

ABRAHAM LINCOLN: PRESERVING THE UNION AND THE CONSTITUTION

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Lincoln's political positions from the Mexican War to the Civil War offer some tempting targets. In the first military conflict, he criticized President James Polk for exercising executive power in an unconstitutional manner; in the second, Lincoln wielded extraordinary powers after the firing on Fort Sumter. One scholar observed:

There is more than a bit of irony in Lincoln's accusation against Polk. Within half a year of reviving it, Lincoln as president was himself to face the question of sending armed forces into disputed territory, and eventually his decision was to make him the second president to be charged with contriving a war and shifting the guilt to the other side.¹

A close look at Lincoln's actions during the Civil War reveals some similarities to Polk but also fundamental differences. More so than Polk, Lincoln showed a deeper respect and commitment for popular rule, legislative authority, and constitutional principles.

Much of what Lincoln said early in his political career reflected Whig philosophy, including the public's right to rule through the legislative branch and limitations on presidential and judicial power in order to preserve the principles of self-government. The Whig Party formed in large part as a reaction to what was considered a dangerous concentration of power within the presidency of Andrew Jackson. In a speech before Congress on July 27, 1848, Lincoln said he and the Whigs wanted the people to "elect whom they please, and afterwards, legislate just as they please, without any hindrance, save only so much as may guard against infractions of the [C]onstitution, undue haste, and want of consideration."² Speaking in Boston two months later, on September 15, he emphasized Whig principles "that the people's will should be obeyed, and not frustrated by Executive usurpation and the interposition of the veto power."³ Those principles helped guide Lincoln's policies when he entered the White House.

¹ RICHARD N. CURRENT, *LINCOLN AND THE FIRST SHOT* 11 (1963). For the same comparison between the military initiatives of Polk and Lincoln, see DAVID HERBERT DONALD, *LINCOLN* 128 (1995).

² The Presidential Question: Speech in the United States House of Representatives (July 27, 1848), in *ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS* 233, 238 (Roy P. Basler ed., De Capo Press 2d ed. 2001) (1946) [hereinafter *HIS SPEECHES AND WRITINGS*]. This speech also appears in 1 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 501, 506 (Roy P. Basler et al. eds., 1953) [hereinafter *COLLECTED WORKS*].

³ Speech at Boston, Massachusetts (Sept. 15, 1848), in 2 *COLLECTED WORKS*, *supra* note 2, at 5, 5.

I. THE MEXICAN WAR

Much of the controversy over the Mexican War concerns Polk's claim that Mexican forces had killed American soldiers on American property. The boundary between Mexico and Texas, however, had never been clearly established in law. In his first annual message to Congress, on December 2, 1845, Polk reviewed for Congress the diplomatic efforts underway to resolve a number of disputes between Mexico and the United States. He had appointed an individual to be "envoy extraordinary and minister plenipotentiary to Mexico, clothed with full powers to adjust and definitively settle all pending differences between the two countries, including those of boundary between Mexico and the State of Texas."⁴

Five months later, on May 11, 1846, President James Polk reported to Congress that Mexico had invaded U.S. territory and that American blood had been shed on American soil.⁵ During the previous fall, Polk had ordered General Zachary Taylor to bring his troops to the Rio Grande, which was disputed territory between Texas and Mexico.⁶ By late March 1846, Taylor's forces were positioned across the Mexican town of Matamoros.⁷ On May 9, Polk learned of a military clash between American and Mexican troops.⁸ Despite legal uncertainties about sovereignty over the land, he sent a message to Congress two days later claiming that Mexican forces "have at last invaded our territory and shed the blood of our fellow-citizens on our own soil."⁹ That was a false statement. The territory did not belong to the United States.

Polk's message to Congress claimed that "war exists."¹⁰ That assertion was also false. What existed was not war but hostilities. For those who defended legislative power and constitutional principles, the President had no authority to decide the existence of war. Some lawmakers, such as Senator William

⁴ First Annual Message (Dec. 2, 1845), in 5 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 2235, 2241 (James D. Richardson ed., 1897) [hereinafter MESSAGES AND PAPERS].

⁵ JOHN H. SCHROEDER, MR. POLK'S WAR: AMERICAN OPPOSITION AND DISSENT, 1846-1848, at 10 (1973).

⁶ *Id.* at 9.

⁷ *Id.*

⁸ *See id.*

⁹ Letter to the Senate and House of Representatives (May 11, 1846), in 6 MESSAGES AND PAPERS, *supra* note 4, at 2287, 2288.

¹⁰ SCHROEDER, *supra* note 5, at 10.

Allen (D-OH), readily agreed that “war actually exists.”¹¹ Polk was only asking Congress “to acknowledge that fact.”¹² On that issue, Senator John Calhoun (D-SC) and other lawmakers strongly objected. Calhoun stated that when a President says there is a war, “there is no war according to the sense of our Constitution.”¹³ He distinguished between hostilities and war. There could be invasion without war, “and the President is authorized to repel invasion without war. But it is *our* sacred duty to make war, and it is for *us* to determine whether war shall be declared or not.”¹⁴

Senator William Archer, a Whig from Virginia, agreed. Congress had an independent duty to acquire facts before it voted on war and not merely assume that Polk’s claims were adequate evidence. Otherwise, the “officers and men on the Rio Grande might involve the country in war at their pleasure.”¹⁵ Mere hostilities did not put the country at war. As he explained:

Suppose we have misunderstood the state of things on the Rio Grande, and that the Mexican authorities have acted justifiably under the circumstances: the danger of admitting the doctrine that a state of war can exist except by the constitutional action of the Government of the United States will then be evident.¹⁶

During House debate on May 11, Rep. Isaac E. Holmes (D-SC) remarked:

We know nothing more than that the two armies have come into collision within the disputed territory, and I deny that war is absolutely, necessarily, the result of it. Suppose the Mexican Congress should not recognise [sic] the conduct of their general, and condemn it, and send here a remonstrance, or rather an apology—is it war?¹⁷

Despite the uncertainties of what had happened, which country was the aggressor, and whether the land on which American blood had been shed was actually U.S. territory, on May 13, Congress declared war on Mexico.¹⁸ Moreover, it put the blame on Mexico: “Whereas, by the act of the Republic of Mexico, a state of war exists between that Government and the United States.”¹⁹ The bill authorized 50,000 volunteers and the sum of ten million

¹¹ CONG. GLOBE, 29th Cong., 1st Sess. 784 (1846).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 792.

¹⁸ Act of May 13, 1846, ch. 16, 9 Stat. 9.

¹⁹ *Id.*

dollars.²⁰

A. Polk Charges Treason

President Polk helped inflame partisan passions with his second annual message of December 8, 1846. He claimed that the War “was neither desired nor provoked by the United States. On the contrary, all honorable means were resorted to to avert it.”²¹ Mexico, he said, “commenced hostilities, and thus by her own act forced the war upon us.”²² He objected to “misapprehensions” that the War was “unjust and unnecessary.”²³

He next turned against his critics: “A more effectual means could not have been devised to encourage the enemy and protract the war than to advocate and adhere to their cause, and thus give them ‘aid and comfort.’”²⁴ He thus did more than merely single out critics as unpatriotic or disloyal. He branded them as treasonous. The Constitution defines treason as “levying War” against the United States, “or in adhering to their Enemies, giving them Aid and Comfort.”²⁵ Polk insisted that Mexico “became the aggressor by invading our soil in hostile array and shedding the blood of our citizens.”²⁶

Beginning in early 1847, the Whig Party began publishing articles attacking Polk for executive usurpations and deceptions. Given what Lincoln would later say in his addresses to the House of Representatives, he appears to have carefully read these articles, which appeared almost monthly in the Whig journal, *The American Review*. An article in the January 1847 issue described Polk’s statements on the Mexican War as “so well calculated to mislead the popular mind, and to imbue it with false impressions.”²⁷ The War “was brought on originally by his own fault.”²⁸ Notwithstanding Polk’s assertions, “Congress knows full well that there is not one word or shadow of truth in the declaration that the enemy had commenced hostilities, ‘by

²⁰ SCHROEDER, *supra* note 5, at 13.

