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LINCOLN THE “DICTATOR”

DENNIS J. HUTCHINSON†

I. INTRODUCTION

“The godfather of despotism”: the charge has haunted Abraham Lincoln from the advent of the Civil War to the wake of his bicentennial.¹ From partisans during the war to early twentieth century historians to post-World War II political scientists fearing an “imperial presidency” to the latest libertarian Lincoln-hater, Lincoln has been vilified as someone who destroyed the Constitution in order to save the Union. The bill of particulars is lengthy and grave: he suspended habeas corpus and jailed opponents, flouted a court order by the Chief Justice of the United States, ordered troops raised and materiel purchased, blockaded Southern ports, emancipated slaves after denying the power to do so—all without prior Congressional authorization. Professor Clinton Rossiter of Columbia put the case starkly in 1948: “dictatorship played a decisive role in the North’s successful effort to maintain the Union by force of arms Lincoln’s amazing disregard for the words of the Constitution was considered by nobody as legal.”²

Although the critique is now heard less often, the recent claims of sweeping executive power by the 43rd president have rejuvenated the question, and Lincoln-haters capitalizing on the impending birthday celebrations have noisily pressed their case. Lincoln has his defenders, to be sure, some with ingenious briefs in defense of his actions, even to the point of labeling him an “arch-constitutionalist,”³ who chronically defended his actions by reference to specific aspects of the document. Neither judgment is satisfying, and both approaches quickly tend to speed to the limits of their logic, be it based in pragmatism or constitutional literalism, and ultimately the remarkable evolutionary nature of

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1. Arthur Schlesinger, Jr. used the term “despot” in *THE IMPERIAL PRESIDENCY* 59 (1973). For a review of the controversy, see Michael Les Benedict, “*The Perpetuation of Our Political Institutions*”: Lincoln, the Powers of the Commander in Chief, and the Constitution,” 29 *CARDOZO L. REV.* 927 (2008).

2. CLINTON ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES* 223, 226 (1948).

3. Herman Belz, *Lincoln and the Constitution: The Dictatorship Question Reconsidered*, 15 *CONGRESS & THE PRESIDENCY* 2 (Autumn 1988) reprinted in LINCOLN’S AMERICAN DREAM: CLASHING POLITICAL PERSPECTIVES 289 (Kenneth L. Deutsch & Joseph R. Fornieri eds., 2005) (quoting Andrew C. McLaughlin, “Lincoln, the Constitution, and Democracy,” 47 *INT’L. J. OF ETHICS* 1, 4-5 (Oct. 1936)).

Lincoln's constitutional thought is homogenized into fixed, primary colors.

In one sense, of course, "dictatorship" is a misplaced metaphor. Consider the record:

- Lincoln constantly tried to square his position with the Constitution;
- he routinely—if sometimes belatedly—sought congressional approval for his actions;
- he suffered an intrusive congressional oversight committee throughout the war;
- and he stood for election near the depth of his popularity, even reporting plans for an orderly transition should he be defeated, which he expected almost to the last minute.

Dictators simply don't go to the polls and let the canvass stand if they lose. Lincoln was not Robert Mugabe. But he was the most muscular president since Andrew Jackson, although the office had so atrophied under his two immediate predecessors that any initiative would have been startling.

Indeed, in many respects Jackson was the initial goad to Lincoln's constitutional thinking. Lincoln was a railroad lawyer. He did not view himself as a constitutional theorist. Concerned with a recent rise in mob violence, he spoke firmly as a young man in praise of fidelity to the free institutions of government, including the laws and the Constitution.⁴ Throughout his life, when Lincoln thought of the founding fathers, he thought of Washington and 1776, not of the Constitutional Convention. Indeed, when he entered politics as an anti-Jacksonian Whig, Lincoln built his platform from Whig Party talking points. For example, his first run for public office, at age 23, focused on the need for improving navigation of the Sangamon River.⁵ Like his idol Henry Clay, the young Whig Lincoln believed in a generous understanding of national powers (think of the Bank of the United States) and federal funding of internal improvements.⁶

Lincoln's constitution remained shaped by Whig politics once he achieved elective office. In Congress, he condemned President James Polk in caustic terms for initiating war with Mexico and challenged him to identify the exact "spot" where hostilities began.⁷ His sometime law partner, William Herndon, chided Lincoln—as did many others—for his *post hoc* fastidiousness, and Lincoln's response cast a paradoxical shadow over his later career. Lincoln explained that

[t]he provision of the Constitution giving the war-making power to Congress was dictated, as I understand it, by the following reasons. Kings had always been involving and impoverishing their people in wars,

4. ABRAHAM LINCOLN, *Address to the Young Men's Lyceum of Springfield, Illinois: The Perpetuation of Our Political Institutions* (Jan. 27, 1838), in SS&W 13.

