreting and administering the laws, and substituted a military government in its place, to be administered and executed by military officers."¹³⁰

Merryman was not just an attack on Lincoln's suspension of the writ, but upon the President's right to interpret the Constitution. Taney declared that it was the responsibility of "that high officer, in fulfillment of his constitutional obligation" under the Take Care Clause to enforce the court's orders.¹³¹ It was another declaration of judicial supremacy in interpreting

121. FARBER, *supra* note 18, at 17; TOOMEY, *supra* note 72 at 21.

122. There is some dispute as to whether Taney was sitting as a judge on circuit or as a Supreme Court Justice in chambers at the time. For a more detailed discussion of the Merryman case, see Yoo, *Merryman & Milligan*, *supra* note 18. The facts of the case are described in *Merryman*, 17 F. Cas. at 147. See also Arthur T. Downey, *The Conflict Between the Chief Justice and the Chief Executive: Ex Parte Merryman*, 31 J. SUP. CT. HIST. 262, 263 (2006).

123. Downey, *supra* note 122, at 264–65.

124. *Id.* at 265, 268.

125. Yoo, *Merryman & Milligan*, *supra* note 18, at 247.

126. *Merryman*, 17 F. Cas. at 148, 151; see also Downey, *supra* note 122, at 269–70.

127. *Merryman*, 17 F. Cas. at 152.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* (citing U.S. CONST. art. II, § 3).

the Constitution—to be expected of the Justice who had written *Dred Scott*, though perhaps not from Jackson’s Attorney General. Taney wanted to dramatize the conflict between the President and the judiciary. He appeared before a crowd of 2,000 on the Baltimore courthouse steps to receive the commanding general’s response, and declared that the officer was defying the law and that even the Chief Justice might soon be under military arrest.¹³²

Lincoln answered Taney, and the widespread claims of executive dictatorship, in his message to the July 4 session of Congress. Lincoln stressed that the Confederacy had fired the first shot before the national government had taken any action that might threaten slavery.¹³³ Secession attacked only the process of “time, discussion, and the ballot-box.”¹³⁴ In response, “no choice was left but to call out the war power of the Government; and so to resist force, employed for its destruction, by force, for its preservation.”¹³⁵ He recited the litany of actions that followed: calling out the militia, the blockade, the call for volunteers, and the expansion of military spending.¹³⁶ Lincoln claimed that he had moved forcefully with the support of public opinion.¹³⁷ “These measures, whether strictly legal or not, were ventured upon, under what appeared to be a popular demand, and a public necessity; trusting, then as now, that Congress would readily ratify them.”¹³⁸

Lincoln avoided the question of whether he had acted unconstitutionally. He sought justification from Congress’s political support, after the fact.¹³⁹ “It is believed that nothing has been done beyond the constitutional competency of Congress.”¹⁴⁰ Congress enacted a statute that did not explicitly authorize war against the South, but declared that Lincoln’s actions “respecting the army and navy of the United States, and calling out or relating to the militia or volunteers from the States, are hereby approved and in all respects legalized and made valid . . . as if they had been issued and done” by Congress.¹⁴¹ Congress gave approval through its

132. PALUDAN, *supra* note 1, at 76.

133. Lincoln, Message to Congress in Special Session, *supra* note 83, at 421, 425; *see also* Lincoln, First Inaugural Address, *supra* note 63, at 220–23.

134. Lincoln, Message to Congress in Special Session, *supra* note 83, at 423, 425.

135. *Id.* at 426.

136. *Id.* at 428–29.

137. *Id.* at 429.

138. *Id.*

139. *Id.*

140. *Id.*

141. Act of Aug. 6, 1861, ch. 63, 12 Stat. 326 (legalizing acts, proclamations, and orders of the president).

explicit control over the size and funding of the military, but did not seek to direct Lincoln's war aims or the conduct of hostilities.

D. The Prize Cases: The Power and Obligation of the Executive to Resist Insurrection

It would be a year and a half before the Supreme Court considered the constitutionality of Lincoln's immediate actions. *The Prize Cases* presented a demand for damages by the owners of several vessels seized by the Union blockade in the summer of 1861.¹⁴² The owners argued that international law limited blockades only to wars between nations.¹⁴³ Thus, international law conflicted directly with Lincoln's theory that the Confederacy was only a conspiracy of law-breakers. If the Civil War were a war, the plaintiffs continued, Lincoln could not act without a declaration of war from Congress first.¹⁴⁴

A 5–4 majority of the Court upheld Lincoln's actions, with or without congressional authorization.¹⁴⁵ It began by endorsing Lincoln's initial judgment that secession had begun an insurrection, not a war with a separate nation.¹⁴⁶ They also agreed that the scope of the insurrection nevertheless granted the United States the rights and powers of war against a belligerent nation: “[I]t is not necessary to constitute war, that both parties should be acknowledged as independent nations or sovereign States. A war may exist where one of the belligerents, claims sovereign rights as against the other.”¹⁴⁷ Even though the South would never be recognized as a nation by the United States, the very nature of the conflict required that it be recognized as war, rather than as a matter for the criminal justice system.¹⁴⁸ “When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a *war*.”¹⁴⁹ Lincoln's blockade of Southern ports, though legal under international law only against another nation, was a legitimate exercise of war power under the Constitution.

142. See *The Prize Cases*, 67 U.S. (2 Black) 635, 636–37 (1862) (describing owner's appeal of condemnation against their vessels).

143. *Id.* at 642–43, 649.

144. *Id.* at 688–90.

145. *Id.* at 668.

146. *Id.* at 641–42.

147. *Id.* at 666.

148. *Id.*

149. *Id.* at 666–67.

The Court found that Lincoln did not need a declaration of war to respond to the attack on Fort Sumter. “If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority.”¹⁵⁰ It did not matter whether the attacker was a foreign nation or a seceding state: The firing on Fort Sumter constituted an act of war against which the President automatically had authority to use force.¹⁵¹ “And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be ‘*unilateral*.’”¹⁵² The Court expressly declared that the scope and nature of the military response rested within the hands of the Executive. “Whether the President in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him . . .*”¹⁵³

Judicial review would not extend to the President’s decisions on whether to consider the Civil War a war, and what type of military response to undertake. Justice Grier wrote for the majority, “[T]his Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted.”¹⁵⁴ The Justices only entertained the need for legislative approval as a hypothetical to buttress their conclusion, and never held that Congress’s approval was necessary as a constitutional matter.

If it were necessary to the technical existence of a war, that it should have a legislative sanction, we find it in almost every act passed at the extraordinary session of the Legislature of 1861, which was wholly employed in enacting laws to enable the Government to prosecute the war with vigor and efficiency.¹⁵⁵

Both the courts and Congress vindicated Lincoln’s constitutional position from the early days of the war.

150. *Id.* at 668.

151. *Id.*

152. *Id.*

153. *Id.* at 670 (emphasis in original).

154. *Id.*

155. *Id.*

E. Lincoln's Initiative: Military Strategy from the President's Desk

We tend to focus on these early presidential acts because they raise questions of the gravest moment—presidential power to act even in areas of clear congressional authority during emergency. What is sometimes forgotten is how quickly Lincoln took direction of the Union's response. In addition to deciding the fundamental question that secession was illegal,¹⁵⁶ Lincoln managed the events following his election to put the South in a difficult position. In his First Inaugural Address, he announced that the Union would keep all federal installations and bases, and he declared that Fort Sumter would be resupplied.¹⁵⁷

Lincoln did not consult with Congress whether to seek a political compromise, or whether to let the South go its own way. This is striking not just in light of Buchanan's narrow view of presidential power,¹⁵⁸ but also the history of negotiations between the North and South over slavery. Congress had reached the Missouri Compromise of 1820;¹⁵⁹ the Compromise of 1850, which admitted California as a free state, allowed slavery in the other territory conquered from Mexico,¹⁶⁰ and enacted the Fugitive Slave Law;¹⁶¹ and it had passed the Kansas-Nebraska Act of 1854, which allowed popular sovereignty to decide on slavery in the Kansas and Nebraska territories.¹⁶² Henry Clay, Daniel Webster, and Stephen Douglas crafted the agreements; Presidents played bystanders with little influence.¹⁶³ Congress's superior role turned on its sole constitutional powers to regulate the territories and to admit new states to the Union,¹⁶⁴ but it also took advantage of presidential weakness during much of the antebellum period.¹⁶⁵

Imagine what might have happened had Congress assumed the lead in the period between Lincoln's election and his inauguration. In early

156. *See supra* Part I.B.

157. *See* Lincoln, First Inaugural Address, *supra* note 63, at 218 (declaring that he will use his power "to hold, occupy, and possess the property, and places belonging to the government").

158. *See supra* Part I.A.

159. Missouri Compromise, ch. 22, 3 Stat. 545 (1820).

160. Act of Sept. 9, 1850, ch. 50, § 1, 9 Stat. 446, 452 (declaring California a free state); Act of Sept. 9, 1850, ch. 49, § 2, 9 Stat. 446, 447 (creating the northern and western borders of Texas and allowing slavery in New Mexico).

161. Fugitive Slave Act of 1850, ch. 60, § 6, 9 Stat. 463.

162. Kansas-Nebraska Act of 1854, ch. 59, 10 Stat. 277, 282-83 (allowing popular sovereignty to decide on slavery in the Kansas and Nebraska territories).

163. DONALD CARTMELL, THE CIVIL WAR BOOK OF LISTS 29-30 (2001).

164. U.S. CONST. art. IV, § 3, cl. 1-2.

165. REPORT OF THE NATIONAL TASK FORCE ON THE PRESIDENCY AND DELIBERATIVE DEMOCRACY, *in* THE PROSPECT OF PRESIDENTIAL RHETORIC 257-58 (James Arnt Aune & Martin J. Medhurst eds., 2008).

December, the House of Representatives established a committee of thirty-three, with one member for each state, while the Senate named Senators Douglas, Jefferson Davis, John Crittenden, and William Seward to a committee of thirteen, to reach a deal on slavery.¹⁶⁶ The Crittenden Compromise, as it became known, would have revived the Missouri Compromise line and absolutely protected slavery where it existed.¹⁶⁷ The House committee proposed an unamendable constitutional amendment that would prohibit federal interference with slavery in the states.¹⁶⁸

Although he seemed aloof from the political horse-trading, Lincoln scuttled the whole affair. While still in Springfield, Illinois, he wrote to Republican legislators: “Let there be no compromise on the question of *extending* slavery. If there be, all our labor is lost”¹⁶⁹ Lincoln welcomed a split sooner rather than later: “The tug has to come, [and] better now, than any time hereafter.”¹⁷⁰ It is true, as historians have concluded, that the North went to war in 1861 with conservative goals in mind: to restore the Union as it was and thus, to allow slavery to exist in the South.¹⁷¹ At the same time, that Constitution contained the mechanism—control over slavery in the territories—that allowed Lincoln to keep faith with his moral commitment to end slavery.¹⁷² Lincoln was unwilling to give up the fruits of electoral victory, and the workings of constitutional democracy, to reach a settlement between North and South.¹⁷³

Lincoln displayed presidential initiative not just when the war came, but after. He exercised clear command over the generals and often urged Union forces to attack while his subordinates preferred more time for training and organization. After the defeat at the first Battle of Bull Run in

166. MCPHERSON, *supra* note 18, at 252–53, 255–56.

167. Amendments Proposed in Congress by Senator John J. Crittenden (Dec. 18, 1860), reprinted in CONG. GLOBE, 36TH CONG., 2ND SESS. 1368 (1861), available at http://avalon.law.yale.edu/19th_century/critten.asp.

168. *Id.*

169. Letter from Abraham Lincoln to Lyman Trumbull (Dec. 10, 1860), in LINCOLN, SPEECHES AND WRITINGS, *supra* note 1, at 190, 190 (emphasis in original).

170. *Id.*

171. See generally HERMAN BELZ, RECONSTRUCTING THE UNION: THEORY AND POLICY DURING THE CIVIL WAR (1969).

172. See Abraham Lincoln, Address at Cooper Institute (Feb. 27, 1860), in 3 COLLECTED WORKS, *supra* note 62, at 522, 523–24 (arguing that the Federal Government controls slavery in the territories); see also Arthur Bestor, *The American Civil War as a Constitutional Crisis*, in AMERICAN LAW AND THE CONSTITUTIONAL ORDER 219, 229 (Lawrence M. Friedman & Harry N. Scheiber eds., 1988); MCPHERSON, *supra* note 18, at 255 (noting that Lincoln resisted proposals that “*assist[ed]* or *permit[ted]*” the extension of slavery into the territories (quoting Letter from Abraham Lincoln to William H. Seward (Feb. 1, 1861), in 4 COLLECTED WORKS, *supra* note 62, at 183, 183)).

173. PALUDAN, *supra* note 1, at 33.

July 1861, Lincoln began to intervene in military decisions.¹⁷⁴ He replaced General McDowell with General McClellan,¹⁷⁵ and in November 1861 he removed General John Fremont for his conduct in the Department of the West.¹⁷⁶

The burdens of the command fell heavily on Lincoln, especially as Union casualties soared. Nonetheless, he urged the overcautious McClellan to use his growing Army of the Potomac to move south, and he removed and reinstated generals until he found the ones—Ulysses S. Grant and William Tecumseh Sherman—who agreed with his strategy of going on the offensive.¹⁷⁷ Lincoln's frustrations with his generals fill history books.¹⁷⁸ It was Lincoln who approved the broader strategy to control the Mississippi River and divide the Confederacy in two,¹⁷⁹ and it was Lincoln who saw, earlier than most generals, that the war would become a war of attrition where Northern resources would overwhelm a South with no industrial base and a small population.

Lincoln did not seek congressional involvement in the strategic decisions about the war. Congress's main job was to supply the resources needed to win on the battlefield, a task it performed far more effectively than its Southern counterpart. Taxes were raised, bonds were sold, a federal bank reestablished, paper currency introduced, and money spent (the federal budget increased by 700% in the first year of the war).¹⁸⁰ Hundreds of thousands of soldiers were trained, equipped, and organized into units, and once on the front they were fed and supplied far better than the enemy.