²¹ Second Annual Message (Dec. 8, 1846), in 6 MESSAGES AND PAPERS, *supra* note 4, at 2321, 2322.

²² *Id.*

²³ *Id.* at 2322–23.

²⁴ *Id.* at 2323.

²⁵ U.S. CONST. art. III, § 3, cl. 1.

²⁶ Second Annual Message (Dec. 8, 1846), *supra* note 21, at 2329.

²⁷ *The President’s Message: The War*, AM. REV.: A WHIG J., Jan. 1847, at 1.

²⁸ *Id.*

shedding the blood of American citizens on American soil.”²⁹

An article in March 1847 deplored “[t]he insane cry of American blood shed on American soil” and said that Polk had “extorted from Congress an act whose false recital laid to the charge of Mexico the war the President had begun.”³⁰ The following month, the journal described the War “as the great political and moral crime of the period” and pledged to “hold the guilty authors of it to their just accountability.”³¹ Other articles in the Whig journal assailed the War as one of American “aggression and rapacity.”³² The issue here was fundamental to Whig principles. For them, government in America meant a peaceful republic that did not “thirst for conquest” by military force.³³ Whigs also deeply resented Polk’s insinuation that they were unpatriotic and treasonous.³⁴

B. *The Spot Resolutions*

And now we come to Lincoln’s contribution. On December 22, 1847, as a freshman member of the House of Representatives, he introduced what has become known as the “Spot Resolutions.”³⁵ He analyzed three of Polk’s messages (May 11, 1846, December 8, 1846, and December 7, 1847) that claimed that American blood had been shed on American soil.³⁶ Lincoln stated that the House was “desirous to obtain a full knowledge of all the facts which go to establish whether the particular spot on which the blood of our citizens was so shed *was* or *was not at that time our own soil*.”³⁷ Eight resolutions, set forth in methodical fashion, sought specific information. The first: “Whether the spot of soil on which the blood of our *citizens* was shed, as in his messages declared, was, or was not, within the territories [sic] of Spain, at least [after] the treaty of 1819 until the Mexican revolution.”³⁸ The second: “Whether that spot is, or is not, within the territory [sic] which

²⁹ *Id.* at 4.

³⁰ *Executive Usurpations*, AM. REV.: A WHIG J., Mar. 1847, at 218.

³¹ *Mr. Slidell’s Mission to Mexico*, AM. REV.: A WHIG J., Apr. 1847, at 325.

³² *Military Conduct of the War*, AM. REV.: A WHIG J., Feb. 1847, at 109.

³³ SCHROEDER, *supra* note 5, at 75.

³⁴ *Id.* at 75, 78–79.

³⁵ See CONG. GLOBE, 30th Cong., 1st Sess. 64 (1847).

³⁶ *Id.*

³⁷ *Id.*

³⁸ “Spot” Resolutions in the U.S. House of Representatives (Dec. 22, 1847), in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1832–1858, at 159, 159 (Don E. Fehrenbacher ed., 1989) [hereinafter SPEECHES AND WRITINGS 1832–1858].

was wrested from Spain, by the Mexican revolution.”³⁹ The other six resolutions extended the analysis to determine whether the territory on which the casualties occurred was ever under the government or laws of Texas or of the United States.⁴⁰ The House never acted on Lincoln’s resolutions, but they underscored the Whig position that Polk lacked persuasive and factual grounds to begin the War.

Polk’s third annual message of December 7, 1847, referred to the military conflict with Mexico as a “just war.”⁴¹ The following month, on January 3, the House of Representatives (then controlled by the Whigs) passed an amendment censuring Polk for “unnecessarily and unconstitutionally” beginning the Mexican War.⁴² The measure passed by a vote of 85–81.⁴³ Among those voting for the amendment was Lincoln.⁴⁴ The initial purpose of the bill was to extricate the United States from a war that had become increasingly burdensome financially and in lives lost.⁴⁵ The House directed that a committee of five senators and five representatives meet with President Polk “to advise and consult upon the best mode of terminating the existing war with Mexico in a manner honorable and just to both belligerents.”⁴⁶ Rep. George Ashmun offered to amend the bill by adding the words “in a war unnecessarily and unconstitutionally begun by the President of the United States.”⁴⁷ Debate was not in order on his amendment.⁴⁸ The full intent of Ashmun’s language is therefore not clear, but the Whigs had regularly criticized Polk for claiming that Mexico was the aggressor and for failing to prove that American blood had been shed on American soil.

On January 12, 1848, Lincoln explained in a floor speech why he voted for the Ashmun amendment.⁴⁹ Lincoln called attention

³⁹ *Id.*

⁴⁰ *See id.*

⁴¹ Third Annual Message (Dec. 7, 1847), in 6 MESSAGES AND PAPERS, *supra* note 4, at 2382, 2393.

⁴² CONG. GLOBE, 30th Cong., 1st Sess. 95 (1847); *see* Office of the Clerk, U.S. House of Representatives, House History, http://clerk.house.gov/art_history/house_history/index.html (last visited Mar. 4, 2010) (in “Congress Overview” select “30th Congress (1847–1849)”).

⁴³ CONG. GLOBE, 30th Cong., 1st Sess. 95 (1847).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 94.

⁴⁷ *Id.* at 95.

⁴⁸ *Id.*

⁴⁹ Speech in the U.S. House of Representatives on the War with Mexico (Jan. 12, 1848), in SPEECHES AND WRITINGS 1832–1858, *supra* note 38, at 161, 161.

to Polk's claim about American blood on American soil.⁵⁰ Recalling Polk's earlier message in December 1846, Lincoln said Polk made an issue which was a false issue.⁵¹ Lincoln wanted to distinguish between presidential claims and presidential facts.⁵²

Without such facts, Lincoln was:

fully convinced, of what [he] more than suspect[ed] already, that [the President was] deeply conscious of being in the wrong [in this matter]—that he [felt] the blood of this war, like the blood of Abel, [was] crying to Heaven against him. That originally [he must have had] some strong motive—what [it was he would not now stop to inquire]—[for involving] the two countries in a war; [that having that motive, he had trusted to avoid the scrutiny of his own conduct by directing the attention of the nation,] by fixing the public gaze upon . . . military glory—that attractive rainbow, that rises in showers of blood—that serpent's eye, that charms [but] to destroy; and thus calculating, had plunged into this war, until disappointed as to the ease by which Mexico could be subdued, he found himself at last he knew not where.]⁵³

Lincoln insisted that whoever “carefully examined”⁵⁴ Polk's messages would find that, “like the half insane mumbling of a fever-dream,”⁵⁵ Polk had made a number of inconsistent statements in favor of the War. “He talked like an insane man.”⁵⁶

C. Scope of Presidential Power

Lincoln's decision to introduce the spot resolutions and vote for the censure amendment, followed by his January 12 speech, caused him some problems with constituents at home. Lincoln wrote several letters to his former law partner, William H. Herndon, about the censure amendment. A letter of February 1 asked: “Would you have voted what you felt and knew to be a lie? I know you would not.”⁵⁷ On February 15, he wrote to Herndon about the constitutional powers of a President and how the Framers deliberately rejected the British model of monarchical prerogatives.⁵⁸ If a nation invaded America, the President had full constitutional authority to defend the nation and invade the

⁵⁰ *Id.* at 162.

⁵¹ *Id.*

⁵² *See id.*

⁵³ *Id.* at 168.

⁵⁴ *Id.* at 162.

⁵⁵ *Id.* at 168.

⁵⁶ CONG. GLOBE, 30th Cong., 1st Sess. 156 (1848).

⁵⁷ Letter to William H. Herndon (Feb. 1, 1848), in HIS SPEECHES AND WRITINGS, *supra* note 2, at 217, 217.

⁵⁸ Letter to William H. Herndon (Feb. 15, 1848), in HIS SPEECHES AND WRITINGS, *supra* note 2, at 220, 220–21.

territory of the enemy.⁵⁹ On that principle Lincoln was clear.