5. ABRAHAM LINCOLN, *To the People of Sangamo [sic] County* (March 9, 1832), in SS&W 3.

6. See ABRAHAM LINCOLN, *From Eulogy on Henry Clay at Springfield, Illinois* (July 6, 1852), in SS&W 85.

7. ABRAHAM LINCOLN, "Spot" Resolutions in the House of Representatives (Dec. 22, 1847), in SS&W 57; ABRAHAM LINCOLN, *Speech in the U.S. House of Representatives* (Jan. 12, 1848), in SS&W 60.

pretending generally, if not always, that the good of the people was the object. This, our Convention understood to be the most oppressive of all Kingly oppressions; and they resolved to so frame the Constitution that *no one man* should hold the power of bringing this oppression upon us.⁸

Later, campaigning vigorously for Zachary Taylor in 1848, Lincoln praised Taylor as someone who would be a passive agent of Congress, who would not use the veto except in extraordinary cases, and who would properly restore the presidency to its narrow scope.

When Taylor won, Lincoln hoped for a plum appointment, but only the secretaryship of the Oregon territory was offered, and so he repaired to Springfield and private practice. His retirement from public life did not last long, and the Kansas-Nebraska Act of 1854 spurred his decision to return to politics. The Act provided that the question of whether slavery would exist in the territory, which stretched from what is now Kansas to the Canadian border including parts of what is now Montana, depended on “popular sovereignty.”

For Lincoln, who had been on the public record for almost twenty years condemning the “injustice and bad policy”⁹ of slavery, the Act was an abomination—an abomination to the Northwest Ordinance, which had forbidden slavery in the area since 1787, a concomitant repeal of the Missouri Compromise of 1820, and an opportunity to expand slavery nationwide. To Lincoln, this was no less than repudiation of the founding principles of the nation embodied in the Declaration of Independence—all cynically wrapped in the mantle of indifference to slavery in deference to self-determination, a rather self-serving form of self-determination, to be sure. Lincoln was careful not to identify himself with the intensifying abolitionist cause: even as he condemned the Act, he said somewhat weakly, “If all earthly power were given me, I should not know what to do, as to the existing institution.”¹⁰ He even admitted that his “first impulse” was colonization, that is, to ship American slaves to Liberia, “their own native land,”¹¹ which echoed a long-standing position of Henry Clay, then dead two years.

Three years after the Kansas-Nebraska Act, the constitutional and political ground shifted under everyone’s feet when the Supreme Court decided *Dred Scott v. Sandford*,¹² and found the Missouri Compromise unconstitutional as a taking of property in violation of the Fifth Amendment and as exceeding Congress’s constitutional authority over the territories.

Roger Brooke Taney’s lead opinion in *Dred Scott* was ugly in tone and reach, and was meant to be. More to the point for Lincoln, the opinion—and whatever support it enjoyed within the Court—represented a threat to the

8. ABRAHAM LINCOLN, *To William H. Herndon* (Feb. 15, 1848), in SS&W 68.

9. ABRAHAM LINCOLN, *Protest in the Illinois Legislature on Slavery* (March 3, 1857), in SS&W 9, 10.

10. ABRAHAM LINCOLN, *From Speech on the Kansas-Nebraska Act at Peoria, Illinois* (Oct. 16, 1854), in SS&W 93, 94.

11. *Id.*

12. 60 U.S. (19 How.) 393 (1857).

principles and the very existence of the new Republican Party. First, by denying the power of Congress to preclude slavery in the territories, the decision on its face seemed to undermine the *raison d'être* for the Party. If Congress could not prohibit slavery in the territories, was expansion of the system inevitable? Second, and worse, the decision was a dagger in the heart of Lincoln's rationale for the soul of the Constitution—that whatever set of procedures the document created, at base its purpose was to enforce the convictions of the revolutionary generation manifested in the Declaration of Independence, which contemplated the eventual extinction of slavery. Lincoln eventually captured his larger vision, not surprisingly, in vivid image with Biblical provenance:

the principle of "Liberty to all". . . in our Declaration of Independence. . . has proved an "apple of gold" to us. The Union, and the Constitution, are the picture of silver, subsequently framed around it. The picture was made, not to conceal, or destroy the apple; but to adorn, and preserve it. The picture was made for the apple—not the apple for the picture.¹³

To Lincoln, Taney's *Dred Scott* judgment turned the Declaration of Independence into the by-laws of a white man's club. Blacks could not be citizens, Taney wrote, because "[t]hey had for more than a century been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations, and so far inferior that they had no rights which the white man was bound to respect, and that the negro might justly and lawfully be reduced to slavery for his benefit."¹⁴ The opinion was built by inference, assertion, and a very selective survey of the historical record. (After all, several post-Revolution states had granted citizenship to blacks, with full voting rights and civic status.) One can only imagine Lincoln's reaction as he read the bitter confection Taney created. Lincoln took the law seriously, but by 1857 he may have viewed constitutional law in the Supreme Court as a mug's game.

The Court was dominated by seven Democrats, including five who had been in the *Dred Scott* majority. The same Taney who so forcefully reported the result in *Dred Scott* had declared only a few years earlier in *Prigg v. Pennsylvania*¹⁵ that the Constitution required non-slave owners to vindicate the interests of slave masters, notwithstanding a complete absence of textual direction other than the Fugitive Slave Clause, which seemed to require Congress to detail who owed whom what and under what circumstances. The silver frame was devouring the picture.

Stephen A. Douglas, Lincoln's opponent for the Senate from Illinois in 1858, thought—wrongly, and not for the first time—that he could out-fox Lincoln by alleging that the Republicans, a "sectional party," would "resist" *Dred Scott*. The charge was bogus, and Lincoln properly dismissed it as such.