The Senate established a Committee on the Conduct of the War that became a forum for investigation and criticism of Lincoln's commanders, especially those perceived to be too cautious, and for praise of those willing to take aggressive measures.¹⁸¹ Lincoln and his second Secretary of War, Edwin Stanton, did nothing to shield the generals from congressional criticism, but instead seemed to see it as a welcome prod to McClellan and his fellow West Pointers.¹⁸² Beyond its oversight function, however, Congress did not play a significant role in setting war policy or strategy. As

174. See Carson et al., *supra* note 44, at 888.

175. *George B. McClellan*, OHIOHISTORYCENTRAL.ORG, http://www.ohiohistorycentral.org/w/McClellan_George_B. (last visited Nov. 12, 2013).

176. PALUDAN, *supra* note 1, at 87.

177. John Y. Simon, *Grant, Lincoln, and Unconditional Surrender*, in LINCOLN'S GENERALS 168–69 (Gabor S. Boritt ed., 1994); ELIOT A. COHEN, SUPREME COMMAND 16–18 (2002).

178. See generally T. HARRY WILLIAMS, LINCOLN AND HIS GENERALS (1952).

179. *Id.* at 190.

180. PALUDAN, *supra* note 1, at 109–12.

181. *Joint Committee on the Conduct of the War*, U.S. SENATE, http://www.senate.gov/artandhistory/history/common/investigations/pdf/JCCW_Fullcitations.pdf (last visited Nov. 12, 2013).

182. PALUDAN, *supra* note 1, at 98, 104.

Philip Paludan has written, “Congress left most decisions on the fighting to the generals, the secretary of war, and the president.”¹⁸³ Military strategist Eliot Cohen has shown that the development of Civil War strategy was largely a process of civilian struggle for control of the military, which boiled down to a contest between Lincoln and his generals.¹⁸⁴

Throughout the war, Lincoln stayed in close contact with Grant and Sherman, reviewed their movements, and continued to suggest different strategies. He asked Francis Lieber, an expert on the laws of war at Columbia University, to draft the first modern code on the rules of warfare, and he issued it as General Orders No. 100 in April 1863.¹⁸⁵ He did not ask Congress to enact it by statute. Upon learning that Confederate troops had executed surrendering black soldiers and their white officers, he threatened retaliatory action.¹⁸⁶ But perhaps no military policy was as far reaching as the decision to emancipate the slaves, a measure he executed solely under his authority as Commander-in-Chief.¹⁸⁷

F. The Emancipation Proclamation

In the first years of the war, Radical Republicans in Congress had kept up a drumbeat of criticism against Lincoln for not immediately ending slavery.¹⁸⁸ In 1861, Lincoln reversed General Fremont for ordering emancipation in Missouri,¹⁸⁹ and the following year he overturned General David Hunter’s freeing of slaves in Georgia, Florida, and South Carolina.¹⁹⁰ Lincoln was concerned about keeping the loyalty of the slave-holding border states, especially Kentucky, the third most populous slave state and occupant of a strategic position in the western theatre.¹⁹¹ Lincoln reportedly said that he hoped for God’s support, but he needed Kentucky’s.¹⁹²

183. *Id.* at 105.

184. See COHEN, *supra* note 177, at 4–5, 16–18, 31, 39, 44.

185. Francis Lieber, Instructions for the Government of Armies of the United States in the Field, General Orders No. 100 (Apr. 24, 1863), available at http://avalon.law.yale.edu/19th_century/lieber.asp.

186. Letter from Abraham Lincoln to Edwin M. Stanton (May 17, 1864), in LINCOLN, SPEECHES AND WRITINGS, *supra* note 1, at 594, 594–95.

187. See MCPHERSON, *supra* note 18, at 504 (“[A]s commander in chief [Lincoln] could order seizure of enemy slaves just as surely as he could order destruction of enemy railroads” (emphasis added)).

188. See *id.* at 494–97, 505 (describing legislative victories for radicals in Congress and their eventual frustration due to Lincoln’s continued ambivalence toward emancipation); DONALD, LINCOLN, *supra* note 18, at 374–76 (explaining the gravity of the decision to emancipate the Southern slaves).

189. MCPHERSON, *supra* note 18, at 353; RANDALL, *supra* note 18, at 354.

190. MCPHERSON, *supra* note 18, at 499; RANDALL, *supra* note 18, at 354.

191. JAMES F. SIMON, LINCOLN AND CHIEF JUSTICE TANAY: SLAVERY, SECESSION, AND THE PRESIDENT’S WAR POWERS 202 (2006).

192. FARBER, *supra* note 18, at 153.

Whether the federal government even had the power to abolish slavery remained unresolved. As he had proclaimed in his First Inaugural Address, Lincoln believed that slavery's preservation was a matter of state law and that the federal government had no power to touch it where it already existed.¹⁹³ Emancipation might qualify as the largest taking of private property in American history, for which the government would owe just compensation under the Fifth Amendment.¹⁹⁴ Another question that remained unclear was whether the United States had the right as a belligerent, under the laws of war, to free slaves. A nation at war generally had the right to seize enemy property when necessary to achieve its military goals, but it could not, as an occupying power, simply take all property held by private citizens.¹⁹⁵

As the conflict deepened, Lincoln's view on whether to order emancipation as a military measure underwent significant change. He had overturned Generals Fremont and Benjamin Butler because their proclamations were essentially political—they sought to free all slaves in their territories, even those unconnected to the fighting.¹⁹⁶ When General Butler in Virginia declared that slaves that escaped to Union lines were “contraband” property that could be kept by the Union, Lincoln let the order stand.¹⁹⁷ Congress urged a more radical approach by enacting two Confiscation Acts: the first deprived rebels of ownership of their slaves put to work in the war; the second freed the slaves encountered by Union forces.¹⁹⁸ Because both laws required an individual hearing before a federal judge prior to freeing a slave, neither had much practical effect.¹⁹⁹

Of greater impact was the July 1862 Militia Act, which freed the slave of any rebel, if that slave joined the U.S. armed forces.²⁰⁰ On August 25, 1862, Secretary of War Stanton authorized the raising of the first 5,000 black troops for the Union army.²⁰¹ As the war grew increasingly difficult, Lincoln became convinced that emancipation would be a valuable weapon for the Union cause.²⁰² It would undermine the Confederacy's labor force

193. See *supra* Part I.B.

194. U.S. CONST. amend. V.

195. FARBER, *supra* note 18, at 154–55 (quoting HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* 416–21 (6th ed. 1855)).

196. RANDALL, *supra* note 18, at 354.

197. PALUDAN, *supra* note 1, at 84.

198. Confiscation Act, ch. 60, §§ 1, 4, 12 Stat. 319 (1861); Second Confiscation Act, ch. 195, 12 Stat. 589 (1862).

199. 12 Stat. at 591. See RANDALL, *supra* note 18, at 357.

200. Militia Act, ch. 201, 12 Stat. 597, 599 (1862).

201. DUDLEY TAYLOR CORNISH, *THE SABLE ARM: NEGRO TROOPS IN THE UNION ARMY, 1861–1865*, at 53, 80 (1966).

202. See ALLEN C. GUELZO, *LINCOLN'S EMANCIPATION PROCLAMATION: THE END OF*

and economy while providing a much-needed pool of recruits for the Union armies.²⁰³

As the cost of the war in blood and treasure became ever dearer, demands for an end to slavery grew louder in the North.²⁰⁴ At the same time, the border states rejected proposals for gradual emancipation paid for by the federal government.²⁰⁵ By late July 1862, Lincoln had a draft proclamation of emancipation ready and had notified his cabinet, which advised him to wait for a Union victory.²⁰⁶ Antietam provided Lincoln the moment.²⁰⁷

While Union casualties were steep (2,108 dead and 9,549 wounded—up to that point the most American casualties ever suffered in a single day²⁰⁸), the Army of the Potomac had forced the Confederate Army from the field. On September 22, 1862, five days after the battle, Lincoln issued the Emancipation Proclamation as President and Commander-in-Chief.²⁰⁹ It declared that all slaves in area under rebellion as of January 1, 1863, “shall be then, thenceforward, and forever free; and the executive government of the United States, including the military and naval authority thereof, will recognize and maintain the freedom of such persons.”²¹⁰ Lincoln stated his intention to ask Congress for compensation for the loyal slave states that voluntarily adopted emancipation and for Southerners who lost slaves but remained loyal to the Union.²¹¹

The President remained clear that the war was not about slavery, but “for the object of practically restoring the constitutional relation between the United States” and the rebel states.²¹² Nevertheless, his proclamation freed 2.9 million slaves: 74% of all slaves in the United States and 82% of the slaves in the Confederacy.²¹³ On January 1, 1863, Lincoln issued the final Emancipation Proclamation, “by virtue of the power in me vested as Commander-in-Chief, of the Army and Navy of the United States in time of

SLAVERY IN AMERICA 207–08, 210, 214 (2006).

203. *Id.* at 214, 217.

204. FARBER, *supra* note 18, at 153 (“As the war became increasingly bloody, the feeling swelled that the root of the rebellion, the slave system, needed to be destroyed.”).

205. *Id.* (noting that Lincoln had proposed “gradual and compensated emancipation in the border states” but that “these proposals were never adopted”).

206. *Id.* at 153–54.

207. *Id.*

208. NORMAN S. STEVENS, ANTIETAM 1862: THE CIVIL WAR’S BLOODIEST DAY 85 (1994).

209. Abraham Lincoln, Preliminary Emancipation Proclamation (Sept. 22, 1862), in LINCOLN, SPEECHES AND WRITINGS, *supra* note 1, at 368, 368–70.

210. *Id.* at 368.

211. *Id.*

212. *Id.*

213. PALUDAN, *supra* note 1, at 155.

actual armed rebellion against [the] authority and government of the United States.”²¹⁴ The President rooted the constitutional justification for the Emancipation Proclamation as “a fit and necessary war measure for suppressing said rebellion.”²¹⁵

Lincoln’s dependence on his constitutional authority explains the Proclamation’s careful boundaries. He did not free any slaves in the loyal states, nor did he seek to remake the economic and political order of Southern society. Lincoln never claimed a broad right to end slavery. Rather, the Emancipation Proclamation was an exercise of the President’s war power to undertake measures necessary to defeat the enemy.

With the cost of war in both men and money rising steeply, emancipation became a means to the end of restoring the Union. Shortly before issuing the preliminary Proclamation, Lincoln wrote to Republican newspaper editor Horace Greeley, and through him to a broad readership, that his goal was to restore “the Union as it was.”²¹⁶ Emancipation was justified only so far as it helped achieve victory. “My paramount object in this struggle *is* to save the Union, and is *not* either to save or to destroy slavery,” Lincoln wrote.²¹⁷ “If I could save the Union without freeing *any* slave I would do it, and if I could save it by freeing *all* the slaves I would do it; and if I could save it by freeing some and leaving others alone I would also do that.”²¹⁸

After he issued the Proclamation, Lincoln made clear that the Commander-in-Chief Clause allows measures based on military necessity that would not be legal in peacetime. Responding to critics of the Proclamation’s constitutionality from his home state, he admitted that “I certainly wish that all men could be free, while I suppose you do not.”²¹⁹ Still, emancipation was a valid war measure. “I think the constitution invests its commander-in-chief, with the law of war, in time of war,” he wrote.²²⁰ Anything that belligerents could lawfully do in wartime, therefore, fell within the President’s authority.

There was no question in Lincoln’s mind that taking the enemy’s property was a legitimate policy in war. “Armies, the world over, destroy enemies’ property when they cannot use it; and even destroy their own to

214. Lincoln, Final Emancipation Proclamation, *supra* note 1, at 424.

215. *Id.*

216. Letter from Abraham Lincoln to Horace Greeley (Aug. 22, 1862), in LINCOLN, SPEECHES AND WRITINGS, *supra* note 1, at 357, 358 (internal quotation marks omitted).

217. *Id.*

218. *Id.*

219. Letter from Abraham Lincoln to James C. Conkling (Aug. 26, 1863), in LINCOLN, SPEECHES AND WRITINGS, *supra* note 1, at 495, 496.

220. *Id.* at 497.

keep it from the enemy.”²²¹ Lincoln went on to say: “Civilized belligerents do all in their power to help themselves, or hurt the enemy, except a few things regarded as barbarous or cruel,” such as the massacre of prisoners or non-combatants.²²² Lincoln would consider anything permitted by the laws of war.

Emancipation did not just deny the South a vital resource, but it also provided black soldiers for the war effort.²²³ Lincoln claimed that Union generals “believe the emancipation policy, and the use of colored troops, constitute the heaviest blow yet dealt to the rebellion.”²²⁴ Black soldiers saved the lives and energies of white soldiers, and, indeed, the lives and rights of white civilians.²²⁵ “You say you will not fight to free negroes,” Lincoln wrote.²²⁶ “Some of them seem willing to fight for you”²²⁷ But he closed by emphasizing again that emancipation was not the goal, but the means.²²⁸ When the war ended, “[i]t will . . . have been proved that, among free men, there can be no successful appeal from the ballot to the bullet; and that they who take such appeal are sure to lose their case, and pay the cost.”²²⁹ When that day comes, Lincoln promised, “there will be some black men who can remember that, with silent tongue, and clenched teeth, and steady eye, and well-poised bayonet,” they helped achieve victory.²³⁰

The Emancipation Proclamation is usually studied as a question of the war powers of the national government, though it has also been studied as a question of whether it amounted to a taking of property requiring compensation.²³¹ What is sometimes neglected is that the Proclamation was a startling demonstration of the constitutional powers of the Presidency. Lincoln decided that military necessity justified emancipation.²³² The Supreme Court did not reach the question of the wartime confiscation of property until after the war, when it upheld the seizure, transfer, and destruction of private property that supported the enemy’s ability to carry

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.* at 498.