But he denied that the territory that sparked the Mexican War was U.S. territory. Therefore no invasion occurred and Polk was in no position to announce that “war exists.”⁶⁰ The disputed territory “was not ours; and Congress did not annex or attempt to annex it.”⁶¹ He warned Herndon:

Allow the President to invade a neighboring nation, whenever *he* shall deem it necessary to repel an invasion, and you allow him to do so, *whenever he may choose to say* he deems it necessary for such purpose—and you allow him to make war at pleasure. Study to see if you can fix *any limit* to his power in this respect . . .⁶²

Lincoln reminded Herndon that the Framers of the Constitution gave Congress the war-making power because kings “had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object.”⁶³ The Framers drafted the Constitution so that “*no one man* should hold the power of bringing this oppression upon us.”⁶⁴ Herndon’s position, he said, “destroys the whole matter, and places our President where Kings have always stood.”⁶⁵

A key distinction in comparing Polk and Lincoln is to understand that Polk moved troops into disputed territory with another nation. Lincoln attempted to protect federal property (Fort Sumter) located within the United States. How well he did that is a subject of legitimate debate to be discussed later, but he faced a domestic, not a foreign, issue. That question was clarified in the Supreme Court’s decision in *The Prize Cases* of 1863.

In closing this discussion on Polk, it is interesting that in his message to Congress on July 6, 1848, he seemed to back away from his claim that American blood had been shed on American soil.⁶⁶ He explained that the treaty presented to Mexico proposed a “boundary line with due precision upon authoritative maps . . . to establish upon the ground landmarks which shall show the limits of both Republics.”⁶⁷ What was vague before would now

⁵⁹ *Id.* at 220.

⁶⁰ CONG. GLOBE, 30th Cong., 1st Sess. 154 (1848).

⁶¹ Letter to William H. Herndon (Feb. 15, 1848), *supra* note 58, at 220.

⁶² *Id.*

⁶³ *Id.* at 221.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Letter to the Senate and House of Representatives of the United States (July 6, 1848), in 6 MESSAGES AND PAPERS, *supra* note 4, at 2437, 2438.

⁶⁷ *Id.*

become clear. Several weeks later, on July 24, Polk no longer claimed that the initial battle occurred on American soil.⁶⁸ He said that after Texas won its independence, its western boundary was declared by Congress to be the Rio Grande “from its mouth to its source, and thence due north to the forty-second degree of north latitude.”⁶⁹ Texas through its own acts “asserted and exercised” title to the country west of the Nueces but “never conquered or reduced to actual possession and brought under her Government and laws that part of New Mexico lying east of the Rio Grande, which she claimed to be within her limits.”⁷⁰ Obviously, Polk was now relying not on facts but on claims. When war began, he said, Mexico was “in possession of this disputed territory.”⁷¹

II. *DRED SCOTT* DECISION

The finality of Supreme Court decisions was a major dispute between Lincoln and Senator Stephen Douglas during their debates in 1858. Douglas accepted the Court’s decision in *Dred Scott v. Sandford* as final and settled. Lincoln accepted the ruling with regard to the particular litigants but refused “to obey it as a political rule.”⁷² The Court could settle an individual case but had no authority to dictate national policy. As Lincoln explained, although the Court held that Congress could not exclude slavery from the territories, he said that if he were in Congress and a vote came up to prohibit slavery in a new territory, “in spite of that Dred Scott Decision, I would vote that it should.”⁷³

Lincoln returned to this issue in his first inaugural address. He agreed that some people assumed that “constitutional questions are to be decided by the Supreme Court.”⁷⁴ He did not deny that a decision was binding in a particular case on the parties to a suit, and that a decision was “entitled to very high respect and consideration, in all paralel [sic] cases, by all other

⁶⁸ *Id.* at 2447.

⁶⁹ *Id.* at 2446.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Speech in Reply to Douglas at Chicago, Illinois (July 10, 1858), in HIS SPEECHES AND WRITINGS, *supra* note 2, at 385, 396.

⁷³ *Id.*

⁷⁴ First Inaugural Address—Final Text (Mar. 4, 1861), in 4 COLLECTED WORKS, *supra* note 2, at 262, 268.

departments of the government.”⁷⁵ And yet, he cautioned:

the candid citizen must confess that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, 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.⁷⁶

Dred Scott was largely praised in the South and denigrated in the North. To the *New York Tribune*, “[t]he decision, we need hardly say, is entitled to just as much moral weight as would be the judgment of a majority of those congregated in any Washington bar-room.”⁷⁷ For the Louisville *Democrat*, the Court’s ruling “is right, and the argument unanswerable, we presume . . . but whether or not, what this tribunal decides the Constitution to be, that it is; and all patriotic men will acquiesce.”⁷⁸

Neither Lincoln, his Attorney General, nor Congress felt any allegiance to the policy doctrines announced in *Dred Scott*. On November 29, 1862, Attorney General Edward Bates issued a legal opinion that rejected part of the Court’s reasoning.⁷⁹ He concluded that “free men of color, if born in the United States, are citizens of the United States.”⁸⁰ In that same year, Congress repudiated another major chunk of *Dred Scott* by passing legislation that prohibited slavery in the territories.⁸¹ During debate on this bill, no one even referred to the Court’s decision or felt constrained by it in any way. Lawmakers were determined to decide national policy with or without the Court.⁸²

III. THE CIVIL WAR

By the time Lincoln had been elected in 1860 and arrived in Washington, D.C. for his inauguration, seven slave states in the Deep South had seceded and established a confederacy with its own President, Jefferson Davis.⁸³ They had taken over federal

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Letter to New York Tribune (Mar. 7, 1857), in THE DRED SCOTT DECISION: LAW OR POLITICS? 46, 47 (Stanley I. Kutler ed., 1967).

⁷⁸ DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 418 (1978).

⁷⁹ 10 Op. Att’y Gen. 382, 411–12 (1862).

⁸⁰ *Id.* at 382.

⁸¹ Act of June 19, 1862, ch. 111, 12 Stat. 432.

⁸² See, e.g., Act of July 1, 1862, ch. 119, § 2, 12 Stat. 432, 433.

⁸³ Message to Congress in Special Session (July 4, 1861), in 4 COLLECTED

property and insisted on the surrender of federal forts that contained U.S. troops.⁸⁴ Several forts were at issue, but the principal attention fell on Fort Sumter in Charlestown, South Carolina; Lincoln had asked General Winfield Scott for his views on supplying and reinforcing Fort Sumter.⁸⁵ It was unclear how Lincoln could do that militarily without provoking war.

Lincoln hoped to hold on to some slave states in the Upper South and border states. If those broke free and joined the Confederacy, there would be eighteen free states arrayed against fifteen slave states. Virginia was among the eight in the Upper South that might secede. If Lincoln lost Virginia and then Maryland to the immediate north, the nation's capital would be encircled without any hope of supplies or survival. Jefferson Davis and the Confederates wanted to gain control over the eight in the Upper South, Maryland, and the District of Columbia. Looking westward, the Confederacy had ambitions as far as the territories of Colorado, New Mexico, Utah, Arizona, and even California.⁸⁶

What language could Lincoln use in his inaugural address to keep Virginia and some of the southern states? In traveling by train from Springfield, Illinois, to the nation's capital, he did not always speak with requisite care. At Indianapolis on February 11, he asked his audience to think clearly and carefully about the words "coercion" and "invasion."⁸⁷ If U.S. troops marched into South Carolina without that state's consent and with hostile intent, that, he said, would be invasion.⁸⁸ But, he asked, if the United States should merely hold and retake its own forts and other property, and collect the duties on foreign importations, or even withhold the mails from places where they were habitually violated, would any or all of these things be "invasion" or "coercion?"⁸⁹ Why speculate about such matters? What was his purpose? Lincoln provided no clear answers to the questions he posed. How did he intend to "retake" U.S. property? By military force? Some form of "coercion"? If by peaceful means, how would he respond in the face of armed resistance?

WORKS, *supra* note 2, at 421, 421–22.

⁸⁴ *Id.* at 422.

⁸⁵ Letter to Winfield Scott (Mar. 9, 1861), in 4 COLLECTED WORKS, *supra* note 2, at 279, 279.

⁸⁶ CURRENT, *supra* note 1, at 131–32.

⁸⁷ Speech from the Balcony of the Bates House at Indianapolis, Indiana (Feb. 11, 1861), in 4 COLLECTED WORKS, *supra* note 2, at 194, 194–95.