13. Abraham Lincoln, Fragment on the Constitution and the Union (c. January, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 168, 169 (Roy P. Brasler ed., 1953). Compare with Proverbs 25:11 (King James) ("A word fitly spoken is like apples of gold in a pictures of silver").

14. 60 U.S. (19 How.) at 407.

15. 41 U.S. (16 Pet.) 539 (1842).

He agreed that the decision as to the plaintiff Scott must be honored. But Douglas's allegation provided Lincoln with a neat opportunity to explain the relationship between decisions by the Supreme Court and durable political rules. In terms no lawyer could misapprehend, Lincoln said:

Judicial decisions are of greater or less authority as precedents, according to circumstances. That this should be so, accords both with common sense, and the customary understanding of the legal profession.

If this important decision had been made by the unanimous concurrence of the judges, and without any apparent partisan bias, and in accordance with legal public expectation, and with the steady practice of the departments throughout our history, and had been in no part, based on assumed historical facts which are not really true; or, if wanting in some of these, it had been before the court more than once, and had there been affirmed and re-affirmed through a course of years, it then might be, perhaps would be, factious, nay, even revolutionary, to not acquiesce in it as a precedent.

But when, as it is true we find it wanting in all these claims to the public confidence, it is not resistance, it is not factious, it is not even disrespectful, to treat it as not having yet quite established a settled doctrine for the country.¹⁶

Nearly three years later, provided with a shimmering platform in New York at the Cooper Union, Lincoln was even more dismissive of Taney's decision:

[T]he Court have decided the question for you in a sort of way. . . . When I say the decision was made in a sort of way, I mean it was made in a divided Court, by a bare majority of the Judges, and they not quite agreeing with one another in the reasons for making it; that it is so made as that its avowed supporters disagree with one another about its meaning, and that it was mainly based upon a mistaken statement of fact - the statement in the opinion that "the right of property in a slave is distinctly and expressly affirmed in the Constitution."¹⁷

In others words, only clarity, consensus, and repetition establish settled constitutional policy, transforming *res judicata* to *stare decisis*.¹⁸ The argument allowed Lincoln to temporize and to try to restrain the more volatile elements of the Republican Party, who decried *Dred Scott* and even prepared to attack the Fugitive Slave Act of 1850, a position Lincoln feared would jeopardize the Party's standing with old-line Whigs and Northern Democrats.¹⁹

Lincoln's political caution helped pilot the Republican Party through the fractured four-candidate presidential election of 1860 and set the tone for his inaugural address following the great secession winter when seven states declared their separation from the Union. Lincoln again addressed the authority of the Supreme Court to expound the Constitution, but this time he spoke less

16. ABRAHAM LINCOLN, *From Speech on the Dred Scott Decision at Springfield, Illinois* (June 26, 1857), in SS&W 117, 118.

17. ABRAHAM LINCOLN, *From Address at Cooper Institute, New York City* (Feb. 27, 1860), in SS&W 240, 247-248.

18. LINCOLN, *supra* note 16, in SS & W at 117.

19. ABRAHAM LINCOLN, *To Salmon P. Chase* (June 20, 1859), in SS&W 217.

legally than politically:

[T]he 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.²⁰

How does this declaration, which makes Lincoln sound like Andrew Jackson, square with the position he took against Douglas or expounded at Cooper Union? I think the two statements are consistent, but without the detail expressed in earlier addresses, the language of the inaugural sounds almost like a warning to the Supreme Court that the stakes are now too high to indulge in the brand of heedless exposition that marked *Dred Scott*. The "whole people" will not "resign" to the Court, Lincoln is saying, over one case (which of course is what his predecessor had hoped, and even contrived, to achieve). It is not accidental that the warning occurs immediately after Lincoln discussed the imperative of union and the anarchy of secession.

Throughout the address, Lincoln adopts a conciliatory tone and tells his audience, North and South, "We are not enemies, but friends. We must not be enemies."²¹ He even proclaims "that it will be much safer for all . . . to conform to, and abide by, all those acts which stand unrepealed"²²—even the Fugitive Slave Act. Lincoln was announcing that he was playing by the book, "with no purpose to construe the Constitution or laws, by any hypercritical rules."²³

Of course, over night, that is almost exactly what he was accused of doing. From his inauguration on March 4 to his calling Congress into special session on July 4, Lincoln ran the government with a firm hand, or as Professor Rossiter would later put it, as a self-appointed dictator.²⁴ Although Congress ultimately sanctioned actions Lincoln took before they convened on the Fourth, critics both then and now have argued that the Union was preserved at the expense of the Constitution. Lincoln would and did deny the charge. How he actually behaved and how he explained his actions reveal a man deeply troubled by the accusations of despotism and the risks that his policies, well-intended to be sure, posed for the future.

Let us consider three of the most controversial wartime episodes: the incarceration of John Merryman in the first month of the war, the exile two years later of Clement Vallandigham—both instances of the suspension of habeas corpus—and finally, the most troubling exercise of Presidential power, at least to Lincoln, the promulgation of the Emancipation Proclamation on New Year's Day 1863. Each reveals a President self-consciously at the boundary of his constitutional power, and, in the first two cases, threatening to establish a

20. ABRAHAM LINCOLN, *First Inaugural Address* (March 4, 1861), in SS&W 284, 290.

21. *Id.* at 293.