226. *Id.*

227. *Id.*

228. *Id.* at 499.

229. *Id.*

230. *Id.*

231. See, e.g., FARBER, *supra* note 18, at 156 (discussing the argument that the Emancipation Proclamation violated the Takings Clause); *id.* at 154–55 (evaluating the merits of the Emancipation Proclamation as an exercise of war powers).

232. *Id.* at 154.

on hostilities.²³³ While Congress passed the two Confiscation Acts, it required individual hearings proving that a slave's owner was engaged in the rebellion or that a slave was being used in the Confederacy's war effort.²³⁴ Lincoln freed the slaves en masse and bypassed the painstaking judicial procedures established by Congress. The Legislature authorized the acceptance of escaped slaves into the Union armed forces, but it remained for the President to organize and deploy in combat the more than 130,000 freedmen who joined the Union armies.²³⁵

G. The Thirteenth Amendment

While the Proclamation had a broad scope, it also recognized the limits of presidential power. It only touched those areas, the Southern states, where slaves helped the enemy.²³⁶ It did not affect the institution of slavery in the loyal states.²³⁷ Emancipation would no longer be a justifiable war measure once the fighting ceased, and it could even be frustrated by the other branches while war continued.²³⁸ Congress might use its own constitutional powers to establish a different regime—a reasonable concern with Democratic successes in the 1862 midterm elections—and allow the states to restore slavery once the war ended.

Lincoln understood that to ensure slavery's permanent end, the states would have to adopt a constitutional amendment making emancipation permanent. Toward the end of the war, he pressed for adoption of a complete prohibition of slavery in what eventually became the Thirteenth Amendment. Ratification made the link between emancipation and democratic rule clear. In June 1864, Congress rejected the amendment,

233. See *Miller v. United States*, 78 U.S. (11 Wall.) 268, 269, 313–14 (1870) (upholding the confiscation of rebel property); *Ford v. Surget*, 97 U.S. 594, 605 (1878) (upholding the legality of destroying rebel property); and *New Orleans v. Steamship Co.*, 87 U.S. (20 Wall.) 387, 395 (1874) (upholding the legality of transferring rebel property during the war).

234. Confiscation Act, ch. 60, §§ 1, 4, 12 Stat. 319 (1861); Second Confiscation Act, ch. 195, §§ 6, 9, 12 Stat. 589 (1862).

235. Yoo, *Unitary, Executive, or Both?*, *supra* note 11, at 2015 (citing MCPHERSON, *supra* note 18, at 769).

236. Lincoln, Final Emancipation Proclamation, *supra* note 1, at 425 (freeing all slaves within any state or designated part of a State where the people are “in rebellion against the United States”); *see id.* (designating the following states as areas in rebellion, with some exceptions: “Arkansas, Texas, Louisiana, . . . Mississippi, Alabama, Florida, Georgia, South-Carolina, North Carolina, and Virginia”).

237. *Id.* (limiting emancipation to areas where the people are in rebellion).

238. See, e.g., Farber, *supra* note 18, at 157 (“Congress probably had concurrent power over emancipation, either under its specific power to make rules for captures on land or under its more general power to effectuate the conduct of war (implicit in the power to declare war).”).

which would have been the first since the changes to the Electoral College after the Jefferson-Burr deadlock in 1800.²³⁹

After resounding Republican victories in the November elections, Lincoln called upon the same lame-duck Congress to ratify the Thirteenth Amendment. “It is the voice of the people now, for the first time, heard upon the question.”²⁴⁰ In a time of “great national crisis,” Lincoln said “unanimity of action” was needed, and that required “some deference . . . to the will of the majority, simply because it is the will of the majority.”²⁴¹ Congress promptly agreed to ratify the amendment even before the new Republican majorities took over.²⁴²

Lincoln’s great political achievement was to meld the original purpose of the war with the new goal of ending slavery. Emancipation of the slaves and restoration of the Union both drew upon Lincoln’s belief, expressed in his First Inaugural Address, that the Constitution enshrined a democratic process in which the fundamental decisions were up to the people, as expressed in the ballot box.²⁴³ He tied together the concepts of popular sovereignty and liberty in the Gettysburg Address, reconciling the political structure of the Constitution with the values of the Declaration of Independence.²⁴⁴

Lincoln justified the carnage of the battle with the prospect of preserving the “new nation,” created by “our fathers,” that was “conceived in Liberty, and dedicated to the proposition that all men are created equal.”²⁴⁵ The equality of all men, of course, was not an explicit goal of the Union as established in the Constitution, but instead was recognized by the Declaration.²⁴⁶ Lincoln called on “us the living” to dedicate themselves “to the great task remaining before us,” to ensure “that this nation, under God, shall have a new birth of freedom,” and “that government of the people, by the people, for the people, shall not perish from the earth.”²⁴⁷ Restoring the Union now stood for two propositions: the working of popular democracy

239. Yoo, *Unitary, Executive, or Both?*, *supra* note 11, at 2015 (citing PALUDAN, *supra* note 1, at 300–01).

240. Abraham Lincoln, Annual Message to Congress (Dec. 6, 1864), in LINCOLN, SPEECHES AND WRITINGS, *supra* note 1, at 646, 658.

241. *Id.*

242. Yoo, *Unitary, Executive, or Both?*, *supra* note 11, at 2016 (citing PALUDAN, *supra* note 1, at 301–02).

243. See Lincoln, Message to Congress in Special Session, *supra* note 83, at 439.

244. See A NEW BIRTH, *supra* note 3, at 79–80 (2000) (describing the connections between the Declaration of Independence and the Gettysburg Address); JAFFA, HOUSE DIVIDED, *supra* note 3, at 227–28.

245. Lincoln, Address at Gettysburg, *supra* note 3, at 536.

246. THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776).

247. Lincoln, Address at Gettysburg, *supra* note 3, at 536.

and freedom and equality for all men. Emancipation may have been a policy justified by military necessity, but it became an end of the war as well as a means.

Lincoln's words at Gettysburg illustrated, as perhaps nothing else could, the President's control over national strategy in wartime. When the war began, Lincoln established the limited goal of restoring the Union.²⁴⁸ Congress likewise agreed in the Crittenden-Johnson resolutions, which declared that the goal of the war was preservation of the Union, and which preserved the "established institutions" of slavery in the existing states.²⁴⁹ Initial military strategy focused on blockading the Confederacy in the East while dividing it in the West through capture of the Mississippi.²⁵⁰ This "Anaconda" strategy would slowly strangle the South until it came back to its senses and returned to the Union.²⁵¹

By the middle of 1862, stiff Southern resistance had convinced Lincoln that only unconditional surrender could end the war. His war goals expanded beyond the restoration of the Union to include, after the Emancipation Proclamation, freedom for all. Strategy shifted to the destruction of Confederate armies in the field and the end of the government in Richmond. Lincoln's declaration that the war sought a new birth of freedom, he believed, would encourage "the army to strike more vigorous blows" by setting an example of the administration "striking at the heart of the rebellion."²⁵²

Lincoln rejected Southern peace feelers that only sought a restoration of the Union without emancipation. In response to one Southern effort to open negotiations, which Lincoln suspected was false anyway, the President sent emissaries with instructions that negotiations could only begin after the South accepted the Union and the permanent abandonment of slavery.²⁵³

248. See *supra* notes 84–85 and accompanying text; see also Lincoln, Message to Congress in Special Session, *supra* note 83, at 439.

[T]he Executive deems it proper to say, it will be his purpose then, as ever to be guided by the Constitution, and the laws; and that he probably will have no different understanding of the powers, and duties of the Federal government, relatively to the rights of the States and the people, under the Constitution, than that expressed in the inaugural address.

Id.

249. CONG. GLOBE, 37TH CONG., 1ST SESS. 322–23 (1861).

250. JAMES M. MCPHERSON, ABRAHAM LINCOLN AND THE SECOND AMERICAN REVOLUTION 75 (1991).

251. See *id.* at 75–76.

252. *Id.* at 84 (quoting GIDEON WELLES, THE HISTORY OF EMANCIPATION 842–43 (1872), available at <https://archive.org/details/historyofemancip00well>).

253. DONALD, LINCOLN, *supra* note 18, at 523.

This “surprise” term went beyond the Emancipation Proclamation, which was limited only to Confederate territory in wartime, and even Lincoln’s understanding of the powers of Congress.²⁵⁴ Jefferson Davis spurned the Northern representatives with the words that “[w]e are not fighting for slavery. We are fighting for Independence,—and that, or extermination, we *will* have.”²⁵⁵ Describing the exchanges later, Lincoln wrote that “[b]etween him and us the issue is distinct, simple, and inflexible. It is an issue which can only be tried by war, and decided by victory.”²⁵⁶ Lincoln’s control over the conduct of the war had transformed the political goals of the conflict into union and liberty, and made the means no longer limited war, but a drive for total victory.

II. CIVIL LIBERTIES IN WARTIME

The unique nature of the Civil War forced the Lincoln administration to reduce civil liberties in favor of greater internal security. Unlike a war against a foreign nation, the rebellion was fought against other Americans, and events in Maryland and Missouri showed that parts of Union territory would have to be placed under military rule.²⁵⁷ The common heritage of the North and South increased the likelihood of irregular guerilla fighting, espionage, and sabotage.²⁵⁸ Southerners could operate easily behind Union lines and find supporters of their cause.²⁵⁹ Significant political dissent from Democrats and anti-war opponents worried the administration, which tried to walk a fine line between respecting free speech and the political process and preventing the disloyal from undermining the war effort.²⁶⁰ Congress did not give its immediate approval to all of Lincoln’s actions; it did not enact any law regarding habeas corpus until 1863.²⁶¹

Lincoln initially gave Secretary of State Seward the job of operating an internal security service responsible for detaining those suspected of aiding the Confederacy.²⁶² His special agents either arrested suspects themselves or asked the military or local police to do so at strategic points in cities,

254. *Id.*

255. *Id.* (emphasis in original) (internal quotation marks omitted).

256. Lincoln, Annual Message to Congress, *supra* note 240, at 660.

257. The unique civil liberty challenges of the Civil War are described in NEELY, *supra* note 18, at 4–9, 44.

258. *See, e.g., id.* at 32, 33, 38.

259. *Id.* at 78.

260. *Id.* at 27–28.

261. An Act relating to Habeas Corpus, and regulating Judicial Proceedings in Certain Cases, ch. 81, 12 Stat. 755 (1863).

262. PALUDAN, *supra* note 1, at 73.

ports, and transportation hubs.²⁶³ Seward even had newspaper editors and state politicians suspected of disloyalty thrown in detention and had the mails opened to search for espionage.²⁶⁴ Seward boasted to a foreign diplomat that he could “ring a little bell” and have anyone in the country arrested.²⁶⁵

A. Balancing Constitutional Duties: Preserving the Nation and Upholding the Law

Lincoln’s domestic policies on detention logically followed those applied to combat. More than 400,000 prisoners were captured in the war by both sides combined.²⁶⁶ Under Lincoln’s theory that the Southern states were still part of the Union, all of the members of the Confederacy were still American citizens. In war, however, the United States used force to kill and capture Confederate soldiers, destroy Confederate property, and impose martial law on occupied Confederate territory.²⁶⁷ Prisoners had no right to a jury trial, and Confederate civilians had neither a right to sue for damages for destroyed property nor a right to immediately govern themselves.²⁶⁸ Occupied Confederate states would have no right to send Senators and Representatives to Congress once Union control had returned.²⁶⁹

The normal process of law could not handle the unique nature of the rebellion. Confederate leaders, for example, were being detained not because they were guilty of a crime, but because their release would pose a future threat to the safety of the country. What if federal authorities, Lincoln wrote in a letter published in June 1863, could have arrested the military leaders of the Confederacy, such as Generals John Breckinridge, Robert E. Lee, and Joseph Johnston, at the start of the war?²⁷⁰

263. *Id.* at 73, 75.

264. *Id.* at 74.

265. 2 FREDERIC BANCROFT, *THE LIFE OF WILLIAM H. SEWARD* 280 (1899).

266. CHARLES W. SANDERS, JR., *WHILE IN THE HANDS OF THE ENEMY: MILITARY PRISONS OF THE CIVIL WAR I* (2005).

267. FARBER, *supra* note 18, at 144–45 (listing intrusions upon individual liberty and suggesting that constitutional rights “evaporated” in the wake of the Union army).

268. *See* FARBER, *supra* note 18, at 144, 147 (stating that the Union armies seized cotton and freed slaves as they advanced through the South); NEELY, *supra* note 18, at 123–24 (emphasizing that the suspension of habeas corpus contributed to the uncountable multitude of civilians held under military rule).

269. Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 *YALE L.J.* 453, 502–03 (1989).

270. Letter from Abraham Lincoln to Erastus Corning and Others, *supra* note 35, at 458.

Unquestionably if we had seized and held them, the insurgent cause would be much weaker,” Lincoln argued.²⁷¹ “But no one of them had then committed any crime defined in the law. Every one of them, if arrested, would have been discharged on *habeas corpus* were the writ allowed to operate.”²⁷²

Suspension of the writ made clear that captured Confederates could not seek the benefits of the very civilian legal system that they sought to overthrow.

Lincoln’s July 4, 1861, message to the special session of Congress mounted a powerful defense of his suspension of the writ. He argued that his presidential duty called upon him to protect the Constitution first, before the decisions of the Supreme Court. “The whole of the laws which were required to be faithfully executed, were being resisted, and failing of execution, in nearly one-third of the States.”²⁷³ Saving the Union from a mortal threat, Lincoln suggested, could justify a violation of the Constitution and the laws, and certainly a single provision of them.