⁸⁸ *Id.*

⁸⁹ *Id.* at 195.

Speaking to the Assembly of New Jersey on February 21, Lincoln said: “The man does not live who is more devoted to peace than I am.”⁹⁰ Standing by itself, that might have been reassuring to the South, but he immediately added a conflicting note. In order to preserve the Union “it may be necessary to put the foot down firmly.”⁹¹ What is being signaled here? A threat? On the following day, at Independence Hall in Philadelphia, Lincoln said: “there is no need of bloodshed and war . . . there will be no bloodshed unless it be forced upon the Government,” and then it will be compelled to act in self-defense.⁹² The plain message: Lincoln would not strike first. But would he be following in the footsteps of Polk, putting U.S. forces in a location that could invite hostilities and war?

A. *The Inaugural Address*

In his inaugural address, Lincoln attempted to set forth his position on slavery without forcing the Union to divide. His views on slavery were well known. Over the years, including his 1858 debates with Stephen Douglas, Lincoln had been largely consistent. While he rejected slavery on moral grounds, he had no intention of interfering with it where it existed but opposed its extension to other territories.⁹³ At one point during his speech in Peoria on October 16, 1854, Lincoln said he would accept some expansion of slavery to save the Union: “Much as I hate slavery, I would consent to the extension of it rather than see the Union dissolved, just as I would consent to any GREAT evil, to avoid a GREATER one.”⁹⁴

At his inaugural, Lincoln acknowledged the “apprehension” that existed among the southern states but found no “reasonable cause” for that concern.⁹⁵ He quoted from his earlier speeches where he said he had “no purpose, directly or indirectly, to

⁹⁰ Address to the New Jersey General Assembly at Trenton, New Jersey (Feb. 21, 1861), in 4 COLLECTED WORKS, *supra* note 2, at 236, 237.

⁹¹ *Id.*

⁹² Speech in Independence Hall, Philadelphia, Pennsylvania (Feb. 22, 1861), in 4 COLLECTED WORKS, *supra* note 2, at 240, 240–41. For Lincoln’s experience between his election and the inauguration, see HAROLD HOLZER, LINCOLN PRESIDENT-ELECT: ABRAHAM LINCOLN AND THE GREAT SECESSION WINTER, 1860–1861 (2008).

⁹³ See, e.g., The First Joint Debates in Ottawa (Aug. 21, 1858), in THE LINCOLN-DOUGLAS DEBATES 40, 63 (Harold Holzer ed., 1994).

⁹⁴ Speech on the Kansas-Nebraska Act at Peoria, Illinois (Oct. 16, 1854), in SPEECHES AND WRITINGS 1832–1858, *supra* note 38, at 307, 333.

⁹⁵ First Inaugural Address—Final Text (Mar. 4, 1861), *supra* note 74, at 262.

interfere with the institution of slavery in the States where it exists. I believe I have no lawful right to do so, and I have no inclination to do so.”⁹⁶ Lincoln cited language in his party’s platform, which read:

the maintenance inviolate of the rights of the States, and especially the right of each State to order and control its own domestic institutions according to its own judgment exclusively, is essential to that balance of power on which the perfection and endurance of our political fabric depend; and we denounce the lawless invasion by armed force of the soil of any State or Territory, no matter under what pretext, as among the gravest of crimes.⁹⁷

The language here was well-intentioned, but many of the southern and border states had concluded that slavery could not survive unless it spread to other territories. Lincoln addressed the issue of runaway slaves. He spoke of the constitutional obligation to deliver up fugitives from service and labor.⁹⁸ The constitutional text was clear. But how would it be enforced? By national or state authority? He did not say. He spoke of why jurisprudence should assure “that a free man be not, in any case, surrendered as a slave.”⁹⁹ How was that to be read? Southerners might have wondered about Lincoln’s commitment to deliver up escaped slaves.

On one point Lincoln was unambiguous: “the Union of these States is perpetual.”¹⁰⁰ No state had an independent right to secede. The Union was older, he argued, than the Constitution. It dated back to the Articles of Association of 1774, and “was matured and continued by the Declaration of Independence in 1776,” and still later by the Articles of Confederation in 1778.¹⁰¹ The draft Constitution of 1787 declared as one of its objects the forming of “a more perfect Union.”¹⁰² Losing one state, or several, would produce a less perfect Union.¹⁰³

Following from those principles, any resolution or ordinance by a state to secede was “legally void” and violent acts against federal authority were “insurrectionary or revolutionary.”¹⁰⁴

⁹⁶ *Id.* at 263 (internal quotation marks omitted).

⁹⁷ *Id.*

⁹⁸ *See, e.g.*, Letter to Salmon P. Chase (June 9, 1859), in 3 COLLECTED WORKS, *supra* note 2, at 384, 384.

⁹⁹ First Inaugural Address—Final Text (Mar. 4, 1861), *supra* note 74, at 264.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 265.

¹⁰² U.S. CONST. pmb.

¹⁰³ First Inaugural Address—Final Text (Mar. 4, 1861), *supra* note 74, at 265.

¹⁰⁴ *Id.*

Lincoln expressed his determination to faithfully execute “the laws of the Union . . . in all the States,” believing that his declaration would “not be regarded as a menace” or lead to “bloodshed or violence.”¹⁰⁵ He said that he would exercise his constitutional authority “to hold, occupy, and possess the property, and places belonging to the [national] government, and to collect the duties and imposts.”¹⁰⁶

Lincoln spoke inconsistently about majority and minority rights. On February 12, 1861, in Cincinnati, he said he was “for those means which will give the greatest good to the greatest number.”¹⁰⁷ That principle could be read to justify slavery in some states and the extinction of minority rights. Could a majority force a minority to speak and write in a certain way and adopt the majority’s religion? How did Lincoln intend to put that philosophical principle into practice?

In his inaugural address, Lincoln cautioned: “If, by the mere force of numbers, a majority should deprive a minority of any clearly written constitutional right, it might, in a moral point of view, justify revolution—certainly would, if such a right were a vital one.”¹⁰⁸ A paragraph later Lincoln turned in a different direction:

From questions of this class spring all our constitutional controversies, and we divide upon them into majorities and minorities. If the minority will not acquiesce, the majority must, or the government must cease. There is no other alternative; for continuing the government, is acquiescence on one side or the other. If a minority, in such a case, will secede rather than acquiesce, they make a precedent which, in turn, will divide and ruin them; for a minority of their own will secede from them whenever a majority refuses to be controlled by such minority . . . Plainly, the central idea of secession, is the essence of anarchy.¹⁰⁹

To Lincoln, the states could establish their independence only by amending the Constitution. He said he had no objection to a constitutional amendment that would prohibit the federal government from “interfer[ing] with the institution of slavery in the States.”¹¹⁰ He believed that understanding was already “implied constitutional law” and could be made “express, and

¹⁰⁵ *Id.* at 265–66.

¹⁰⁶ *Id.* at 266.

¹⁰⁷ Speech to Germans at Cincinnati, Ohio (Feb. 12, 1861), in 4 COLLECTED WORKS, *supra* note 2, at 201, 202.

¹⁰⁸ First Inaugural Address—Final Text (Mar. 4, 1861), *supra* note 74, at 267.

¹⁰⁹ *Id.* at 267–68.