22. *Id.* at 286.

23. *Id.*

24. ROSSITER, *supra* note 2, at 226.

menacing precedent.

II. *EX PARTE MERRYMAN*²⁵

When hostilities began with Ft. Sumter in April 1861, Lincoln's first priority was Washington, D.C. Sandwiched between slave states, the District was vulnerable and honeycombed with disloyalists employed by the government, spies, and fellow travelers. To protect the District, Lincoln summoned troops from Massachusetts, who came under fire when they traversed Baltimore in late April—resulting in the “patriotic gore that flecked the streets of Baltimore” in the still-honored Maryland state song. One of the leaders of the state militia, which participated in the attack on the Union troops and who burned railroad bridges to frustrate further troop movement, was John Merryman, a prominent local planter. He was taken into custody by Union forces and incarcerated in Ft. McHenry, near Baltimore. His prominence guaranteed access to a lawyer, who filed a petition for a writ of habeas corpus not with the local federal district court but with the Chief Justice of the United States. Taney, a Maryland native, leapt at the opportunity to teach Lincoln a lesson, and agreed to hear the petition “in chambers,” since the Supreme Court was not in session, and the Judiciary Act of 1789 gave him jurisdiction as a single justice over the question.²⁶

What developed was a slapdash judicial hearing that was as much politics as law. Taney rushed to Baltimore, to accommodate, he said, the military commander holding Merryman, and quickly concluded that the petition should be granted. He ordered the military commander to produce Merryman, but he was informed that the prisoner would not be produced. Instead of holding the commander in contempt, Taney announced an oral judgment concluding that Lincoln lacked authority to hold Merryman and that he should be discharged, but he filed no formal opinion until later.

Taney's opinion scorched Lincoln and dismissed any argument that the executive could suspend habeas corpus. The power to suspend resided in Article I, and thus, Taney reasoned, only Congress could suspend the writ, which it had not. Leaning on an opinion by Chief Justice John Marshall in *Ex Parte Bollman*²⁷ more than a half-century before, Taney concluded that he was obliged to order Merryman's release from military custody. Never mind that *Bollman* was distinguishable (he had been charged with a federal crime and held in civil,

25. 17 F. Cas. 144 (1861).

26. The literature on *Merryman* is extremely large and often confused. The most accessible recent treatment is by Bruce A. Ragsdale, *Ex Parte Merryman and Debates of Civil Liberties During the Civil War* (Federal Judicial Center 2007). Mark E. Neely, who has done so much to illuminate the question of civil liberties during the Civil War, has suggested that Taney lacked jurisdiction to issue the writ because §14 of the Judiciary Act of 1789 does not authorize habeas corpus from the Supreme Court in its original jurisdiction. But individual justices could grant relief, as long as the Court was not in session—as it was not when Merryman was arrested. Cf. Mark E. Neely, *The Constitution and Civil Liberties under Lincoln*, in *OUR LINCOLN: NEW PERSPECTIVES ON LINCOLN AND HIS WORLD* 37 (Eric Foner ed., 2008).

27. 8 U.S. (4 Cranch) 75 (1807).

not military, custody); for Taney, the great Chief Justice's provenance was enough. Never mind that the Suspension Clause expressly granted power to neither the legislative nor executive branch, but only specified when the writ could be temporarily abated. And never mind that in *Luther v. Borden*²⁸ Taney himself had acknowledged a president's power to call out the militia to suppress an insurrection—there, the Dorr Rebellion.

Notwithstanding Taney's opinion, the military commander at Ft. McHenry, acting under the commander-in-chief's orders, declined to produce Merryman. Thus, Abraham Lincoln defied a lawful order of the Chief Justice of the United States. Even Lincoln's most energetic defenders flinch at this point. As Judge Richard Posner has observed, "whether Lincoln was authorized to suspend habeas corpus [does not decide] whether he was authorized to flout Chief Justice Roger Taney's order granting habeas corpus, as he did. Officials are obliged to obey judicial orders even when erroneous."²⁹ Rossiter, one of Lincoln's most tenacious modern critics, called Lincoln's behavior "astounding" and wholly lacking authoritative support.³⁰

Not exactly. Putting to one side the predictably wooden defense by the administration by Attorney General Edward Bates' formal opinion,³¹ and the predictably partisan positions by the partisan newspapers, Lincoln enjoyed remarkably strong scholarly support at the time. Horace Binney, the distinguished Philadelphia lawyer, published a sustained critique of Taney's decision,³² and Joel Parker—Royal Professor of Law at Harvard—issued a careful and compelling pamphlet which skewered Taney premise by premise and point by point.³³

Lincoln held his fire until his special address to Congress, which was read, apparently in somewhat of a monotone, by a clerk on July 4, 1861. Although Lincoln sternly defended all of the actions he had taken to date, his tone changed markedly when he addressed the *Merryman* issue. He was obviously sensitive to the criticisms of his policy (including a broadside condemning military arrests written by Benjamin Robbins Curtis,³⁴ the former Justice who had dissented so forcefully in *Dred Scott*). Lincoln did not mount a closely reasoned, legalistic case, but basically rested on two factors—necessity and logic.