Must they be allowed to finally fail of execution, even had it been perfectly clear, that by the use of the means necessary to their execution, some single law, made in such extreme tenderness of the citizen’s liberty, that practically, it relieves more of the guilty, than of the innocent, should, to a very limited extent, be violated?²⁷⁴

In a famous passage, Lincoln asked, “[A]re all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated?”²⁷⁵ He suggested that painstaking attention to the habeas corpus provision would come at the expense of his ultimate constitutional duty—saving the Union.²⁷⁶ “Even in such a case, would not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it?”²⁷⁷

Lincoln performed some acrobatics to pull back from a constitutional conflict. It was obvious that the nation indeed was confronted with

271. *Id.*

272. *Id.*

273. Lincoln, Special Message to Congress, *supra* note 2, at 252.

274. *Id.* at 252–53.

275. *Id.* at 253 (emphasis in original).

276. *Id.*

277. *Id.*

“rebellion or invasion.”²⁷⁸ Written in the passive voice, the Constitution’s habeas corpus provision did not specify which branch had the right to suspend it.²⁷⁹ Lincoln quickly returned to the need for prompt executive action to address the crisis. “[A]s the provision was plainly made for a dangerous emergency,” he wrote, “it cannot be believed the framers of the instrument intended, that in every case, the danger should run its course, until Congress could be called together.”²⁸⁰ A rebellion might even prevent Congress from meeting.

In an opinion issued the next day, Attorney General Edward Bates agreed that the President’s duty to execute the laws and uphold the Constitution required him to suppress the rebellion, using the most effective means available.²⁸¹ If the rebels sent an army, the President had the discretion to respond with an army. “[I]f they employ spies and emissaries, to gather information, to forward rebellion, he may find it both prudent and humane to arrest and imprison them,” Bates wrote.²⁸² Despite the vagueness of the Suspension Clause, the President must have the ability to suspend habeas corpus in the case of a “pressing emergency” that requires him to “call to his aid the military power of the nation.”²⁸³ In times of emergency, “the President must, of necessity, be the sole judge, both of the exigency which requires him to act, and of the manner in which it is most prudent for him to employ the powers entrusted to him”²⁸⁴

Bates’s legal opinion launched a frontal assault on Taney’s claim to judicial supremacy in *Merryman*.²⁸⁵ “To say that the departments of our government are co-ordinate, is to say that the judgment of one of them is not binding upon the other two, as to the arguments and principles involved in the judgment.”²⁸⁶ Independence required that no branch could compel another.²⁸⁷ No court could issue a writ requiring compliance by the President, just as no President could order a court how to decide a case.²⁸⁸

278. U.S. CONST. art. I, § 9, cl. 2.

279. *Id.*

280. Lincoln, Special Message to Congress, *supra* note 2, at 253.

281. Suspension of the Privilege of the Writ of Habeas Corpus, 10 Op. Att’y Gen. 74, 82–83 (1861).

282. *Id.* at 83.

283. *Id.* at 87, 90.

284. *Id.* at 84.

285. Compare *id.* at 86 (describing suspension of the writ of habeas corpus during wartime as a political power not subject to judicial review), with *Ex parte Merryman*, 17 F. Cas. 144, 152 (C.C.D. Md. 1861) (holding suspension of the writ to be a usurpation of judicial authority by the President and the military).

286. *Suspension of the Privilege*, 10 Op. Att’y Gen. at 77.

287. *Id.*

288. *Id.* at 77, 85–86.

Bates's opinion ventured even further than Lincoln's view on *Dred Scott*, which Lincoln agreed to enforce at least as to the parties in the case.²⁸⁹ Bates's claim of the independent status of each branch implied that the President had no obligation to obey a court judgment even in that narrow case²⁹⁰—a position that the administration had to adopt because Lincoln had already ignored Taney's order releasing Merryman.²⁹¹

Bates questioned whether the courts had any competence to decide questions relating to the war:

[T]he whole subject-matter is political and not judicial. The insurrection itself is purely political. Its object is to destroy the political government of this nation and to establish another political government upon its ruins. And the President, as the chief civil magistrate of the nation, and the most active department of the Government, is eminently and exclusively political, in all his principal functions.²⁹²

A court, Bates concluded, had no authority to review these political decisions of the President.²⁹³ The Attorney General suggested that something like the modern Political Question Doctrine applied to judicial review of the President's wartime decisions.²⁹⁴ Almost as an aside, Bates addressed the merits of the constitutional question. He observed that the Suspension Clause was vague and did not specify whether Congress alone, or the President as well, could suspend habeas corpus.²⁹⁵ He argued that it was absurd to allow habeas corpus to benefit enemies in wartime, as it would imply that the enemy could sue for replevin of the return of arms and munitions that had been confiscated by the Union.²⁹⁶

289. See Abraham Lincoln, First Inaugural Address, *supra* note 63, at 221 (establishing Lincoln's view).

290. See *Suspension of the Privilege*, 10 Op. Att'y Gen. at 78 (arguing that the judicial branch has powers that are "ample and efficient" for resolving conflicts between individual parties, but that it is "powerless to impose rules of action and of judgment upon the other departments").

291. FARBER, *supra* note 18, at 164–66.

292. *Suspension of the Privilege*, 10 Op. Att'y Gen. at 86.

293. *Id.*

294. *Id.*

295. *Id.* at 88–89.

296. *Id.* at 91.

B. Crime v. War: The Suppression of Northern Agitators

In September 1862, the President turned to more aggressive measures. Military rule had displaced civilian government in areas touched by the battlefield, in the border states where Confederate irregulars conducted guerilla operations, and in recaptured territory.²⁹⁷ Martial law went unmentioned in the Constitution but had been used during the Revolution and the War of 1812,²⁹⁸ and had even been upheld by Chief Justice Taney in a case involving civil unrest in Rhode Island.²⁹⁹ Lincoln drew upon his Commander-in-Chief power to impose military rule in areas where fighting or occupation were ongoing.

In a September 24, 1862, proclamation, Lincoln extended military jurisdiction beyond the battlefield to those giving assistance to the enemy behind the lines.³⁰⁰ He ordered the military to detain anyone within the United States who gave aid or comfort to the rebels, and anyone who resisted the draft or discouraged volunteers from enlisting.³⁰¹ Detainees would have no right to seek a writ of habeas corpus and would be tried by courts martial or military commission, a form of military court used to try the enemy or civilians for violations of the laws of war and to administer justice in occupied territory.³⁰² Under Lincoln's order, the jurisdiction of the military commissions extended to those suspected of assisting the rebellion or disrupting the war effort well behind the front lines.

Union officials primarily deployed these authorities in or near active hostilities to detain spies and saboteurs. A common use was to capture irregular Confederate forces that were killing Union soldiers and attacking supply trains in states such as Missouri, or to maintain order in recaptured territory such as Tennessee.³⁰³ Civilian processes of justice simply could not handle cases of widespread violence by guerillas and Confederate soldiers in the areas around the front lines.³⁰⁴ According to existing Union records,

297. See, e.g., NEELY, *supra* note 18, at 32–33, 39 (describing military rule in Missouri, a border state).

298. G. Norman Lieber, *Martial Law During the Revolution*, 1 MAG. AM. HIST. 538, 538–39 (1877); REGINALD C. STEWART, CIVIL-MILITARY RELATIONS IN THE WAR OF 1812, at 101 (2009).

299. *Luther v. Borden*, 48 U.S. (7 How.) 1, 45–46 (1849); see also *Moyer v. Peabody*, 212 U.S. 78, 83–84 (1909) (reaffirming *Luther v. Borden* and approving martial law); FARBER, *supra* note 18, at 148–49 (providing background on both cases and explaining that both approved martial law).

300. Abraham Lincoln, Proclamation Suspending the Writ of Habeas Corpus (Sept. 24, 1862) in LINCOLN, SPEECHES AND WRITINGS, *supra* note 1, at 371, 371.

301. *Id.*

302. *Id.*

303. NEELY, *supra* note 18, at 169.

304. See *id.* at 168–69 (explaining how civil unrest and disorder in the border states led to military tribunals and draconian government measures).

the army conducted 4,271 military commission trials during the Civil War.³⁰⁵ About 55% took place in Missouri, Kentucky, and Maryland,³⁰⁶ border states that saw significant disorder and unrest, with Missouri alone accounting for about 46%.³⁰⁷ Almost all of these cases involved guerrilla activity, horse-stealing, and bridge-burning.³⁰⁸

Lincoln ordered the use of military detention and trial in the North, not because it was under direct threat of attack, but because agitators were interfering with the North's war effort. Although recent historical work has shown that Union officials did not exercise these authorities as broadly against political activity as some have thought, Union officials did detain and try newspaper editors and politicians who urged disloyalty or opposition to the administration's war measures.³⁰⁹ The most well-known case was that of Clement Vallandigham, a former member of Congress and Ohio Democrat who was seeking his party's nomination for Governor on a peace platform.³¹⁰ Union authorities arrested Vallandigham for a speech attacking the war as "wicked, cruel, and unnecessary" because it sought to abolish slavery rather than restore the Union.³¹¹ He made a particular point of attacking "King Lincoln" for depriving Northerners of their civil liberties.³¹² A military commission convicted Vallandigham and sentenced him to prison for the rest of the war, but Lincoln altered the sentence to banishment to the Confederacy.³¹³

Vallandigham's case became a cause célèbre to Lincoln's opponents in the North, who accused him of wielding dictatorial powers ever since the start of the war.³¹⁴ Unlike Merryman, the Ohio Democrat had refrained from any overtly hostile actions against the United States, other than using his right to free speech to criticize the administration's wartime policies. The Supreme Court refused to hear Vallandigham's petition for a writ of habeas corpus because a military commission was not a *court* over which it

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.*

309. *See id.* at 28, 65–68.

310. *See generally* JENNIFER L. WEBER, *COPPERHEADS: THE RISE AND FALL OF LINCOLN'S OPPONENTS IN THE NORTH* (2006); FRANK KLEMENT, *THE LIMITS OF DISSENT: CLEMENT L. VALLANDIGHAM AND THE CIVIL WAR* (1999).

311. *THE TRIAL OF THE HONORABLE CLEMENT L. VALLANDIGHAM, BY A MILITARY COMMISSION: AND THE PROCEEDINGS UNDER HIS APPLICATION FOR A WRIT OF HABEAS CORPUS IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO 11* (Ricky and Carroll 1863) [hereinafter *THE TRIAL*] (internal quotation marks omitted).

312. *Id.* at 23 (internal quotation marks omitted); *see* FARBER, *supra* note 18, at 171.

313. *THE TRIAL*, *supra* note 311, at 34.

314. *See* MARK NEELY, *supra* note 18, at 66.

could exercise review.³¹⁵ Its decision effectively removed the federal courts as a check on executive detention while hostilities were ongoing. As political protests erupted, Ohio Democrats nominated Vallandigham for Governor on a platform of opposition to executive tyranny.³¹⁶

In a June 12, 1863, public letter to New York Democrats, Lincoln responded that his administration had properly held Vallandigham because the Constitution recognized that military rule was appropriate “when, in cases of rebellion or invasion, the public safety may require.”³¹⁷ “[U]nder cover of ‘liberty of speech,’ ‘liberty of the press,’ and ‘habeas corpus,’” Lincoln claimed, the Confederacy “hoped to keep on foot among us a most efficient corps of spies, informers, suppliers, and aiders and abettors of their cause in a thousand ways.”³¹⁸ Enemies were not just those who took up arms against the Union, but those who attempted to prevent the mobilization of its men and industry. Words could be just as deadly as bullets. “[H]e who dissuades one man from volunteering, or induces one soldier to desert, weakens the Union cause as much as he who kills a Union soldier in battle.”³¹⁹ In one of his memorable turns of phrase, Lincoln asked: “Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of a wily agitator who induces him to desert?”³²⁰

Arresting civilians for crimes and detaining the enemy in war achieved different goals in different circumstances. “The former is directed at the small [percentage] of ordinary and continuous perpetration of crime,” Lincoln argued, “while the latter is directed at sudden and extensive uprisings against the Government.”³²¹ During war, detention “is more for the preventive and less for the vindictive.”³²² He rejected the Democrats’ argument that military detention could run only on the battlefield or in occupied territory.³²³ Lincoln interpreted the Constitution as allowing suspension of the writ “*wherever* the public safety” requires, not just in areas of actual combat.³²⁴ Lincoln remained conscious that political speech should not be suppressed. Vallandigham “was not arrested because he was damaging the political prospects of the Administration, or the personal interests of the Commanding General, but because he was damaging the

315. *Ex Parte Vallandigham*, 68 U.S. (1 Wall.) 243, 253 (1863).

316. KLEMENT, *supra* note 310, at 178–80.

317. Letter from Abraham Lincoln to Erastus Corning and Others, *supra* note 35, at 459.

318. *Id.* at 456.

319. *Id.* at 457.

320. *Id.* at 460.

321. *Id.* at 458.

322. *Id.*

323. *Id.* at 455.

324. *Id.* at 458–59 (emphasis in original).

Army, upon the existence and vigor of which the life of the Nation depends.³²⁵ Lincoln closed by invoking Andrew Jackson, who, as military governor in New Orleans, arrested a newspaper editor and judge for endangering public order while the city was under threat of British invasion.³²⁶

Even as Lee's armies marched north toward Pennsylvania, Ohio Democrats sent a letter to Lincoln criticizing his domestic security policies.³²⁷ They claimed that the President treated the Constitution as if it were different during war than peace, and that he had trampled on individual liberties.³²⁸ Lincoln defended his suspension of the writ on the ground that the Constitution did not specify which branch held the authority to suspend.³²⁹ He turned to the basic difference between crime and war. The nature of war required detentions without trial, which "have been for *prevention*, and not for *punishment*—as injunctions to stay injury, as proceedings to keep the peace."³³⁰

Turning to the rhetorical offensive, Lincoln accused the Ohio Democrats of encouraging resistance to lawful authority by rejecting the legitimacy of military force to restore the Union. "Your own attitude, therefore, encourages desertion, resistance to the draft and the like," Lincoln claimed, "because it teaches those who incline to desert, and to escape the draft, to believe it is your purpose to protect them."³³¹ Lincoln challenged the Ohio Democrats to agree that a military response to secession was valid, that they should not hinder the efficient operation of the army or navy, and that they should support the troops.³³² They refused, but Lincoln had won the battle (but not the war) for public opinion. He had appealed to more than just military necessity, and he had carefully argued that his exercise of extraordinary powers remained within the Constitution.³³³

325. *Id.* at 459.