¹¹⁰ *Id.* at 263.

irrevocable.”¹¹¹

Lincoln concluded by saying the “momentous issue of civil war” was in the hands of citizens, “not in *mine*.”¹¹² Citizens, he said, took no oath “to destroy the government, while *I* shall have the most solemn one to ‘preserve, protect, and defend’ it.”¹¹³ Therefore, the issue of civil war was not solely in the hands of citizens. It was left in large part to Lincoln. He had to decide whether to resupply Fort Sumter. When Secretary of State Charles Seward pressed Lincoln to act, either by his own initiative or by designating someone else in the Cabinet to clarify and enforce the policy toward the states and secession, Lincoln replied: “if this must be done, *I* must do it.”¹¹⁴

B. Resupplying Fort Sumter

On the day after the inauguration, Lincoln read the appeals of Major Robert Anderson, commander of Fort Sumter. Supplies were running low and would not last beyond a few weeks.¹¹⁵ In Anderson’s judgment, resupply “would require a force of not less than 20,000.”¹¹⁶ Joseph Holt, serving as holdover Secretary of War from the Buchanan Administration, told Lincoln that the War Department did not have that many men.¹¹⁷ General Winfield Scott advised Lincoln that it was too late to save Sumter.¹¹⁸ It had to be surrendered. Scott estimated it would take six or eight months to put together the ships and troops to resupply Sumter. It was better to evacuate.¹¹⁹

Both Lincoln and the South wanted the other side to take the initiative, believing that action by an “aggressor” would help assure a broad and unified resistance. Initially, most Cabinet members advised Lincoln not to resupply Sumter.¹²⁰ Lincoln decided that if he failed to assist Sumter he could also lose Fort Pickens in Florida.¹²¹ Even if he sent only provisions to Sumter, it was possible—if not likely—that hostilities would erupt. After

¹¹¹ *Id.* at 270.

¹¹² *Id.* at 271.

¹¹³ *Id.*

¹¹⁴ Letter to William H. Seward (Apr. 1, 1861), in 4 COLLECTED WORKS, *supra* note 2, at 316, 317.

¹¹⁵ CURRENT, *supra* note 1, at 44.

¹¹⁶ *Id.* at 45.

¹¹⁷ *Id.* at 44–45.

¹¹⁸ *Id.* at 46.

¹¹⁹ See Letter to Winfield Scott (Mar. 9, 1861), *supra* note 85, at 279.

¹²⁰ CURRENT, *supra* note 1, at 67.

¹²¹ See *id.* at 76.

reconsideration, most of his Cabinet supported the attempt.¹²² A key question: would resupply be interpreted as the action of an “aggressor”? Lincoln received conflicting advice: (1) resupply would be “coercion” and drive Virginia and other states to secede; (2) resupply would keep them in the Union.

In the end, Lincoln decided to send supplies to Sumter. Both his plans and expectations were regularly undermined by poor communication and mixed messages.¹²³ One of the armed ships, the *Powhatan*, was sent by mistake not to Sumter where it was needed, but to Fort Pickens in Pensacola, Florida.¹²⁴ The governor of South Carolina was told that Lincoln had ordered unarmed ships carrying only supplies. That was misleading, as vessels accompanying the supply ship were prepared to use force if they encountered military attacks.

Lincoln became involved in the same type of gamble as Polk in Mexico. If “unarmed” American ships were fired on in Charleston, Lincoln believed that the responsibility for shedding blood would fall on the South, not the North: he authorized selective leaks of the resupply mission to underscore its humanitarian nature.¹²⁵ Lincoln could attempt to frame the public debate to his advantage, but exactly how Charleston would react when the ships reached the harbor was out of his hands. Violence seemed inevitable. On April 6, the War Department learned that the guns of Charleston had opened fire on an unarmed merchant ship that had accidentally entered the harbor.¹²⁶ Months earlier, in January 1861, President James Buchanan had tried to send supplies to Fort Sumter via the merchant steamer the *Star of the West*, but shore batteries opened fire and forced the ship to return home.¹²⁷ Lincoln asked Stephen A. Hurlbut, a “friend from Illinois who [was] born in Charleston,” to visit the city and report back on public attitudes.¹²⁸ Hurlbut returned and told Lincoln that “any attempt to [resupply] Sumter would be [viewed in Charleston] as an act of

¹²² JAMES M. MCPHERSON, *TRIED BY WAR: ABRAHAM LINCOLN AS COMMANDER IN CHIEF* 18 (2008).

¹²³ See CURRENT, *supra* note 1, at 71–117 (chronicling the confusion that arose between the generals at Fort Sumter, Lincoln, and his Cabinet in the decision and action of reinforcing Sumter).

¹²⁴ *Id.* at 103–05, 117.

¹²⁵ *Id.* at 120–21.

¹²⁶ RUSSELL MCCLINTOCK, *LINCOLN AND THE DECISION FOR WAR: THE NORTHERN RESPONSE TO SECESSION* 248 (2008).

¹²⁷ *Id.* at 119–20; see PHILLIP SHAW PALUDAN, *THE PRESIDENCY OF ABRAHAM LINCOLN* 59 (1994).

¹²⁸ DONALD, *supra* note 1, at 287.

war,” even if the ships brought “only provisions.”¹²⁹ As scholars have noted, “Lincoln had plenty of reasons to expect the Confederates to attack.”¹³⁰

The relief ships left New York on April ninth, and reached Charleston on the morning of the twelfth.¹³¹ By that time, local authorities had ordered Anderson to surrender the Fort.¹³² When he refused to evacuate, the batteries opened fire.¹³³ After several days of fighting a truce was called and Anderson agreed to leave the Fort on April 14.¹³⁴

C. War Begins

On April 15, Lincoln issued a proclamation calling up a militia of 75,000 to suppress “combinations” in the Deep South that were “too powerful to be suppressed by the ordinary course of judicial proceedings or by the powers vested in the marshals by law.”¹³⁵ He justified his action as necessary to maintain “the existence of [the] National Union and the perpetuity of popular government and to redress wrongs already long enough endured.”¹³⁶ The first priority of these forces would “probably be to repossess the forts, places, and property which have been seized from the Union.”¹³⁷ His proclamation called Congress into special session on July 4.¹³⁸

In the meantime, Lincoln issued a series of proclamations calling forth the militia, instituting “a blockade of the ports within the States” that had seceded, calling for volunteers, and calling for the enlistment of seamen.¹³⁹ He exercised powers broadly, not only his own powers, but those of Congress. To his credit, he knew the difference.

Shortly after Lincoln’s April 15 proclamation for calling forth the militia, Virginia announced it was seceding from the Union,

¹²⁹ *Id.* at 288.

¹³⁰ MCPHERSON, *supra* note 122, at 21.

¹³¹ See DAVID M. POTTER, *THE IMPENDING CRISIS: 1848–1861*, at 580 (Don E. Fehrenbacher ed., 1976).

¹³² *Id.* at 582.

¹³³ *Id.*; see MCPHERSON, *supra* note 122, at 21.

¹³⁴ MCCLINTOCK, *supra* note 126, at 250.

¹³⁵ Proclamation (Apr. 15, 1861), in 7 MESSAGES AND PAPERS, *supra* note 4, at 3214, 3214.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Proclamation (Apr. 19, 1861), in 7 MESSAGES AND PAPERS, *supra* note 4, at 3215, 3215; Proclamation (Apr. 27, 1861), in 7 MESSAGES AND PAPERS, *supra* note 4, at 3216, 3216; Proclamation (May 3, 1861), in 7 MESSAGES AND PAPERS, *supra* note 4, at 3216, 3216.

as did Arkansas, North Carolina, and Tennessee.¹⁴⁰ Other southern and border states moved either to secede or to adopt a neutral status that opposed any troops from the North passing through their territories.¹⁴¹ After Virginia seceded, its western counties pledged their support to the Union and took steps to create an independent state.¹⁴² The western counties applied for admission to the Union and they were so added in 1863 as West Virginia.¹⁴³

In his book on crisis government, Clinton Rossiter prepared a section called “The Lincoln Dictatorship.”¹⁴⁴ He claimed that Lincoln was “the sole possessor of the indefinite grant of executive power in Article II of the Constitution.”¹⁴⁵ On the contrary, Lincoln appreciated that his powers were not indefinite. He understood that his actions after the firing on Fort Sumter exceeded his Article II powers, and he took steps to preserve not only the Union, but the Constitution.

D. Lincoln’s Message to Congress

When Congress assembled in special session on July 4, 1861, Lincoln reviewed what had happened at the start of his term, including the debate within his administration on what to do about Fort Sumter. He explained that to abandon the Fort would be “utterly ruinous” because “it would discourage the friends of the Union, embolden its adversaries, and go far to insure to the latter a recognition abroad; that, in fact, it would be our national destruction consummated.”¹⁴⁶ The assault on the Fort, he said, “was in no sense a matter of self-defense on the part of the assailants. They well knew that the garrison in the fort could by no possibility commit aggression upon them.”¹⁴⁷ In this manner, Lincoln intended to place responsibility on the Confederacy for

¹⁴⁰ DONALD, *supra* note 1, at 297.