First, he famously asked, "To state the question more directly, are all the laws, *but one*, to go unexecuted, and the Government itself go to pieces, lest that

28. 48 U.S. (7 How.) 1 (1849).

29. Richard A. Posner, *Desperate Times, Desperate Measures*, N.Y. TIMES, Aug. 24, 2003 at p. 10 (reviewing DANIEL FARBER, *LINCOLN'S CONSTITUTION* (2003)).

30. ROSSITER, *supra* note 2, at 227.

31. Edward Bates, Letter to President Abraham Lincoln (July 5, 1861), in *THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES*, Ser. II, Vol. II, 20-30 (Washington: Government Printing Office 1902) [hereinafter *Official Records*].

32. HORACE BINNEY, *THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS UNDER THE CONSTITUTION* (C. Sherman & Son ed., Philadelphia, 1862).

33. JOEL PARKER, *HABEAS CORPUS AND MARTIAL LAW; A REVIEW OF THE OPINION OF CHIEF JUSTICE TANEY, in THE CASE OF JOHN MERRYMAN* (John Campbell ed., Philadelphia 1862).

34. B.R. CURTIS, *EXECUTIVE POWER* (Little, Brown and Company ed., Boston 1862).

one be violated? 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?"³⁵ Then he implied that Taney's analysis stood the objective of the Suspension Clause on its head: "[A]s the provision was plainly made for a dangerous emergency, 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, the very assembling of which might be prevented, as was intended in this case, by the rebellion."³⁶ Apparently Lincoln felt his response was sufficient both to defend his suspension of habeas corpus and to justify his non-compliance with Taney's order granting the writ. (In fact, Congress decided to ignore Taney, too, and a year after Lincoln's statement voted to abolish slavery in the territories—a sharp, if somewhat gratuitous, repudiation of *Dred Scott*.)³⁷

So, with a rhetorical question and a logical deduction, Lincoln was personally finished justifying what turned out to be one of the most durably controversial decisions he made during the war. Attorney General Bates was left with the duty of more formally squaring the policy with statutes and precedent, but for Lincoln, a short, somewhat awkward paragraph was enough.

Lincoln's two-point argument is telling about his constitutional thought. He was an experienced lawyer who was capable of crafting conventional, professional arguments steeped in statute and prior decisions, but during the war his strongest arguments on volatile legal issues were directed at larger audiences. At Ottawa, Illinois, during the first debate with Stephen A. Douglas in 1858, Lincoln said: "[P]ublic sentiment is everything. With public sentiment, nothing can fail; without it nothing can succeed. Consequently he who moulds public sentiment, goes deeper than he who enacts statutes or pronounces decisions. He makes statutes and decisions possible or impossible to be executed."³⁸ Lincoln was going over the head of the angry old Chief Justice—who in many respects had stage-managed a constitutional confrontation—and arguing his case to what remained of the Congress and to the public. His case was a practical one but still a constitutional one, based on fidelity to his oath and to the Union established by the document. Lincoln may have been betting that in what was a bitterly uncertain constitutional world, his appeal to the thoughtful sensibilities of the public could re-set the course of Constitutional thought in the proper direction. Near the end of his statement, in what might have otherwise sounded like a conventional homage to the electorate, he reaffirmed what for him was the soul of constitutional sovereignty: "The people themselves, and not their servants, can safely reverse their own deliberate decisions."³⁹

35. ABRAHAM LINCOLN, *Special Message to Congress* (July 4, 1861), in SS&W 300, 307.

36. *Id.*

37. 12 Stat. 432 (June 19, 1862). Earlier, Congress abolished slavery in the District of Columbia. 12 Stat. 376, §1 (April 16, 1862). See generally David P. Currie, *The Civil War Congress*, 73 U. CHI. L. REV. 1131 (2006).

38. ABRAHAM LINCOLN, *From First Lincoln-Douglas Debate, Ottawa, Illinois* (Aug. 21, 1858), in SS&W 149, 150.

39. ABRAHAM LINCOLN, *Message to Congress in Special Session* (July 4, 1861), in SS&W 300,

III. VALLANDIGHAM

My second example also involves a military arrest and a similar rhetorical strategy Lincoln developed to defend it. The difference in the case of Clement Vallandigham is that Lincoln bypassed Congress as his nominal audience and directly addressed some of his public critics, Democrat partisans in upstate New York.

Vallandigham was a dashing and charismatic Copperhead congressman from Ohio who opposed the war and condemned Lincoln's war policies from day one. He was arrested in early May 1863 by General Ambrose Burnside, commander of the Ohio department, based in Cincinnati, for violating his General Order 38, which proclaimed that "all persons found within our lines who commit acts for the benefit of the enemies of our country will be tried as spies or traitors, and if convicted will suffer death."⁴⁰ Lincoln, constantly faced with death warrants for deserting soldiers, feared rear-column disruption of the forces almost as much as direct military engagements. The previous fall, Lincoln had issued a proclamation warning that military arrest and martial law would apply against anyone who discouraged volunteer enlistments, reporting for the draft, "or any disloyal practice, affording aid and comfort to Rebels."⁴¹ Lincoln did not know of Burnside's order nor was he forewarned when Burnside arrested Vallandigham for violating Order 38. Vallandigham had given a major speech on May 1 decrying "King Lincoln" and charging that the war had been fought not to save the Union but to free blacks and to enslave whites.⁴² For two hours, Vallandigham harangued Lincoln and the war while two undercover agents furiously took notes for Burnside. Vallandigham sought federal habeas corpus, which was denied, and Burnside ordered the prisoner to be sent to Ft. Warren in Boston Harbor.