326. *Id.* at 461–62.

327. Abraham Lincoln, Reply to the Ohio Democratic Convention (June 29, 1863), in LINCOLN, SPEECHES AND WRITINGS, *supra* note 1, at 465, 466, 467.

328. *Id.* at 466–67.

329. *Id.* at 467.

330. *Id.* at 468 (emphasis in original).

331. *Id.* at 469.

332. *Id.* at 470.

333. *Id.* at 465–69; PALUDAN, *supra* note 1, at 201–02.

C. Congressional Agreement on Civil Liberties

Congress waited until March 1863 to approve the President's suspension of habeas corpus.³³⁴ Although some leading Republican and Democratic members of Congress had severe misgivings over the policy, some historians have read Congress's silence as implicit approval of Lincoln's actions.³³⁵ And indeed, the Habeas Corpus Act recognized Lincoln's suspension of the writ, immunized federal officers who detained prisoners, and left untouched executive policy on the detention of prisoners of war and the operations of military commissions.³³⁶

Others have argued that the Act rebuked Lincoln, because it required the military to provide the courts with lists of prisoners and to allow for their release if they were not indicted by a grand jury.³³⁷ As J.G. Randall has pointed out, these arguments ignore the fact that the Lincoln administration did not change its detention policies in any meaningful way.³³⁸ The military did not interpret the Act to apply to anyone triable by military commission or places where martial law held sway.³³⁹ Vallandigham himself, for example, would not have benefited from the Act. The Secretary of War or the military sometimes simply refused to provide complete lists of prisoners to the federal courts, and it appears that there was no measurable difference in the number of civilians arrested or released because of the Act.³⁴⁰ Randall estimates that the Lincoln administration detained approximately 13,500 citizens.³⁴¹ Mark Neely puts the number at about 12,600, though the records are incomplete.³⁴²

D. Ex parte Milligan: The Judiciary Checks Executive War Powers

Not until the end of the war did the other branches of government truly push back. In *Ex parte Milligan*, the Supreme Court took up the case of an Indiana Peace Democrat who had conspired to raid federal arsenals and prisoner-of-war camps.³⁴³ In December 1864, a military commission

334. An Act Relating to Habeas Corpus, and regulating Judicial Proceedings in Certain Cases, ch. 81, § 1, 12 Stat. 755 (1863).

335. NEELY, *supra* note 18, at 68, 202.

336. § 1, 12 Stat. at 755.

337. RANDALL, *supra* note 18, at 166 (suggesting that the Habeas Corpus Act was designed to recover authority for the Legislature, from the Executive).

338. *Id.*

339. *Id.* at 167.

340. *Id.*

341. *Id.* at 152 n.25.

342. NEELY, *supra* note 18, at 130.

343. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 6–7 (1866); FARBER, *supra* note 18, at 164.

convicted Milligan and sentenced him to death, a sentence that President Johnson later commuted to life imprisonment.³⁴⁴ Milligan and his co-conspirators filed for a writ of habeas corpus. In 1866, the Supreme Court overturned the military commission and ordered the release of Milligan.³⁴⁵ It held that he could not be tried by the military because he was not a resident of a Confederate state, not a prisoner of war, and never a member of the enemy's armed force.³⁴⁶ He had been captured in Indiana, where the normal civilian courts were open, and there was no showing of a military necessity to try him outside of that system.³⁴⁷ Only if Indiana had been under attack and the normal judicial system closed, the Court found, could Milligan be subject to military courts.³⁴⁸

Four Justices concurred.³⁴⁹ They did not take issue with the majority's argument that the military commission lacked jurisdiction. Instead the Justices focused on the claim that Congress, if it had wanted to, could have authorized the use of military commissions.³⁵⁰ Since Congress had not authorized the use of military commissions, they agreed with the Court's outcome.³⁵¹ Implicitly, five Justices of the *Milligan* majority rejected Lincoln's argument that military detention could extend to those well behind the front lines who aided the rebellion or sought to interfere with the war effort. The Majority also rejected any claim that the Constitution did not operate during the Civil War.³⁵² "The Constitution," the majority declared, "is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."³⁵³

While *Milligan* is cited today as a ringing endorsement of civil liberties in wartime, it was heavily criticized at the time and sparked a remarkable

344. No good biography exists of Milligan, but there are several helpful articles about him and his case. See, e.g., FRANK L. KLEMENT, *The Indianapolis Treason Trials and Ex Parte Milligan*, in AMERICAN POLITICAL TRIALS 97, 110 (Michael R. Belknap ed., 1994) (detailing Milligan's time in prison and the events leading to his release); Allan Nevins, *The Case of the Copperhead Conspirator*, in QUARRELS THAT HAVE SHAPED THE CONSTITUTION 101, 114–15 (John A. Garraty ed., 1962) (explaining how President Johnson commuted Milligan's sentence to life in prison); Kenneth M. Stampp, *The Milligan Case and the Election of 1864 in Indiana*, 31 MISS. VALLEY HIST. REV. 41, 56–57 (1944) (describing Milligan's death sentence and noting that Johnson commuted it in 1865). One short book is DARWIN KELLEY, *MILLIGAN'S FIGHT AGAINST LINCOLN* (1973).

345. *Milligan*, 71 U.S. at 107.

346. *Id.* at 131.

347. *Id.* at 7, 121–22.

348. *Id.* at 127.

349. *Id.* at 132 (Chase, C.J. concurring).

350. *Id.* at 136.

351. *Id.* at 141.

352. *Id.* at 120 (majority opinion).

353. *Id.* at 120–21.

political response. Congress's authority was not presented in the *Milligan* case, but the majority's desire to reach this question and to answer it in such broad terms plunged the Court into the maelstrom of Reconstruction politics. *Milligan* suggested that any continuation of military occupation in the South was unconstitutional, and signaled that Republicans would have to count the judiciary among their opponents.

"In the conflict of principle thus evoked, the States which sustained the cause of the Union will recognize an old foe with a new face," wrote the *New York Times*.³⁵⁴ "The Supreme Court, we regret to find, throws the great weight of its influence into the scale of those who assailed the Union and step after step impugned the constitutionality of nearly everything that was done to uphold it."³⁵⁵ Comparing *Milligan* to *Dred Scott*, Harper's Weekly declared that "it is not a judicial opinion; it is a political act."³⁵⁶ The *New York Herald* raised the idea of reforming the Court: "a reconstruction of the Supreme Court, adapted to the paramount decisions of the war, looms up into bold relief, on a question of vital importance."³⁵⁷

Congress was determined to prevent the Court from ending Reconstruction prematurely. Radical Republicans were already at war with President Johnson, who wanted a quick readmission of the Southern states into the Union.³⁵⁸ Johnson vetoed bills to deepen Reconstruction policies, and quoted *Milligan* to support his claim that continued occupation of the South violated the Constitution.³⁵⁹ Colonel William McCardle, a Vicksburg newspaper editor held in military detention for virulent denunciation of Union authorities, challenged the constitutionality of Reconstruction.³⁶⁰ In 1868, to forestall McCardle's challenge, Congress enacted legislation eliminating the Court's jurisdiction to hear appeals from military courts in the South.³⁶¹ Only after Johnson's acquittal on impeachment charges, and

354. 2 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY, 1836–1918*, at 429 (rev. ed. 1947) (quoting *Trials by Military Commissions—The Supreme Court Decision*, N.Y. TIMES, Jan. 3, 1867, at 4).

355. *Id.* (quoting *Trials by Military Commissions*, *supra* note 354, at 4).

356. *Id.* at 432 (quoting *The New Dred Scott*, HARPER'S WKLY., Jan. 19, 1867, at 43).

357. *Id.* at 431 (quoting Editorial, *The Late Decision of the Supreme Court on Military Trials During the War*, N.Y. HERALD, Dec. 20, 1866, at 4).

358. See PAUL BERGERON, *ANDREW JOHNSON'S CIVIL WAR AND RECONSTRUCTION 76–77* (2011) (explaining how Radical Republicans disagreed with Johnson's Reconstruction policies); ERIC L. MCKITRICK, *ANDREW JOHNSON AND RECONSTRUCTION 3, 53* (1960) (explaining how the Radical Republicans were energized by a fight with Johnson over the terms of Reconstruction).

359. Andrew Johnson, Veto Message, (Mar. 2, 1867), in 6 Richardson, *supra* note 13, at 498, 504.

360. See William W. Van Alstyne, *A Critical Guide to Ex parte McCardle*, 15 ARIZ. L. REV. 229, 236 (1973).

361. An Act amendatory of "An Act to Amend an Act entitled 'An Act relating to Habeas Corpus, and regulating judicial Proceedings in certain Cases,'" ch. 17, 14 Stat. 385 (1867); see also 2

Grant's election to the Presidency, did the Court announce in 1869 that it accepted the reduction of its jurisdiction and would not reach the merits of the *McCardle* petition.³⁶² Thus, *Milligan* became the motivating factor that led to the only clear example of congressional jurisdiction-stripping in the Court's history.³⁶³ *Milligan* may be remembered as the Court's resistance to Lincoln's wartime measures, but it also embroiled the Court in national politics of the highest order, and ultimately it led to a severe counterstroke against judicial review.

While Lincoln claimed extraordinary authority over civil liberties during the Civil War, he exercised it in a restrained manner. After examining the records of detentions and military trials, Neely concludes that more civilians were detained than was commonly thought, but that most came from border states near the scene of fighting or were citizens of the Confederacy.³⁶⁴ Only a small percentage of the total number of Union prisoners could be considered political prisoners.³⁶⁵ While hostilities were ongoing, no branch of government opposed Lincoln's internal security program. His administration cooperated at times with Congress's suspension of the writ, but at times it continued to follow military policy.³⁶⁶ Even in its decision after the war, the Supreme Court did not reverse President Lincoln's suspension of habeas corpus or the extension of martial law to the areas under occupation or threat of attack. The Court's decision left unclear whether its demands for the protection of citizens detained beyond the battlefield would apply to those actively associated with the enemy.

Historians and political scientists have long criticized Lincoln for going too far in limiting civil liberties, but no one doubts that he did so with the best of intentions, in unprecedented circumstances. Americans were fighting Americans and the mobilization of the home front held the key to victory. It is easy today, with the benefit of hindsight, to argue that Lincoln

WARREN, *supra* note 354, at 427–28 (describing Republican reaction); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868) (upholding constitutionality of repeal of appellate jurisdiction over military commissions).

362. *McCardle*, 74 U.S. at 515.

363. See Stanley I. Kutler, *Ex Parte McCardle: Judicial Impotency? The Supreme Court and Reconstruction Reconsidered*, 72 AM. HIST. REV. 835, 839–43 (1967) (chronicling how *McCardle*, which invoked *Milligan*, led Congress to repeal a portion of the Habeas Corpus Act of 1867); see also Van Alstyne, *supra* note 360, at 232 (pronouncing *McCardle* the “leading case” on Congress's power to strip jurisdiction from the Supreme Court under the Exceptions Clause).

364. NEELY, *supra* note 18, at 137–38, 168.

365. See *id.* at 134, 137 (“No military prison was reserved exclusively for civilian prisoners, and most held only small numbers of civilians compared to prisoners of war. . . . [M]ost [arrests] had nothing to do with dissent or political opposition in the loyal states above the border states.”).

366. *Id.* 202–03.

went too far.³⁶⁷ But it is also impossible to know, either at the time or even now, whether his policies kept the North committed and prevented Southern successes behind the lines. Lincoln's approach to civil liberties may well have been an indispensable part of his overall strategy to win the Civil War, though one that came with a high price.

III. RECONSTRUCTION

The Civil War's hybrid nature as a rebellion on American territory and as a traditional war colored a third major arena of presidential action—Reconstruction. If the Confederacy were considered an enemy nation, the laws of war permitted the occupation of recaptured territory. But if the states had never left the Union, as Lincoln had argued from the beginning, they could have claimed an immediate restoration of their authority. They could again pass their own laws and run their own courts and police. If the defeated states were automatically restored to the Union, they could exercise their rights in the federal government, including the election of Senators and Representatives. In the unprecedented circumstances of the Civil War, there were no rules for the readmission of rebellious states to the Union or how much authority the national government could exercise in occupied territory.³⁶⁸

A. The Road to Reconstruction: Military Government During War

Lincoln did not hesitate to take the initiative in setting occupation and reconstruction policy. He believed that the Constitution concentrated in the Commander-in-Chief the rights of a nation at war, and one aspect of the nation's powers under the laws of war was the right to occupy captured territory.³⁶⁹ The conflict's nature as an insurrection gave him even greater powers. The key feature of the laws of war is to retain as much of the normal civilian governmental structure as is consistent with military

367. See, e.g., GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* 105 (2004) (describing civil libertarian objections).

368. For discussions of the law and policy of Reconstruction, see KENNETH M. STAMPP, *THE ERA OF RECONSTRUCTION, 1865–1877* (1965); BELZ, *supra* note 18; MICHAEL LES BENEDICT, *A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION, 1863–1869* (1974); HYMAN, *supra* note 18; and ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877* (1988).

369. See Lincoln, *First Inaugural Address*, *supra* note 63, at 218 (proclaiming the power “to hold, occupy, and possess the property” belonging to the government); Letter from Abraham Lincoln to James C. Conkling, *supra* note 219, at 497 (arguing that in times of war the Constitution invests in the Commander-in-Chief the power to take property, “both of enemies and friends”); EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 7 (1993).

necessity.³⁷⁰ An occupying military may take measures to prevent attacks on its soldiers, but it generally cannot change civil or criminal laws wholesale, and it generally leaves civilian government and its officials in place.³⁷¹ But since the United States was waging war to restore its authority over rebellious States, occupation of Southern territory inevitably involved change not just of local officials, but of the institutions of government.