¹⁴¹ *See id.* at 297, 299–300.

¹⁴² *Id.* at 300–01.

¹⁴³ Congress agreed to accept West Virginia as a new state, subject to a proclamation by the President that a state convention provided for immediate or forthcoming freedom for slaves. Act for the Admission of the State of “West Virginia” into the Union, ch. 6, §§ 1–2, 12 Stat. 633, 633–34 (1862).

¹⁴⁴ CLINTON L. ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES* 224 (Greenwood Press, Inc. 1979) (1948).

¹⁴⁵ *Id.* at 225.

¹⁴⁶ Special Session Message (July 4, 1861), in 7 *MESSAGES AND PAPERS*, *supra* note 4, at 3221, 3222.

¹⁴⁷ *Id.* at 3223.

the War.¹⁴⁸ He reminded Congress of his warning to the Deep South in the inaugural message: “You can have no conflict without being yourselves the aggressors.”¹⁴⁹

For Lincoln, the attack on Fort Sumter was part of a larger question of how republican government can survive, “whether a constitutional republic, or democracy—a government of the people by the same people—can or can not [sic] maintain its territorial integrity against its own domestic foes.”¹⁵⁰ Could “discontented individuals, too few in numbers” to control the government under law, “break up their government, and thus practically put an end to free government upon the earth”?¹⁵¹ Do all republics have “this inherent and fatal weakness?” Is there something about a republic that is “too *weak* to maintain its own existence?”¹⁵²

In his July 4 address, Lincoln flagged another danger. When he issued his proclamation of April 19 for a blockade, he noted that the Confederacy “threatened to grant pretended letters of marque to authorize the bearers thereof to commit assault on the lives, vessels, and property of good citizens of the country lawfully engaged in commerce on the high seas and in waters of the United States.”¹⁵³ Because of that initiative, what began as a domestic civil war could have involved other countries, some of them having hostile intent. Lincoln told Congress on July 4 that there was no longer a risk that “some foreign nations” might shape their actions and policies in anticipation that the Union would collapse.¹⁵⁴

Lincoln concluded his address to Congress by underscoring the principles of republican government: “This is essentially a people’s contest.”¹⁵⁵

On the side of the Union it is a struggle for maintaining in the world that form and substance of government whose leading object is to elevate the condition of men; to lift artificial weights from all shoulders; to clear the paths of laudable pursuit for all; to afford all an unfettered start and a fair chance in the race of life.¹⁵⁶

¹⁴⁸ *See id.*

¹⁴⁹ *Id.* (internal quotation marks omitted).

¹⁵⁰ *Id.* at 3224.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ Proclamation (Apr. 19, 1861), *supra* note 139, at 3215.

¹⁵⁴ Special Session Message (July 4, 1861), *supra* note 146, at 3226–27.

¹⁵⁵ Special Session Message (July 4, 1861), in 8 MESSAGES AND PAPERS, *supra* note 4, at 3231.

¹⁵⁶ *Id.*

Popular government in America had been successful in its establishment and administration. What remained was “its successful *maintenance* against a formidable internal attempt to overthrow it.”¹⁵⁷ People had to demonstrate that they could both carry an election and suppress a rebellion, “that ballots are the rightful and peaceful successors of bullets.”¹⁵⁸ Lincoln said he had done what he deemed to be his duty. “You will now, according to your own judgment, perform yours.”¹⁵⁹

E. Constitutionality of Lincoln’s Actions

In referring to his order to call up 75,000 militia and place a blockade, Lincoln told Congress he acted on grounds that were “believed to be strictly legal.”¹⁶⁰ His proclamation of April 15 for the militia did not specifically mention a 1795 statute empowering the President to call up the militia in time of insurrection or invasion. But the text of his proclamation tracks the language of the statute.¹⁶¹ As for his other initiatives, he did not dissemble and attempt to defend their legality or constitutionality. Increasing the size of the Army and Navy clearly invaded the power of Congress, under Article I, to “raise and support Armies” and “provide and maintain a Navy.”¹⁶² Lincoln committed money from the Treasury in direct violation of constitutional language that “[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”¹⁶³ On those transgressions, Lincoln spoke with commendable candor:

Other calls were made for volunteers, to serve three years unless sooner discharged; and also for large additions to the Regular Army and Navy. 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

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 3232.

¹⁶⁰ Special Session Message (July 4, 1861), *supra* note 146, at 3225.

¹⁶¹ See Proclamation Calling Militia and Convening Congress (Apr. 15, 1861), in 4 COLLECTED WORKS, *supra* note 2, at 331, 331. Lincoln’s April 15 proclamation refers to “combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the Marshals by law.” Proclamation (Apr. 15, 1861), *supra* note 135, at 3214. The 1795 statute contains the same language. See Act of Feb. 28, 1795, ch. 36, § 2, 36 Stat. 424, 424 (providing for the calling of militia to suppress insurrections).

¹⁶² U.S. CONST. art. I, § 8, cls. 12 & 13.

¹⁶³ *Id.* art. I, § 9, cl. 7.

readily ratify them. It is believed that nothing has been done beyond the constitutional competency of Congress.¹⁶⁴

Several Presidents have claimed “inherent” powers to operate beyond the control of Congress and the courts: Harry Truman with his steel seizure in 1952;¹⁶⁵ Richard Nixon claiming he could refuse to spend appropriated funds and engage in domestic surveillance;¹⁶⁶ and the initiatives of George W. Bush with military commissions, “extraordinary rendition,” and National Security Agency surveillance.¹⁶⁷ Lincoln never invoked inherent powers. The phrase “whether strictly legal or not” is not the language of someone who believes he has acted legally. It was an appeal to Congress (and the public) to examine what Lincoln had done under emergency conditions and to independently judge his actions. If he had violated his oath of office he could be impeached and removed. To ask Congress to ratify his actions was not the conduct of a dictator, even a constitutional dictator. Moreover, Lincoln expressly admitted to exercising not only his own Article II powers, but those of Congress under Article I: “It is believed that nothing has been done beyond the constitutional competency of Congress.”¹⁶⁸

F. *Suspending the Writ*

Lincoln next reviewed his actions in authorizing “the Commanding General in proper cases, according to his discretion, to suspend the privilege of the writ of *habeas corpus*.”¹⁶⁹ Initially the writ was suspended between Washington and Philadelphia to protect the northern flank of the capital and assure that Union troops could reach it.¹⁷⁰ Later, the suspension applied more broadly.¹⁷¹ Lincoln acknowledged that the “legality and propriety” of his actions “are questioned[,] and the attention of the country has been called to the proposition that one who is sworn to ‘take care that the laws be faithfully executed’ should

¹⁶⁴ Special Session Message (July 4, 1861), *supra* note 146, at 3225.

¹⁶⁵ See Louis Fisher, *Invoking Inherent Powers: A Primer*, 37 PRESIDENTIAL STUD. Q. 1, 6 (2007) (citing The President’s News Conference, 98 PUB. PAPERS 273 (Apr. 17, 1952)).

¹⁶⁶ See Louis Fisher, *Preserving Constitutional Freedoms in Times of National Crisis*, 33 VT. L. REV. 627, 636–37 (2009).

¹⁶⁷ See *id.* at 637–38; see also Fisher, *supra* note 165, at 1.

¹⁶⁸ Message to Congress in Special Session (July 4, 1861), *supra* note 83, at 429.

¹⁶⁹ *Id.*

¹⁷⁰ See MCPHERSON, *supra* note 122, at 27.

¹⁷¹ *Id.*

not himself violate them.”¹⁷² He offered three arguments.