For Lincoln, Burnside's precipitous and unauthorized actions created a political crisis. Burnside was a flamboyant and popular but unreliable general whose most recent command had been at the disastrous defeat at Fredericksburg in December 1862. Relieving Burnside seemed out of the question, but upholding the sentence would fuel Copperhead resentments at a dangerous time in a dangerous place. Vallandigham could not be a martyr, so Lincoln made him a fool: he ordered Burnside to exile Vallandigham "beyond the lines" ⁴³ with rebel forces so he could be "where," Lincoln quipped, "his heart already was."⁴⁴ The maneuver defused the situation, but in city after Northern city there were rallies attacking Lincoln, the Vallandigham incident, and the war itself.

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40. Major-General Burnside, General Orders, No. 38: Hdqrs. Department of the Ohio (April 13, 1863) in OFFICIAL RECORDS, Ser. I, Vol. XXXIII, Pt. 2, at 237.

41. ABRAHAM LINCOLN, *Proclamation Suspending the Writ of Habeas Corpus*, Washington, D.C., Sept. 24, 1862, SS&W 348.

42. FRANK L. KLEMENT, *THE LIMITS OF DISSENT: CLEMENT L. VALLANDIGHAM & THE CIVIL WAR* 154 (1970).

43. *Id.* at 177 (internal citations omitted).

44. DORIS KEARNS GOODWIN, *TEAM OF RIVALS* 523 (2005) (internal citations omitted).

Resolutions, or “Resolves,” were passed in various places, and Lincoln decided to respond, very publicly, to those issued in Albany, New York, and signed by the Democrat Mayor, Erastus Corning.

Lincoln worked harder on the Corning Letter, as it came to be called, than on many of his other writings during the period, and the result was a multi-page document deserving the designation as a State Paper, as his secretaries, John Nicolay and John Hay, put it. More than ten million people read the letter, which Nicolay and Hay thought made a deep impression upon the public mind.⁴⁵ The letter was more than 3700 words long and, without sacrificing gravity, was conversational in tone but closely reasoned. Lincoln defended the Vallandigham punishment, as he understood it, explained his view of public debate in war-time, reminded the Albany Democrats that one of their own, Andrew Jackson, had found it necessary to suspend habeas corpus (after the Battle of New Orleans), but encouraged them, in a conciliatory manner, to meet him not as Democrats but as American citizens: “In this time of national peril, I would have preferred to meet you upon a level one step higher than any party platform.”⁴⁶

By all accounts, Lincoln’s letter was a popular success, and at least two features are especially striking: as he did in the Merryman episode, he turned at critical points in an otherwise meticulously reasoned analysis to homely similes or practical hypotheticals to drive home his case. Against the claim that freedom of speech and due process of law would be permanently suppressed due to the war-time practices, Lincoln replied that he thought that no more likely than “that a man could contract so strong an appetite for emetics during temporary illness as to persist in feeding upon them during the remainder of his healthful life.”⁴⁷ To the objection that Vallandigham was punished for simply opposing the war, Lincoln offered another memorable rhetorical question: “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? . . . I think that in such a case to silence the agitator and save the boy is not only constitutional, but withal a great mercy.”⁴⁸ And to the fear that there would be too many arbitrary military arrests, Lincoln conceded that false positives were naturally possible in a rebellion of such scale, but, after naming a half-dozen generals who had been in the Union army before Ft. Sumter—beginning with Robert E. Lee—he coldly mused, “I think the time not unlikely to come when I shall be blamed for having made too few arrests rather than too many.”⁴⁹

The images are disarming, but the most important substance of the letter was how Lincoln clarified what Vallandigham did and what the scope of public debate was, in his view, in wartime generally and in militarily sensitive locations in particular. My colleague Geof Stone has summarized Lincoln’s position as sanctioning restrictions on speech under two conditions: “(1) the speaker

45. DAVID HERBERT DONALD, LINCOLN 444 (1996).

46. ABRAHAM LINCOLN, *To Erastus Corning and Others* (June 12, 1863), in SS&W 373, 380.

47. *Id.*

48. *Id.* at 379.

49. *Id.* at 378.

specifically intended to cause unlawful conduct, and (2) the speech was likely seriously to interfere with the war effort."⁵⁰ Vallandigham's guilt was satisfied by his knowledge that his speeches may have caused desertions, which Lincoln thought "Mr. V." was duty-bound to discourage, and by the fact that the speeches had already in fact caused harm to the military.