When territory in Tennessee and Louisiana fell under Northern control in 1862, Lincoln appointed military governors to establish occupation governments.³⁷² As military governor of Tennessee, Andrew Johnson removed confederate officials, appointed civilian officers, and arrested confederates who were elected to office.³⁷³ Elections were not held, and Tennessee did not exercise the political rights of a state within the federal system.³⁷⁴ In New Orleans, General Benjamin Butler delivered justice by military commissions, which included executing a man who had torn down the Union flag. He ran the city by decree, such as the infamous “Women’s Order,” which declared that any woman who showed disrespect to a Union soldier would be considered “as a woman of the town plying her avocation.”³⁷⁵

Military commanders ordered arrests without warrant or criminal trial; the seizure of land and property for military use; the closure of banks, churches and businesses; and the suppression of newspapers or political meetings deemed to be disloyal.³⁷⁶ Military courts were established that enforced law and order among civilians, without effective appeal to federal courts—an arrangement upheld by the Supreme Court after the war, as was the whole system of occupation government.³⁷⁷ The basic rule of occupation government was the will of the military commander, checked only by his superior officers and ultimately the President. As the Supreme Court observed when it reached cases challenging military government, the occupation was “a military duty, to be performed by the President as commander-in-chief, and intrusted as such with the direction of the military force by which the occupation was held.”³⁷⁸

370. BENVENISTI, *supra* note 369, at 7.

371. *See id.*

372. *See* FONER, *supra* note 368, at 43–48 (describing the military occupation of Tennessee and Louisiana, and the military’s role in crafting governments).

373. *Id.* at 43.

374. *Id.* at 44–45.

375. PALUDAN, *supra* note 1, at 235 (internal quotation marks omitted).

376. RANDALL, *supra* note 18, at 225–26.

377. *Cushing v. Durant (The Grapeshot)*, 76 U.S. (9 Wall.) 129, 131–32 (1869); *United States v. Diekelman*, 92 U.S. 520, 524, 527 (1875).

378. *The Grapeshot*, 76 U.S. at 132.

Congress never played a successful role in the operation of the military governments. In 1862, out of discontent with Lincoln's reversal of General Hunter's emancipation order, it considered legislation to treat the Southern states as territories subject to its regulation, but Congress eventually chose to accept Lincoln's policies and put the legislation aside.³⁷⁹ On the question of the readmission of recaptured states, however, it held a critical constitutional power—that of judging whether to seat members of Congress.³⁸⁰ Congress, not Lincoln, would control whether any reconstituted Southern state could send Senators and Representatives.

B. Radical Republicans Attempt Congressional Efforts to Shape Reconstruction

As the war wore on, Radical Republicans in Congress were determined to set a high bar before restoring rebel states to the Union. Lincoln wanted an easier path to peace. His initial promise of returning the Union as it was suggested that he would be open to allowing states to return with slavery intact, and for a time, he pursued a similar policy in the loyal border states.³⁸¹ Congressional leaders wanted a greater role in Reconstruction and a more radical reshaping of Southern society, which included the abolition of slavery.³⁸² In 1864, Congress refused to seat representatives sent by Louisiana, but at the same time identified no clear path in the war's first years on the readmission of the states of the Confederacy.³⁸³

Lincoln seized the initiative in his 1863 annual message, delivered less than a month after the Gettysburg Address. He rejected the idea that a Confederate state would be entitled to automatic readmission to the Union upon occupation. "An attempt to guaranty and protect a revived State government, constructed in whole, or in preponderating part, from the very element against whose hostility and violence it is to be protected," Lincoln observed, "is simply absurd."³⁸⁴ While setting the terms of political debate, the President paid careful attention to constitutional details.

Lincoln based his right to set the terms for Reconstruction on his plenary power to grant pardons, and the Constitution's provision

379. PALUDAN, *supra* note 1, at 244.

380. David P. Currie, *The Civil War Congress*, 73 U. CHI. L. REV. 1131, 1219–22 (2006).

381. See FONER, *supra* note 368, at 35–43 (discussing how Lincoln deferred to the local politics of the slave states who had remained loyal to the union).

382. *E.g., id.* at 228–30.

383. Currie, *supra* note 380, at 1219–22.

384. Abraham Lincoln, Annual Message to Congress (Dec. 8, 1863), in LINCOLN, SPEECHES AND WRITINGS, *supra* note 1, at 538, 552.

guaranteeing to every state a “republican form of government.”³⁸⁵ He proposed a plan that required at least 10% of a state’s voters in the 1860 election to take an oath of loyalty and obedience to the Emancipation Proclamation and Congress’s laws against slavery.³⁸⁶ Lincoln excluded from chances of a pardon all ranking Confederate civilian and military officials, any federal Congressmen or officers who joined the rebellion, or any who had not treated black soldiers as prisoners of war.³⁸⁷ When a former Confederate state reached the 10% requirement, it would be permitted to form a government.³⁸⁸ In exchange, the reconstructed states would retain their prewar names, boundaries, constitutions, and laws, so long as they accepted the end of slavery.³⁸⁹ While Lincoln set out the first plan for Reconstruction, he recognized that only Congress could decide whether to seat the elected Congressmen of the reconstructed states.³⁹⁰

Lincoln’s plan set relatively easy terms because he wanted to get Louisiana back into the Union as quickly as possible. He hoped Louisiana’s example would weaken the resolve of other Southern states and end the war.³⁹¹ Republican Congressmen, however, worried that allowing the Southern states to return too soon would lead to the oppression of the black freedmen.³⁹² They drafted an alternative, the Wade-Davis bill, which required a state to write a new constitution ending slavery and providing protections to the former slaves.³⁹³ Only those who took an oath of past and future loyalty—known as the “ironclad” oath³⁹⁴—could elect delegates to the constitutional convention, and it required more than 50%, rather than Lincoln’s 10%, of the 1860 voters to take the oath before the state could

385. Abraham Lincoln, Proclamation of Amnesty and Reconstruction (Dec. 8, 1863), in LINCOLN, SPEECHES AND WRITINGS, *supra* note 1, at 555, 557 (quoting U.S. CONST. art. IV, § 4); *see id.* at 556–57 (setting the terms of reconstruction by proclaiming that states shall be guaranteed protections of the Constitution and a republican form of government if 10% of the state voting population took the oath to “abide by and faithfully support” all acts of Congress and “all proclamations of the President made during the existing rebellion having reference to slaves”).

386. *Id.* at 556.

387. *Id.*

388. *Id.* at 556–57.

389. *Id.* at 557.

390. *Id.*

391. PEYTON McCrARY, ABRAHAM LINCOLN AND RECONSTRUCTION: THE LOUISIANA EXPERIMENT 18 (1978) (describing Lincoln’s moderate reconstruction plan and indicating that he thought it most likely to succeed in Louisiana); WILLIAM C. HARRIS, WITH CHARITY FOR ALL: LINCOLN AND THE RESTORATION OF THE UNION 145 (1997).

392. HERMAN BELZ, A NEW BIRTH OF FREEDOM: THE REPUBLICAN PARTY AND FREEDMEN’S RIGHTS, 1861–1866, at 51–53, 64 (1976).

393. Lincoln used a pocket veto to block the bill. Abraham Lincoln, Proclamation (July 8, 1864), in 6 Richardson, *supra* note 13, at 222–23. The bill is printed as an appendix to the President’s veto message. *See id.* at 223–26.

394. MCPHERSON, *supra* note 18, at 712 (internal quotation marks omitted).

elect a government.³⁹⁵ Confederate officeholders and members of the Confederate armed forces could not vote. The bill gave federal officials and judges authority to override state laws that attempted to continue involuntary servitude.³⁹⁶ Reconstruction under Congress's plan would take longer and require the federal government to play a far more intrusive role in state politics.

As casualties increased in the summer of 1864, Republicans in Congress believed that more, rather than fewer, radical measures were needed. Though he had taken the position that the veto should not be used over policy disagreements, Lincoln resorted to a pocket veto in July 1864 to reject the Wade-Davis bill.³⁹⁷ Because Congress had submitted the bill at the end of its session, Lincoln's veto gave Congress no chance to override. Lincoln considered Wade-Davis to be at odds with his theory of the Civil War by treating the Confederate states as if they had left the Union during the rebellion.³⁹⁸ Wade-Davis, he wrote in an unusual veto message, would have set aside the new constitutions that had been adopted by Arkansas and Louisiana.³⁹⁹ Nor could Congress ban slavery in the states without a constitutional amendment. When Republican Senator Zachariah Chandler of Michigan responded, at the signing of the other bills passed during the congressional session, that Lincoln had already banned slavery, the President answered: "I conceive that I may in an emergency do things on military grounds which cannot be done constitutionally by Congress."⁴⁰⁰ Above all, Lincoln sought flexibility in Reconstruction policy.⁴⁰¹ He was willing to accept the restoration of any state that met Wade-Davis's standards, but he also kept his own approach, which allowed Southern states to reassume their political rights under more lenient standards.⁴⁰²

Lincoln's fellow Republicans did not let his pocket veto go unchallenged. The authors of the bill, Senator Benjamin Wade and Congressman Henry Davis, issued a "manifesto" in the *New York Times* attacking Lincoln for his "grave Executive usurpation."⁴⁰³ Congress, not the

395. Lincoln, *Proclamation*, *supra* note 393, at 224.

396. *Id.* at 225.

397. *Id.* at 222–23.

398. DONALD, LINCOLN, *supra* note 18, at 511.

399. Lincoln, *Proclamation*, *supra* note 393, at 222–23.

400. DONALD, LINCOLN, *supra* note 18, at 511 (internal quotation marks omitted).

401. *Id.* (noting that Lincoln rejected Wade-Davis because of its inflexible approach to Reconstruction).

402. *Id.*

403. B.F. Wade & H. Winter Davis, *The War Upon the President: Manifesto of Ben. Wade and H. Winter Davis Against the President's Proclamation*, N.Y. TIMES, Aug. 9, 1864, <http://www.nytimes.com/1864/08/09/news/war-upon-president-manifesto-ben-wade-h-winter-davis-against-president-s.html>.

President, controlled the restoration of the Union.⁴⁰⁴ The President's veto to protect his Reconstruction policies violated the separation of powers.⁴⁰⁵ "A more studied outrage on the legislative authority of the people has never been perpetrated," they claimed.⁴⁰⁶ In words not much different from those of the Democrats who had long accused Lincoln of dictatorship, they portrayed his veto as "a blow . . . at the principles of republican government" and declared that "the authority of Congress is paramount, and must be respected."⁴⁰⁷ The President "must confine himself to his executive duties—to obey and execute, not make the laws."⁴⁰⁸

Coming a few months before the 1864 election, the Wade-Davis manifesto gave heart to Lincoln's opponents. Democrats praised the two Republicans "found willing at last to resent the encroachments of the executive on the authority of Congress."⁴⁰⁹ It also inspired Republicans who wanted to replace Lincoln.⁴¹⁰ Their electoral fortunes that summer had waned with Union failures to capture Richmond and Atlanta.⁴¹¹ The future turned so bleak that Lincoln drafted a "Memorandum on Probable Failure of Re-election" for his files.⁴¹² Lincoln believed it "exceedingly probable that this Administration will not be re-elected" and declared his duty to "co-operate with the President elect, as to save the Union between the election and the inauguration."⁴¹³

Sherman's capture of Atlanta on September 4, 1864, marked a turnabout in Lincoln's fortunes. Democrats helped by nominating General McClellan as their presidential candidate on a platform that sought a "cessation of hostilities" because of "four years of failure to restore the Union by the experiment of war."⁴¹⁴ Boosted by the fall of Atlanta, Lincoln

404. *Id.*

405. *See id.* ("That judgment of Congress which the President defies was the exercise of an authority *exclusively* invested in Congress by the Constitution to determine what is the established government in a State, and in its own nature and by the highest judicial authority binding on all other departments of the Government." (emphasis added)).

406. *Id.*

407. *Id.*

408. *Id.*

409. DONALD, LINCOLN, *supra* note 18, at 524.

410. *Id.* at 524–25 (noting that radicals met on August 18, just thirteen days after the Manifesto was published, to plan the replacement of Lincoln).

411. *See id.* at 513–14, 524; Noah Brooks, *The Tide of Battle*, May 13, 1864, in LINCOLN OBSERVED: CIVIL WAR DISPATCHES OF NOAH BROOKS 109, 109 (Michael Burlingame ed., 1998) (noting the public's discontent that Richmond had not yet been taken).

412. Abraham Lincoln, Memorandum on Probable Failure of Re-election (Aug. 23, 1864), in LINCOLN, SPEECHES AND WRITINGS, *supra* note 1, at 624, 624.