First, given the condition of the country (with nearly one-third of the states in open rebellion), he asked whether “all the laws, *but one*, [are] to go unexecuted, and the government itself [is to] go to pieces, lest that one be violated?”¹⁷³ Second, the Constitution recognized that the privilege of habeas corpus may be suspended in cases of rebellion or invasion, when required for the public safety; but there was some question whether the location of this language in Article I reserved the right of suspension to Congress rather than the President.¹⁷⁴ To Lincoln, the Constitution “itself[] is silent as to which, or who, is to exercise the power.”¹⁷⁵ He thought it unreasonable to interpret the Constitution to prevent the President from selectively suspending the writ in the midst of an emergency when Congress was out of session, and thus, require him to wait for lawmakers to return and consider what to do.¹⁷⁶

Lincoln faced not a theory but a condition. All of the southern states had seceded, including Virginia, which borders the nation’s capital.¹⁷⁷ He could not afford to lose Maryland to the South and have the capital surrounded.¹⁷⁸ After the firing on Fort Sumter and the start of the Civil War, Lincoln needed troops from the North to pass through Maryland to reach the capital.¹⁷⁹ A secessionist mob in Baltimore had attacked Massachusetts troops on their way to Washington.¹⁸⁰ Approximately four soldiers and twelve citizens were killed.¹⁸¹ Lincoln advised the Governor of Maryland and the Mayor of Baltimore that he was willing to have Union troops skirt Baltimore, but they still needed to pass through Maryland.¹⁸² As he explained to a delegation from

¹⁷² Message to Congress in Special Session (July 4, 1861), *supra* note 83, at 429–30.

¹⁷³ *Id.* at 430.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 430–31 (“[A]s the provision was plainly made for a dangerous emergency, it can not be believed the framers of the instrument intended, that in every case, the danger should run its course, until Congress could be called together; the very assembling of which might be prevented, as was intended in this case, by the rebellion.”).

¹⁷⁷ See MCPHERSON, *supra* note 122, at 26.

¹⁷⁸ See *id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 25–26.

¹⁸¹ *Id.* at 26.

¹⁸² Letter to Thomas H. Hicks and George W. Brown (Apr. 20, 1861), in 4 COLLECTED WORKS, *supra* note 2, at 340, 340.

Baltimore, he needed Union troops “to defend this Capital.”¹⁸³ The state had to allow it: “Our men are not moles, and can’t dig under the earth; they are not birds, and can’t fly through the air. There is no way but to march across, and that they must do.”¹⁸⁴ Suspending the writ, Lincoln concluded, was necessary to deal with secessionist forces in Maryland.¹⁸⁵

Lincoln told Congress that he had consulted his Attorney General for legal guidance. He added: “Whether there shall be any legislation upon the subject, and if any, what, is submitted entirely to the better judgment of Congress.”¹⁸⁶ With this language Lincoln made no pretense that suspension of the writ was entirely a matter for the President. He had taken some emergency actions and left the rest to “the better judgment of Congress.”¹⁸⁷ When Attorney General Edward Bates released his legal analysis, it again recognized Congress as the superior branch. Bates reasoned that in times of “a great and dangerous insurrection, the President has the lawful discretionary power to arrest and hold in custody persons known to have criminal intercourse with the insurgents, or persons against whom there is probable cause for suspicion of such criminal complicity.”¹⁸⁸ Bates qualified his opinion by saying that if the constitutional language meant “a repeal of all power to issue the writ, then I freely admit that none but Congress can do it.”¹⁸⁹ In the event of “a great and dangerous rebellion, like the present,” the President’s power to suspend the privilege was “temporary and exceptional.”¹⁹⁰

Both Lincoln and Bates acknowledged congressional power to pass legislation that limits how a President may suspend the writ of habeas corpus during a rebellion. On March 3, 1863, Congress enacted a bill that directed the Secretary of State and the Secretary of War to furnish federal judges with a list of the names of all persons held as prisoners by order of the President or executive officers.¹⁹¹ Submitting this list was mandatory.¹⁹² Under the statute, failure to furnish someone’s name to the

¹⁸³ Reply to Baltimore Committee (Apr. 22, 1861), in 4 COLLECTED WORKS, *supra* note 2, at 341, 341.

¹⁸⁴ *Id.* at 342.

¹⁸⁵ Message to Congress in Special Session (July 4, 1861), *supra* note 83, at 430.

¹⁸⁶ *Id.* at 431.

¹⁸⁷ *Id.* at 430–31.

¹⁸⁸ 10 Op. Att’y Gen. 74, 81 (1861).

¹⁸⁹ *Id.* at 90.

¹⁹⁰ *Id.*

¹⁹¹ Act of Mar. 3, 1863, ch. 81, § 2, 12 Stat. 755, 755.

¹⁹² *Id.*

judiciary could result in the discharge of a prisoner.¹⁹³

What of Lincoln's action in the John Merryman case? Merryman was suspected of being the captain of a secessionist group that planned to destroy railroads and bridges between Baltimore and Washington, D.C. He was arrested by military authorities and held at Fort McHenry in Baltimore. Chief Justice Roger Taney, sitting as circuit judge, issued a writ of habeas corpus to the commandant at the Fort, directing him to bring Merryman to the circuit courtroom in Baltimore on May 27, 1861.¹⁹⁴ The commandant, acting under Lincoln's orders, refused to produce Merryman. Taney proceeded to issue an opinion stating that Merryman was "entitled to be set at liberty," but recognized that his order had "been resisted by a force too strong for [him] to overcome."¹⁹⁵ All that he could do was to publicly advise Lincoln to take care to faithfully execute the laws and "to determine what measures he will take to cause the civil process of the United States to be respected and enforced."¹⁹⁶

Some scholars have praised Taney's defense of constitutional rights. Whatever interpretation we apply to his decision in *Merryman*, Taney, in May 1861, was not the federal official responsible for preserving the Union. He had neither the authority nor the capacity. His decision in *Dred Scott* had helped propel the country toward civil war. In May 1861, Lincoln faced a hard reality. Having lost Virginia to the South, he could not afford to also lose Maryland to the South and have the nation's capital encircled. At that moment in time it was Lincoln's constitutional call, not Taney's.

G. Statutory Endorsement

Lincoln understood that to the extent his actions exceeded his Article II powers and invaded those of Congress, he had to submit his message to Congress and seek statutory support. Whether his measures were "strictly legal or not," it was his duty to explain both why he had acted as he did and the initiatives he had taken, and to trust "that Congress would readily ratify them."¹⁹⁷

Lawmakers debated his request from July 4 to early August.

¹⁹³ *Id.* § 3, 12 Stat. at 756.

¹⁹⁴ *Ex parte Merryman*, 17 F. Cas. 144, 147 (C.C.D. Md. 1861) (No. 9,487).

¹⁹⁵ *Id.* at 153.

¹⁹⁶ *Id.*

¹⁹⁷ Message to Congress in Special Session (July 4, 1861), *supra* note 83, at 429.

Some wanted to move the bill through quickly to support the President. The general mood, however, was to act with care and receive whatever materials would be instructive, including the attorney general opinion referred to by Lincoln.¹⁹⁸ It was generally understood that Lincoln had exceeded his powers, especially by increasing the regular Army and suspending the writ of habeas corpus. It was for that very reason that he found it necessary to seek statutory ratification to legalize what he had done. The bill became law on August 6, 1861, providing that all of Lincoln's "acts, proclamations, and orders" after March 4:

respecting the army and navy . . . and calling out . . . the militia or volunteers from the States, are hereby approved and in all respects legalized and made valid, to the same intent and with the same effect as if they had been issued and done under the previous express authority and direction of the Congress of the United States.¹⁹⁹

H. Lincoln's Blockade

In *The Prize Cases* (1863), the Supreme Court upheld Lincoln's blockade of ports in the South.²⁰⁰ Although this decision is often cited to uphold broad interpretations of the President's power over war, both the Lincoln Administration and the Court read those powers in a more restrictive manner. What Lincoln did was a purely internal, domestic matter of civil war and had nothing to do with exercising the war power outside the United States.

Richard Henry Dana, Jr., serving as Lincoln's lawyer in this case, submitted a brief to the Supreme Court in which he reviewed the comparative duties of the President and Congress regarding questions of war.²⁰¹ Although the Constitution reserves to Congress the power to declare war, war might exist without a declaration. For example, "[i]f a foreign power springs a war upon us by sea and land, during a recess of Congress, exercising

¹⁹⁸ CONG. GLOBE, 37th Cong., 1st Sess. 41 (1861) (remarks by Sen. Thurston Polk).