It was said of Lord Mansfield that when he had stated the facts, no one could doubt what the result would be; so, too, with Lincoln. Gen. Burnside decided to arrest Vallandigham because his anti-war speeches fomented public agitation, the same reason that he subsequently shut down the *Chicago Times* newspaper until Lincoln ordered him to desist. But Lincoln infers that Mr. V. was not arrested simply for making a critical speech—that would be "wrong"—but, Lincoln said, "as I understand . . . [Vallandigham was arrested] because he was laboring, with some effect, to prevent the raising of troops; to encourage desertions from the army; and to leave the Rebellion without an adequate military force to suppress it."⁵¹ He was arrested, Lincoln explained, not for damaging the administration but for damaging the army. "As I understand" is a tiny qualification to his summary of the facts that allows Lincoln to defend his impulsive general on much more comfortable legal and political ground, and substantially to narrow the grounds for further arrests. The careful lawyer in Lincoln knew that a precedent is no greater than its most recent authoritative explanation.

IV. EMANCIPATION

My final example is today perhaps the least controversial decision Lincoln made during the war, but which at the time was one of the most explosive and unpopular acts of Lincoln's embattled presidency. At our remove, the questions are more often: why Lincoln did not do more, do it sooner, and do it more eloquently (to Richard Hofstadter, the final Emancipation Proclamation "had all the moral grandeur of a bill of lading"⁵²)? For our purposes today, the question is why did someone who denounced executive emancipation as unconstitutional after nine months in office make a 180-degree turn exactly one year later? For his entire public career, Lincoln had argued that emancipation should be gradual, voluntary, and compensated. In his first Inaugural Address, Lincoln assured the seceding states that he would exercise his powers in accordance with the Constitution, even to the point of continuing to enforce the Fugitive Slave Act. When the war began, that promise became a "dead letter,"⁵³ and Lincoln continued to pursue emancipation in line with his long-held precepts. He tried to work out a plan for voluntary compensated emancipation in Delaware, but the Legislature balked; a few months later, he succeeded in the District of

50. GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* 117 (2004).

51. LINCOLN, *supra* note 46, at 378.

52. RICHARD HOFSTADTER, *THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT* 131 (1948).

53. *See* Currie, *supra* note 37, at 1174.

Columbia.⁵⁴

As happened so often during the war, the issue was forced by two of Lincoln's generals in the field. Congress had pushed the envelope of its war power with the Confiscation Act of 1861, which provided for the forfeiture of slaves who were serving as soldiers or military laborers against the United States. General John C. Fremont, the Republican candidate for president in 1856 and now military commander in Missouri, issued a proclamation in August 1861 declaring that all property of Union enemies—including slaves—be seized and forfeited. Lincoln immediately wrote Fremont to rescind the order, on the grounds that it exceeded both the scope of the Act and military necessity. Under the law of war, as Lincoln understood it, property could only be taken for as long as the army needed it; afterwards, it reverted. As a practical matter, Fremont's proclamation was a political bombshell that threatened to dislodge Missouri from neutral status (and, Lincoln soon discovered, Kentucky as well).

Principle and political necessity made Fremont's position unacceptable, but Lincoln quickly received a private rebuke from his old friend Orville H. Browning, who had been appointed to the Senate from Illinois when Stephen A. Douglas died suddenly. Lincoln, "astonishe[d]" by Browning's letter, replied privately on September 22 that Fremont's proclamation was "*purely political*, and not within the range of *military* law or necessity. . . . The proclamation . . . is simply 'dictatorship.' It assumes that the general may do *anything* he pleases—confiscate the lands and free the slaves of *loyal* people, as well as of disloyal ones."⁵⁵ Lincoln dismissed Browning's criticism and inverted it: "You speak of it as being the only means of *saving* the government. On the contrary it is itself the surrender of government. Can it be pretended that it is any longer the government of the U.S.—any government of Constitution and laws,—wherein a General, or a President, may make permanent rules of property by proclamation?"⁵⁶ When General David Hunter issued a military order in May 1862 purporting to emancipate all slaves in the states of Georgia, Florida, and South Carolina, again Lincoln immediately rescinded the measure, although he was softening his position on the scope of executive power. Instead of the stern rebuff to Fremont and Browning, Lincoln simply told Secretary of the Treasury Salmon P. Chase (who supported Hunter) that "no commanding general shall do such a thing, upon *my* responsibility, without consulting me,"⁵⁷ implying that an order might be possible under the right circumstances, after consultation.

During the summer of 1862, Lincoln turned his mind more and more to the question of emancipation. In mid-July, he tried to convince a delegation representing border states to embrace gradual, compensated emancipation, but the effort was in vain. At the same time, he was reconsidering the scope of his own power with respect to slavery, as his reaction to Hunter's order lightly

54. *Id.* at 1147.

55. ABRAHAM LINCOLN, *To Orville H. Browning* (Sept. 22, 1861), in SS&W 317-318.

56. *Id.* at 318.