413. *Id.*

414. Aaron F. Perry, Speech to the National Union Association at Mozart Hall (Sept. 20, 1864), available at <http://archive.org/details/speechofaaronfpe00perr>.

unified his party by removing his Postmaster General, who was hated by the Radical Republicans, and by announcing that he would appoint Chase, whom he had forced to resign as Treasury Secretary for leading the Republican opposition, to the position of Chief Justice.⁴¹⁵

While Lincoln exerted all his energies to ensure his reelection, he never questioned the importance of holding the elections themselves. “We can not have free government without elections,” he told serenaders after his reelection.⁴¹⁶ “[I]f the rebellion could force us to forego, or postpone a national election, it might fairly claim to have already conquered and ruined us.”⁴¹⁷ Lincoln won an overwhelming victory: 55% of the vote and 212 electoral votes compared to the 21 for McClellan.⁴¹⁸ His overall share of the popular vote had grown by more than 340,000 votes, and Republicans increased their control of the Senate to 42–10 and the House to 149–42.⁴¹⁹ To Lincoln, the election answered the “grave question whether any government, not *too* strong for the liberties of its people, can be strong enough to maintain its own existence, in great emergencies.”⁴²⁰

C. Reelection: Congress and Lincoln Spar over the Goals of Reconstruction

Returned to office with a more secure electoral base, Lincoln pursued Reconstruction anew. As David Donald has observed, Lincoln and Congress had very different goals in mind. Lincoln wanted to use Reconstruction to end the fighting.⁴²¹ He believed that quickly forming loyal governments in recaptured territory might encourage other Confederate states to rejoin the Union.⁴²² Radical Republicans, by contrast, were concerned about a host of other issues, such as the continuing strength of the white elites and the economic and political rights of the black freedmen.⁴²³ Reconstruction involved the intersection of executive and legislative powers: The President had the authority as Commander-in-Chief to govern occupied enemy territory and the executive power to pardon rebels; Congress controlled the seating of members of Congress, the rules

415. DONALD, LINCOLN, *supra* note 18, at 550–53.

416. Abraham Lincoln, Response to Serenade (Nov. 10, 1864), in LINCOLN, SPEECHES AND WRITINGS, *supra* note 1, at 641, 641.

417. *Id.*

418. *Historical Election Results*, ELECTORAL COLLEGE BOX SCORES, 1789–1996, <http://www.archives.gov/federal-register/electoral-college/scores.html#1864> (last visited Nov. 13, 2013).

419. PALUDAN, *supra* note 1, at 290.

420. Lincoln, Response to Serenade, *supra* note 416, at 641 (emphasis in original).

421. DONALD, LINCOLN, *supra* note 18, at 561.

422. *Id.*

423. *Id.*

governing the territories, and the admission of states. Lincoln wanted a quick restoration of the Union; Congress wanted to remake Southern society first.⁴²⁴

After his election, Lincoln threatened to veto any congressional effort to deny admission to Louisiana, which had been reconstructed according to his 10% plan. While congressional Republicans in 1864 had passed the Wade-Davis bill, in 1865 they could not override Lincoln's approach. When he first came to the legislature, "this was a Government of law," Congressman Davis exclaimed.⁴²⁵ "I have lived to see it a Government of personal will."⁴²⁶ Nevertheless, in a demonstration of the checks that Congress still possessed over executive war policy, Radical Republicans filibustered a Lincoln-supported proposal to admit Louisiana in the spring of 1865.⁴²⁷ Lincoln had recognized Congress's power in his December 1864 State of the Union message. Some Reconstruction questions, he admitted, "would be, beyond the Executive power to adjust; as, for instance, the admission of members into Congress, and whatever might require the appropriation of money."⁴²⁸

It was in this political setting that Lincoln delivered one of his greatest speeches, the Second Inaugural Address. He would not venture a prediction for the end of the war, but held "high hope for the future."⁴²⁹ Lincoln's main purpose was to argue not just for reconstruction, but reconciliation. It is true, he said, that insurgents had sought to dismember the Union to preserve slavery, which the government could not permit.⁴³⁰ "Both parties deprecated war; but one of them would *make* war rather than let the nation survive; and the other would *accept* war rather than let it perish. And the war came."⁴³¹

Lincoln avoided placing the blame on individuals or on states. "Neither party expected for the war, the magnitude, or the duration, which it has already attained. Neither anticipated that the *cause* of the conflict might cease with, or even before, the conflict itself should cease."⁴³² Both sides were guilty of miscalculation. "Each looked for an easier triumph, and a

424. See generally FONER, *supra* note 368 (exemplifying the academic consensus that views Reconstruction as a noble effort to expand the civil rights of black freemen in the South).

425. DONALD, LINCOLN, *supra* note 18, at 562 (internal quotation marks omitted).

426. *Id.* (internal quotation marks omitted).

427. TED TUNNELL, CRUCIBLE OF RECONSTRUCTION: WAR, RADICALISM, AND RACE IN LOUISIANA, 1862–1877, at 81 (1984).

428. Lincoln, Annual Message to Congress, *supra* note 240, at 660.

429. Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), in LINCOLN, SPEECHES AND WRITINGS, *supra* note 1, at 686, 686.

430. *Id.*

431. *Id.* (emphasis in original).

432. *Id.* (emphasis in original).

result less fundamental and astounding.”⁴³³ He emphasized their common heritage too. “Both read the same Bible, and pray to the same God; and each invokes His aid against the other.”⁴³⁴ While Lincoln remarked that owning slaves was not his idea of being a good Christian—“[i]t may seem strange that any men should dare to ask a just God’s assistance in wringing their bread from the sweat of other men’s faces”—even there he insisted, “let us judge not that we be not judged.”⁴³⁵

Lincoln was not interested in assigning responsibility for the amazing costs of the war. He referred to the war almost as an act of God: “All dreaded it—all sought to avert it.”⁴³⁶ He saw it as God’s punishment of the nation as a whole for the sin of human slavery.⁴³⁷ “He gives to both North and South, this terrible war, as the woe due to those by whom the offence came[.]”⁴³⁸ No one wanted the war to go on. “Fondly do we hope—ferverently do we pray—that this mighty scourge of war may speedily pass away.”⁴³⁹ But it would be God, not man, who would decide how long the war must continue to atone for slavery.⁴⁴⁰

If the Civil War was God’s judgment upon a sinning nation, Reconstruction should have pursued healing, not retribution. Lincoln’s final paragraph is among the most eloquent in American public speeches, and it is a plea for mercy and reconciliation:

With malice toward none; with charity for all; with firmness in the right, as God gives us to see the right, let us strive on to finish the work we are in; to bind up the nation’s wounds; to care for him who shall have borne the battle, and for his widow, and his orphan—to do all which may achieve and cherish a just, and a lasting peace, among ourselves, and with all nations.⁴⁴¹

While the Second Inaugural Address is widely praised for its eloquence, it also explained Lincoln’s reasons for a more lenient Reconstruction.

As the Union armies moved closer to victory, Lincoln continued to signal flexibility on his reconstruction plans. Sherman had captured Savannah by Christmas, and Columbia and Charleston in early 1865, while Grant’s steady pressure had forced the Confederate government to abandon

433. *Id.*

434. *Id.* at 687.

435. *Id.*

436. *Id.* at 686.

437. *Id.* at 687.

438. *Id.*

439. *Id.*

440. *Id.*

441. *Id.*

Richmond. Lincoln held the upper hand. He was the first President since Andrew Jackson to be reelected, the head of a party that had just won stunning majorities in Congress, with a cabinet staffed with political allies. Nevertheless, as the end of the war approached, his constitutional authority would weaken because the reach of his Commander-in-Chief power would narrow.

After news of Lee's surrender reached Washington, Lincoln used the occasion of an impromptu celebration outside the White House to give a speech on Reconstruction. After giving thanks to God for General Grant's victory, Lincoln declared that the "re-inauguration of the national authority" in the South would be "fraught with great difficulty" and that there was great division in the North about the right policy.⁴⁴² He pled again for the quick admission of Louisiana, but in a new sign of flexibility he declared that he would drop his public demands for it: "But, as bad promises are better broken than kept," Lincoln said, "I shall treat this as a bad promise, and break it, whenever I shall be convinced that keeping it is adverse to the public interest."⁴⁴³ Lincoln said he had yet to be convinced, however.⁴⁴⁴

This time, Lincoln did not want to open up the difficult constitutional issues involved. He observed that he had "*purposely* forbore any public expression upon" the question of whether the Southern states had ever left the Union as a matter of constitutional law.⁴⁴⁵ Deciding that question, Lincoln now thought, would only distract from the more important goal of restoring those states into that "proper practical relation[]" with the Union.⁴⁴⁶ It would be easier to embark on a quick Reconstruction without deciding whether the Southern states had actually seceded. "Finding themselves safely at home, it would be utterly immaterial whether they had ever been abroad."⁴⁴⁷

Louisiana had met Lincoln's terms and it had adopted a new constitution abolishing slavery.⁴⁴⁸ Lincoln admitted that he wished the reconstructed Southern governments had broader popular support and had extended the franchise to the "very intelligent" blacks or those who had served in the war; he clearly hoped that the states would grant the freedmen their political and civil rights without the use of federal power.⁴⁴⁹ But the

442. Abraham Lincoln, Speech on Reconstruction (Apr. 11, 1865), in LINCOLN, SPEECHES AND WRITINGS, *supra* note 1, at 697, 697.

443. *Id.* at 698.

444. *Id.*

445. *Id.* at 699 (emphasis in original).

446. *Id.*

447. *Id.*

448. *Id.* at 700.

449. *Id.* at 699–700.

question was whether Louisiana, and the states to follow her, would be restored to the Union “sooner by *sustaining*, or by *discarding* her new State Government[.]”⁴⁵⁰ It would be better to get a start immediately by nurturing the new state governments into the Union than to ruin the loyal effort in Louisiana. Lincoln also observed that quickly readmitting Louisiana and other states might help the Thirteenth Amendment reach the three-quarters vote of the states required for ratification.⁴⁵¹

Lincoln closed with an offer of negotiation to the Radical Republicans. He declared that Reconstruction was so “new and unprecedented” that “no exclusive, and inflexible plan can safely be prescribed as to details and colaterals [sic].”⁴⁵² Radicals in Congress reacted negatively to Lincoln’s failure to protect the full political and civil rights of the freedman, even though his April 11 speech made him the first American President to call for black suffrage of any kind.⁴⁵³ Pressing forward with plans for a quick Reconstruction, Lincoln decided at a cabinet meeting on April 14 (with General Grant in attendance) to set in motion plans for military governors in the Southern states, who would exercise martial law until loyal civilian governments could be established.⁴⁵⁴ Lincoln planned to set Reconstruction on an inalterable course before Congress could act. “If we were wise and discreet,” Lincoln said at the cabinet meeting, “we should reanimate the States and get their governments in successful operation, with order prevailing and the Union reestablished, before Congress came together in December.”⁴⁵⁵ Lincoln believed that several members of Congress were simply so “impracticable” or full of “hate and vindictiveness” toward the South that the executive branch would accomplish more good without legislative participation.⁴⁵⁶

John Wilkes Booth assassinated Lincoln at Ford’s Theatre that very night. It is impossible to know whether Lincoln’s second term would have brought about a different kind of Reconstruction than the one that followed, but it seems clear that Lincoln intended that the Executive would take the lead through its constitutional powers over the making of war and peace. With hostilities winding down, Lincoln wanted to create a state of affairs in the South that Congress would be unable to undo. He was following the same strategy toward Congress at the end of the war that he had adopted at

450. *Id.* at 700 (emphasis in original).

451. *Id.* at 700–01.

452. *Id.* at 701.

453. DONALD, LINCOLN, *supra* note 18, at 584–85.

454. *Id.* at 590.

455. *Id.* at 592 (internal quotation marks omitted).

456. *Id.* (internal quotation marks omitted).

its start—he would take swift action under his Commander-in-Chief and Chief Executive powers while the Legislature remained out of session.

Lincoln wanted Congress's cooperation, and he openly acknowledged that its power over the seating of its members exercised a check on a state's restoration to the Union. But he would not go as far as the Radicals, nor did he agree with Democrats who were content to allow the dominance of the Southern economic and political systems. The Civil War had not just restored the Union—it had ended slavery. Lincoln wanted the freedmen to have equal rights, but he sought to achieve them through a restoration of the state governments and the traditional principles of constitutional government.

IV. ANDREW JOHNSON AND THE POST-WAR PRESIDENCY

Lincoln was neither a dictator nor an unprincipled partisan. His unprecedented action to preserve the Union exploited the broadest reaches of the Constitution's grant of the Chief-Executive and Commander-in-Chief powers. Once war had begun, Lincoln took control of all measures necessary to subdue the enemy; including the definition of war aims and strategy, supervision of military operations, detention of enemy prisoners, and management of the occupation.⁴⁵⁷ He freed the slaves, but only those in the South, because his powers were limited to the battlefield. He took swift action, normally within Congress's domain, but only because of the pressure of emergency. After the first months of the war, Lincoln never again usurped Congress's powers over the raising or funding of the military. He was not afraid of a contest with Congress, particularly over Reconstruction, but the Civil War witnessed far more cooperation between the executive and legislative branches than is commonly thought. But when Lincoln believed Congress to be wrong, he did not hesitate to draw upon the constitutional powers of his own office to follow his best judgment.

A. Lincoln's Lessons

Lincoln's administration provides valuable lessons on the nature of civil liberties in wartime. Lincoln undeniably took a tough posture toward citizens suspected of collaborating with the Confederacy and ordered the restriction of peacetime civil liberties, especially the rights of free speech and of habeas corpus.⁴⁵⁸ No reduction in constitutional rights is desirable, standing alone, but the measures were part of a systematic mobilization to

457. *See supra* Part III.

458. *See supra* Part III.A–B.

win the most dangerous war in our nation's history. They had costs, but they also bore benefits for a war effort that eventually defeated the South and left behind no permanent diminution of individual liberties. If anything, the Civil War was followed by the passage of the Reconstruction Amendments and the freeing of the slaves, the expansion of the franchise, and the constitutional guarantee of due process and equal protection rights against the states. To demand that Lincoln should have been more sensitive to civil liberties is to impose the ex-post standards of peacetime on decisions made under the pressures of wartime.

Lincoln's greatness in preserving the Union depended crucially on his discovery of the broad executive powers inherent in Article II for use during war or emergency. But not every President is a Lincoln, and not every crisis rises to the level of the Civil War. Once a crisis passes, presidential powers should recede, and if there is no real emergency in the first place, Congress should generally have the upper hand. While great Presidents have been ones who have held a broad vision of the independence and powers of their office, every President who uses his constitutional powers does not necessarily rise to greatness. Presidents may so overstep their political bounds in the use of their constitutional powers that they trigger a reaction by the other branches. Either the President or Congress can succeed in producing a stalemate, which may or may not yield the best result.