¹⁹⁹ Act of Aug. 6, 1861, ch. 63, § 3, 12 Stat. 326, 326. For legislative debate, see CONG. GLOBE, 37th Cong., 1st Sess. 2, 16, 21, 40-50, 64-71, 127, 137-44, 208, 220, 234-35, 276, 288-97, 332-35, 391-95, 451-58 (1861); CONG. GLOBE, 37th Cong., 1st Sess. 12-19 (App. 1861) (speech by Sen. Bayard, "Executive Usurpation").

²⁰⁰ *The Prize Cases*, 67 U.S. (2 Black) 635, 671 (1863).

²⁰¹ R.H. Dana, Jr., Brief for the United States and Captors, *The Prize Cases*, in 3 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 495 (Philip B. Kurland & Gerhard Casper eds., 1978) [hereinafter LANDMARK BRIEFS].

all belligerent rights of capture,” it would be necessary for the President to be able to repel the attack as a matter of self-defense.²⁰² Dana explained that the issue in the case had nothing to do with “the right to initiate a war, as a voluntary act of sovereignty . . . [t]hat is vested only in Congress.”²⁰³

Second, Dana said that a declaration of war does not apply to civil war, which results from an act of a rebel, not an independent power.²⁰⁴ A sovereign nation “never in form declares war against a rebellion.”²⁰⁵ Third, Dana looked to see if any existing legislation by Congress at the time of Fort Sumter restricted what Lincoln could do with blockades and captures of vessels.²⁰⁶ He concluded that “no act of Congress had, when the capture was made, or has since, conflicted with the acts of the President.”²⁰⁷ That is an important admission. Even in times of emergency from civil wars and foreign wars, the President is subject to statutory policy. As Dana later noted, “[t]here were no acts of Congress at the time of this capture (July 10, 1861) in any way controlling this discretion of the President.”²⁰⁸

For some reason the administration decided to submit a brief by another attorney, William M. Evarts, and his position on the war power, different from Dana’s. Drawing from the maxim “*silent leges inter arma*,” Evarts insisted that “[a]ll laws, of whatever dignity and permanence . . . are silent under the overwhelming fact of war, and its operations are governed only by its own laws.”²⁰⁹ This seems to imply that the “law of war” supersedes existing statutory law, which Dana did not assert. Evarts further argued: “[t]he acts *declaring and determining* upon what emergencies of war, civil and foreign, the military and naval power of the nation, shall be wielded by the President, without further needed recourse to the Legislature, and making the President exclusive judge of these emergencies.”²¹⁰ That position goes far beyond Dana and even Lincoln, who specifically went to Congress to seek retroactive authority.

During oral arguments, Dana presented the administration’s

²⁰² *Id.* at 514.

²⁰³ *Id.*

²⁰⁴ *Id.* at 507–08.

²⁰⁵ *Id.* at 515.

²⁰⁶ *Id.* at 517.

²⁰⁷ *Id.* at 515.

²⁰⁸ *Id.* at 517.

²⁰⁹ William M. Evarts, Brief for the United States, The Prize Cases, in 3 LANDMARK BRIEFS, *supra* note 201, at 527, 554.

²¹⁰ *Id.* at 558–59.

position but Evarts did not. Dana repeated what he said in his brief, including the point that the case had nothing to do with “the right to *initiate a war, as a voluntary act of sovereignty . . . [t]hat is vested only in Congress.*”²¹¹ In a separate document, not called oral argument but rather “Argument of Mr. Evarts for the United States,” the themes of *silent leges inter arma* are reiterated.²¹² Many of the passages are confusing, such as:

Not that the laws ought to be silent, not that the laws wish to be silent, but that law speaks, when it speaks at all, with a potential voice, not of persuasion, not of entreaty, but of command; and when its command is taken from it, its voice is silent till its command is restored.²¹³

In such times, Evarts claimed that the Supreme Court “is silenced for the future.”²¹⁴ Then why was this case submitted to the Court for argument and why did the administration submit briefs?²¹⁵

The Supreme Court ignored Evarts’ definition of presidential power and picked up some themes advanced by Dana. The Court’s decision helps clarify that Dana argued for one of the vessels involved (the *Amy Warwick*) and Evarts for a separate vessel (the *Hiawatha*).²¹⁶ The Court lists in detail the arguments made by Dana, including the points that the case has nothing to do with “the right to *initiate a war, as a voluntary act of sovereignty*. That is vested only in Congress,” and the President’s authority in time of civil war, “in the absence of any Act of Congress on the subject,” to meet the war by capturing vessels that aid the enemy.²¹⁷ Dana said that there were no statutes by Congress at the time of the captures “in any way controlling this discretion of [these acts of] the President,” and that Congress by statute recognized the validity of Lincoln’s actions and proclamations, including the blockade.²¹⁸

Writing for a 5–4 majority, Justice Grier reflected many of the arguments offered by Dana. The President “has no power to

²¹¹ Summary of Oral Argument, The Prize Cases, in 3 LANDMARK BRIEFS, *supra* note 201, at 567, 590.

²¹² Argument of Mr. Evarts for the United States, The Prize Cases, in 3 LANDMARK BRIEFS, *supra* note 201, at 597, 642.

²¹³ *Id.* at 642.

²¹⁴ *Id.*

²¹⁵ See generally *id.* at 646–47, 652–53 (stating additional arguments Evarts made on presidential power unchecked by the other branches during time of war).

²¹⁶ The Prize Cases, 67 U.S. (2 Black) 635, 638–39 (1862).

²¹⁷ *Id.* at 660.

²¹⁸ *Id.* at 661.

initiate or declare a war either against a foreign nation or a domestic State.”²¹⁹ If war comes by invasion of a foreign power or by states organized in rebellion, the President is authorized to “resist force by force.”²²⁰

IV. COMPARING POLK AND LINCOLN

At first glance, Polk and Lincoln seem similar in that both men decided to put American troops or ships in a territory that was likely to provoke hostilities. Both men wanted to be able to tell the nation they acted only in “self-defense” and that the other side was the aggressor. The comparison starts to weaken because Polk acted against a foreign country while Lincoln faced a civil war. Polk wanted to extend American territory; Lincoln needed to preserve the existing Union. I think the record is clear that Polk wanted war to gain territory that he thought the United States could use better than Mexico.²²¹

With both Polk and Lincoln, war was a matter of choice. Polk concluded that he could not, through negotiation with Mexico, acquire the territory he wanted.²²² Lincoln had a choice: resupply Fort Sumter or allow it to fall in the hands of South Carolina.²²³ He did not want war but concluded that allowing the states to secede and take federal property could not be tolerated, and he saw the threat of other nations intervening for their own benefit as too great to ignore. Also, allowing the secession to continue without a decision from Lincoln created increasing strains within his own party and among the party faithful. He was under greater pressure to act than Polk.

Both wars resulted in deaths, casualties, financial costs, and the passage of time that went far beyond what Polk and Lincoln expected. What was thought to be a military commitment of a few months stretched for years. They learned that it is relatively easy to begin a war and much harder to control what happens next.

Polk spoke deceptively about American blood being shed on American soil. I am not aware of a public message issued by Lincoln during his presidency that relied on deception or deceit to

²¹⁹ *Id.* at 668.

²²⁰ *Id.*

²²¹ LOUIS FISHER, *PRESIDENTIAL WAR POWER* 42–43 (2d ed. 2004) (citing *The President's Message: The War*, AM. REV.: A WHIG J., Jan. 1847, at 10).

²²² See Letter to the Senate and House of Representatives (May 11, 1846), *supra* note 9, at 2292.

²²³ MCPHERSON, *supra* note 122, at 14.

mask military aims or present as fact information that was, at best, a claim. The closest he came was to send U.S. ships to Charleston, knowing that war was the likely result, and then explain that he had acted in self-defense and that the South was responsible for the War. The South attempted the same strategy.

Lincoln, as did Polk, stretched executive power to gain political objectives. Unlike Polk, Lincoln at all times respected republican government, congressional authority, and understood that not only did he exceed his Article II powers but said so. He did not use artifice or guile to disguise that fact. He presented his case to Congress and asked for statutory support to make legal what was illegal. With such actions he held firm to his oath of office to defend not just the Union but the Constitution.