57. Abraham Lincoln, *To Salmon P. Chase* (May 17, 1862), in 5 THE COLLECTED WORKS OF ABRAHAM LINCOLN 219 (Roy P. Brasler ed., 1953).

suggests. Two factors weighed on Lincoln's thinking. First, the scope of the war was widening, more troops were needed, and the seemingly interminable Peninsular Campaign was demonstrating how much the rebel forces were utilizing slave labor to build fortifications, serve troops, and generally undergird the war effort. Second, constitutional thought was in ferment. William Whiting, a Boston abolitionist, published an influential pamphlet entitled *The War Powers of the President, and the Legislative Powers of Congress in relation to Rebellion, Treason, and Slavery*.⁵⁸ Whiting, who became solicitor of the War Department, contended that the President enjoyed "full belligerent rights" as commander in chief and thus could seize property, including slaves, being used to wage war against the United States: "This right of seizure and condemnation is harsh . . . as all the proceedings of war are harsh, in the extreme, but is nevertheless lawful."⁵⁹

Pressure was mounting on Lincoln to act decisively on emancipation, and Horace Greeley tried to goad Lincoln with an editorial, "the Prayer of Twenty Millions," urging abolition. Lincoln's famous reply on August 22 disappointed Greeley and the Radicals: "My paramount object in this struggle is to save the Union, and is *not* either to save or to destroy slavery."⁶⁰ But the letter added: "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 I would also do that."⁶¹ Two points escaped most of his critical readers: He was speaking of emancipation in the first person, and he was not hiding behind the Constitution to excuse his posture toward emancipation.

Since July, Lincoln had been working on a draft of the Emancipation Proclamation, and on September 22, shortly after the victory at Antietam, he issued a preliminary version of the Proclamation⁶² announcing his intent on January 1, 1863, to emancipate slaves in states rebelling against the United States, with the exception of border states and areas of rebel states already under federal control. To the extent that the November election was an implicit referendum on Lincoln's war policies, including his planned New Year's Day order, the net result was mixed: Democrats took the Illinois and Indiana legislatures and the governorship of New York, but the Republicans held the House of Representatives and picked up seats in the Senate. The Proclamation was nonetheless duly issued on New Year's Day, "by virtue of the power in me vested as Commander-in-Chief, of the Army and Navy of the United States in time of actual armed rebellion against authority and government of the United States, and as a fit and necessary war measure for suppressing said

58. WILLIAM WHITING, *THE WAR POWERS OF THE PRESIDENT, AND THE LEGISLATIVE POWERS OF CONGRESS IN RELATION TO REBELLION, TREASON, AND SLAVERY* (Boston, 7th ed. 1863) reprinted in . JAMES M. MCPHERSON, *THIS MIGHTY SCOURGE: PERSPECTIVES ON THE CIVIL WAR* 209 (2007)

59. MCPHERSON, *supra* note 58, at 218.

60. ABRAHAM LINCOLN, *To Horace Greeley* (Aug. 22, 1863), in SS&W 343.

61. *Id.*

62. ABRAHAM LINCOLN, *Preliminary Emancipation Proclamation* (Sept. 22, 1862), in SS&W 345.

rebellion”⁶³

Lincoln knew that his *volte face* on emancipation needed explanation,⁶⁴ and chose the forum of a rather public letter to A. G. Hodges, a Kentucky editor, in April 1864. The argument is somewhat condensed but the simile, again, is vivid, especially to a war-weary audience:

[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. Was it possible to lose the nation, and yet preserve the constitution? 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. I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation. Right or wrong, I assumed this ground, and now avow it.⁶⁵

In other words, he concluded over time that the scope of the war and the military utility of slaves to the South warranted the Emancipation Proclamation, which would have been outside his powers when the war began. The argument is based on principle, and Lincoln always yoked replies to his critics in both principle and policy. Had he been more frank in the letter and addressed policy as well, or what he sometimes called practicality, he might have repeated what he is reported to have said after signing the proclamation: “It is my conviction that, had the proclamation been issued even six months earlier than it was, public sentiment would not have sustained it.”⁶⁶

To those who subscribed to the dictator thesis, the Hodges letter has a dark undercurrent: the scope of presidential power, in extremis, may be a function to a large extent to popular will or opinion. Lincoln understood that, and tried to blunt its force by claiming he acted for defensive purposes—to save the Union—and to protect liberty. “I claim,” he wrote in an afterword to Hodges, “not to have controlled events, but confess plainly that events have controlled me.”⁶⁷ Dictators do not deny their capacity; Lincoln did. A few weeks after the final Emancipation Proclamation was signed, Abraham Lincoln appointed Joseph Hooker as the head of the Army of the Potomac. He wrote a personal letter to Hooker that was punctuated with left-handed compliments and a sharp admonition: “I have heard, in such way as to believe it, of your recently saying that both the Army and the Government needed a Dictator. Of course it was not *for* this, but in spite of it, that I have given you the command.”⁶⁸

63. ABRAHAM LINCOLN, *Final Emancipation Proclamation* (Jan. 1, 1863), in SS&W 368.

64. Privately, he had detailed his position in a letter to his old friend James C. Conkling, whom he admonished to read the document slowly. ABRAHAM LINCOLN, *To James C. Conkling* (Aug. 26, 1863), in SS&W 389.

65. ABRAHAM LINCOLN, *To Albert G. Hodges* (April 4, 1864), in SS&W 419, 419-20.

66. KEARNS GOODWIN, *supra* note 44, at 501-502 (internal citations omitted).

67. LINCOLN, *supra* note 65, at 421.

68. ABRAHAM LINCOLN, *To Joseph Hooker* (Jan. 26, 1863), in SS&W 371. For an earlier admonition to a general against assuming dictatorial power, see ABRAHAM LINCOLN, *To John C. Frémont* (Sept. 11, 1861), in SS&W 316, 318.