B. Andrew Johnson and the Limits of Executive Power

Lincoln's Vice President, Andrew Johnson, shows the perils of exercising constitutional powers to bring on, rather than resolve, a crisis. A Tennessee Democrat, Johnson held sharply different views on Reconstruction than the Radical Republicans.⁴⁵⁹ Like Lincoln, he favored a quick restoration of the South to its normal status as part of the political community.⁴⁶⁰ Southerners only had to pledge an oath of loyalty to the Union, hold constitutional conventions, ratify the Thirteenth Amendment, repudiate the public debts borrowed by the Confederate government, and repeal secession.⁴⁶¹ Under Johnson's plan, many Republican Congressmen believed the Southern social and economic system would remain intact.⁴⁶² Aside from former Confederate government officeholders and military

459. MICHAEL LES BENEDICT, *THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON* 4, 6 (1973).

460. *Id.* at 6.

461. *Id.*

462. *See id.* at 7-10 (describing the political climate during Reconstruction).

officers, who could not receive amnesty, the Southern elites would remain in charge.⁴⁶³

Congressional Republicans wanted a far more radical reordering of the South. They wanted to grant to black freedmen, whose fate did not figure in Johnson's scheme, equality with whites in the economy, government, and society.⁴⁶⁴ They passed the Freedmen Bureau and Civil Rights Acts to continue economic assistance to the freed slaves and to guarantee their equal legal rights,⁴⁶⁵ and proposed the Fourteenth Amendment, which guaranteed the rights of due process and equal protection against the state governments.⁴⁶⁶ Congress had constitutional powers at its disposal that were the equal, if not greater, than those available to Johnson. While the President was the Commander-in-Chief over the military forces occupying the South, only Congress could determine whether Southern states could reassume their standing as political equals. If the Southern states had formally left the Union, the Constitution gave only Congress the right to admit new states.⁴⁶⁷ If the Confederate states had simply been taken over by disloyal conspiracies, but had never lost their status as states, Congress could refuse to seat the Southern Representatives and Senators until the South properly reconstructed their governments.⁴⁶⁸

Fundamental disagreement over Reconstruction policy prompted the battle between the executive and legislative branches after Lincoln's death. Johnson vetoed the Freedman and Civil Rights bills for upsetting the proper balance between the powers of the national and state governments and urged the Southern states to reject the Fourteenth Amendment.⁴⁶⁹ He allowed rebel-dominated governments to exercise civil authority in the South and assured their leaders that he would push for quick readmission to the Union.⁴⁷⁰ Congress was furious. Johnson, who had the unfortunate combination of a terrible temper, political inflexibility, and a zealot's fervor, responded by attacking the Republicans just as angrily as he had once attacked the rebels.⁴⁷¹ Both were traitors, said the President in January

463. *See id.* at 6. (explaining how these officeholders and military officials could, however, seek a pardon from Johnson).

464. *Id.* at 8–12.

465. *Id.*

466. *Id.* at 14.

467. U.S. CONST. art. IV, § 3, cl. 1.

468. *Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849); *see also* AKHIL REED AMAR, *AMERICA'S CONSTITUTION*, 370 (2005) (laying out the argument that it was up to Congress to determine if the Southern states who ceded from the Union were Republican enough to be readmitted to the Union).

469. LES BENEDICT, *supra* note 459, at 12, 16.

470. *See id.* at 7 (explaining how Johnson believed that because there was a massive amount of participation in the new Southern governments, his lenient Reconstruction policy was a success).

471. *Id.* at 13.

1866. Southerners stood “for destroying the Government to preserve slavery,” while Republicans wanted “to break up the Government to destroy slavery.”⁴⁷²

Johnson joined forces with his old party, the Democrats, in the 1866 midterm elections, but the Republicans prevailed.⁴⁷³ In 1867, Congress overrode the vetoes of the Freedman and Civil Rights bills and passed a Reconstruction Act that required the Confederate states to ratify the Fourteenth Amendment and repeal all racially discriminatory laws.⁴⁷⁴ Congress further required the Southern states to extend to the freedmen the equal right to vote.⁴⁷⁵ A supplementary Reconstruction Act swept away Johnson’s Reconstruction and ordered new elections and constitutional conventions.⁴⁷⁶

Just as Congress blocked Johnson’s policies, Johnson used his constitutional powers to frustrate Congress. In 1865, he appointed former rebels as provisional governors in the South, freely granted pardons at their recommendation, and gave federal offices to other former rebels.⁴⁷⁷ His Attorney General ordered federal prosecutors to drop cases that transferred the lands of rebel officers to the Freedman Bureau for the use of freed slaves.⁴⁷⁸ On April 2, 1866, he issued a proclamation that the insurrection had ended, which implied an end to occupation government.⁴⁷⁹ As the split with Congress worsened, Johnson used his power of removal to fire federal officials, including 1,283 postmasters, to bind the executive branch to his policies.⁴⁸⁰

Even implementation of the Reconstruction Acts was up to the military, which served under the command of the President. Johnson declared the Reconstruction Acts to be “without precedent and without authority, in palpable conflict with the plainest provisions of the Constitution, and utterly destructive to those great principles of liberty and humanity for which our ancestors on both sides of the Atlantic have shed so much blood and expended so much treasure.”⁴⁸¹ By summer 1867, he had

472. *Id.* (quoting Andrew Johnson, Speech in Washington (Feb. 22, 1866), in LILLIAN FOSTER, ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES: HIS LIFE AND SPEECHES 246 (1866)) (internal quotation marks omitted).

473. *Id.* at 15–16.

474. *Id.* at 16–17.

475. *Id.* at 17.

476. *Id.* at 18.

477. *Id.* at 40.

478. *Id.* at 42–43.

479. Proclamation No. 1, 14 Stat. 811 (1866).

480. LES BENEDICT *supra* note 459, at 48.

481. *Id.* at 22 (quoting Andrew Johnson, Veto of the Reconstruction Bill (Mar. 2, 1867), in 6 Richardson, *supra* note 13, at 500, 500).

adopted the legal position that the military governors could keep the peace and punish criminal acts, but not remove Southern officeholders nor enforce civilian laws such as the Civil Rights Act.⁴⁸² Johnson had effectively declared that the military would not execute the Reconstruction Acts. He had set the nation toward his minimal Reconstruction policy solely by exercising his powers as Commander-in-Chief.

Angry Republicans believed Johnson was conducting a coup. They struck back in the February 1867 Tenure of Office Act.⁴⁸³ It prohibited the President from removing any appointed official while the Senate was in session until the Senate had confirmed his successor.⁴⁸⁴ It required the President to explain the reasons for any removal and required Senate approval before it became official.⁴⁸⁵ That summer, Congress enacted a third Reconstruction Act that restored the authority of the military governors to enforce civilian laws in the South.⁴⁸⁶ Johnson waited until the Senate went on recess and then replaced Stanton as Secretary of War with General Grant.⁴⁸⁷ He fired the military governors who had used their authority under the Reconstruction Acts to remove Southern officeholders.⁴⁸⁸ Johnson had completely blocked congressional Reconstruction. “Yet,” observes Michael Les Benedict, “Johnson had broken no law; he had limited himself strictly to the exercise of his constitutional powers.”⁴⁸⁹

A Congress determined to have its way had one tool left: impeachment. An initial drive to impeach Johnson in 1867 failed, even after his State of the Union message declared that he would not enforce the Reconstruction Acts.⁴⁹⁰ Congress tried again after Johnson violated the Tenure of Office Act.⁴⁹¹ On February 24, 1868, the House overwhelmingly impeached Johnson for violating the Act, blocking implementation of the Reconstruction Acts, and publicly vilifying Congress.⁴⁹² House managers

482. *Id.* at 53–54.

483. See Amended Tenure of Office Act, ch. 10, 16 Stat. 6 (1869), reprinted in SELECT STATUTES AND OTHER DOCUMENTS ILLUSTRATIVE OF THE HISTORY OF THE UNITED STATES 1861–1898, at 217 (William MacDonald ed., 1903) (limiting the powers of the President).

484. *Id.* at 218.

485. *Id.*

486. LES BENEDICT *supra* note 459, at 17.

487. *Id.* at 130; William H. Rehnquist, *The Impeachment Clause: A Wild Card in the Constitution*, 85 NW. U. L. REV. 903, 915 (1991).

488. LES BENEDICT *supra* note 459, at 130.

489. *Id.* at 60.

490. *Id.* at 22–23; Arthur Schlesinger, Jr., *Reflections on Impeachment*, 67 GEO. WASH. L. REV. 693, 696 (1999).

491. LES BENEDICT, *supra* note, at 459 at 23.

492. Rehnquist, *supra* note 487, at 915.

argued that the President could not refuse to enforce an Act because he believed it to be unconstitutional.⁴⁹³ Such power would give him, they claimed, an absolute veto over all legislation.⁴⁹⁴ These legal grounds joined the unstated political motives for impeachment. The Senate refused to convict by only one vote, however, with seven Republican Senators voting in favor of Johnson (dramatically retold in John F. Kennedy's *Profiles in Courage*).⁴⁹⁵

Both the President and Congress had exercised their legitimate constitutional powers. Johnson had the duty not to enforce laws he believed to be unconstitutional. He had only followed the example of past Chief Executives by using his powers of appointment and removal to promote his policies. Johnson was even correct on the merits. The Tenure of Office Act violated the Constitution's grant of the removal power to the President as part of its vesting of the executive power; the issue resolved in 1789 by the First Congress.⁴⁹⁶ Still, Congress had every right to pursue its own vision of the Constitution, and if it honestly disagreed with the President, it could remove him through impeachment. While the Senate failed to convict Johnson, the impeachment process left his administration in shambles and convinced him to end his confrontational ways. The 1868 elections soon replaced him with Grant, the hero of the Civil War.

C. Johnson, Lincoln, and the Effective Use of Presidential Power

Johnson's example modifies the lessons of the Lincoln Presidency in several important respects. Not all Presidents who press their constitutional powers to the limits will prevail. Johnson today is ranked as one of the worst Presidents because of his racist views and his efforts to block a Reconstruction that sought to guarantee equality for the black freedmen. Eric Foner views Reconstruction as a shining moment when the South could have been remade into a racially harmonious and egalitarian society.⁴⁹⁷ Johnson set that vision back at least four years, and perhaps a century, but he could not have been so successful an obstacle without the same vigorous understanding of presidential power shared by his predecessor. When it came to the questions about the power of removal and

493. *Id.* at 914–915.

494. *Id.* at 109.

495. LES BENEDICT, *supra* note 459, at 126; JOHN F. KENNEDY, *PROFILES IN COURAGE* 121 (1955).

496. *See* *Myers v. United States*, 272 U.S. 52, 52 (1926) (observing that the Tenure of Office Act violated the Constitution).

497. FONER, *supra* note 368, at 602–03.

non-enforcement of unconstitutional laws, Johnson even had the better of the constitutional arguments.

Johnson failed not because he misunderstood the scope of his constitutional powers, but because he misjudged when to use them. It could be argued that Johnson simply could not overcome congressional opposition, but what made Johnson's defeat profound was his effort to use his constitutional powers in a way that triggered his impeachment. Earlier Presidents had invoked their constitutional powers during times of great national challenge and opportunity: establishing a new government; charting a course between the Napoleonic wars; winning Louisiana and the Southwest. With Reconstruction, the great emergency that had forced Lincoln to draw on a robust vision of the Commander-in-Chief role was waning, not beginning. With complex questions about the nature of restoring the Union at hand, and with little need for swift and decisive action, the demand for the unique qualities of the Executive was less evident. If Johnson had limited his opposition to political measures, without invoking his constitutional authority, Congress would have prevailed, but impeachment would have been unnecessary.

Reconstruction reaffirms another lesson about executive power: even at its greatest height, the other branches always have ample authority of their own to counter it. Johnson could block congressional policy, but he could get nowhere on his own. Congress could not choose the generals in charge of the occupation, but it could grant them broader powers over the Southern governments. Even if Johnson would not enforce the Reconstruction Acts, Congress could refuse to readmit the Southern states to the Union. If Congress disagreed so sharply over the executive branch's definition and use of its constitutional powers, it could resort to the ultimate remedy of impeachment.

Johnson failed to understand that Congress was just as wedded to its principles as he was to his. Instead of triggering a constitutional confrontation with no good outcome, he should have cooperated with Congress. The Reconstruction crisis was not an external one confronting the government, but one of his own making. The former demands that Presidents exercise their powers decisively for the benefit of the nation; the latter does not.

CONCLUSION

Contemporary struggles over executive power are not unprecedented. As Lincoln's Presidency demonstrates, they have repeated throughout American history even during periods of emergency. In fact, the Framers

designed the Presidency to come to the fore exactly during crises such as the Civil War. While the Legislature surpasses the Executive in deliberation with accountability, only the Executive can act with the speed and decision needed during challenges such as secession and war. A President might err more often than Congress, as the former makes a decision on his or her own while the latter benefits from the greater knowledge and reason of many. In times of national security, emergency, and war, however, the costs of delay can exceed the expected harms of mistakes.

The contrast between Lincoln and Johnson highlights the functional differences between the Executive and Legislature. Lincoln's presidency puts on vivid display the benefits of the Executive's advantages in speed and vigor. As we celebrate the 150th anniversary of the Emancipation Proclamation this year, we should also recognize that the freeing of the slaves would not have happened without Lincoln's startling exercise of presidential power. At the same time, his successor shows the dangers of exercising such authority when the circumstances do not demand it. Reconstruction did not generate the immediate emergency that requires the President's constitutional initiative. Johnson failed because he sought to continue to extend Lincoln's precedents beyond their natural environment of war. Today's struggles over the scope of presidential power raise some of the same questions—is the United States in a time of crisis, or has the crisis passed—and the answers depend on the Constitution.