

Abraham Lincoln and the Development of the “War Powers” of the Presidency

By conferring on the President the title of “commander in chief,” the Constitution created an awkward and undefined area of presidential prerogative. The first President to have to confront this ambiguity was Abraham Lincoln, who developed a presidential “war powers” doctrine based on his presidential oath, the Constitution’s “republican guarantee,” and the necessity imposed by the novelty of a civil war. This doctrine was seriously contested in Lincoln’s time by both Congress and the judiciary, and it continues to be an unresolved constitutional question in the present. But Lincoln’s use of such war powers is one demonstration of how a doctrine aimed at awarding the President unilateral powers to override civil liberties safeguards need not create a lethal threat to democratic and constitutional government.

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On the day that Charles Sumner heard about the firing on Fort Sumter, he immediately took himself to the White House to tell Abraham Lincoln (as Sumner would tell the President so many more times during the course of the next two years) that the war had delivered slavery into the President’s hands for destruction. Why the Civil War—not Congress or the state legislatures—should be the mechanism for emancipation came down to two words: “I ... told him,” Sumner said, “that under the war power the right had come to him to emancipate the slaves.” And if Lincoln had pressed Sumner for more details, the President would have learned that Sumner believed that the President’s *war power* gave him more than just the opportunity to emancipate slaves. Sumner argued that the war power of the President—

... is above the Constitution, because, when set in motion, it knows no other law. ... The civil power, in mass and in detail, is superseded, and all rights are held subordinate to this military magistracy. All other agencies, small and great, executive, legislative, and even judicial, are absorbed in this transcendent triune power, which, for the time, declares its absolute will, while it holds alike the scales of justice and the sword of the executioner.¹

“The existence of this power,” Sumner triumphantly concluded, is something “nobody questions.”² People might have said that it was typical of Charles Sumner to announce

as an accepted fact something that very few people understood and one that still fewer agreed upon.

The lack of agreement began with the very term, “war power,” which, inconveniently for Sumner’s argument, does not even exist in the Constitution that Sumner believed it superseded. And the debate about the term ran from that moment through the four most pressing issues of the Civil War: the suspension of habeas corpus; the confiscation of rebels’ property; the imprisonment and trial of rebel sympathizers and Northern dissidents; and, ultimately, the emancipation of the slaves. And the debate continued—and continues to this day—to run through the seizures of German property during both world wars, detention of the *Nisei* in 1942, Truman’s nationalization of the steel industry, the Vietnam War, the failed Iranian hostage rescue, Lebanon, Grenada, and the gates of Guantanamo Bay. Despite the passing of 140 years, Supreme Court opinions, and the War Powers Act of 1973, we are, in fact, no closer to a comprehensive definition of the war powers of the presidency than Charles Sumner was in 1861. And so it might be instructive to take this opportunity to see in what ways Abraham Lincoln thought it was possible to take Sumner’s advice.

The Constitution splits the responsibility for war: Article I, § 8, gives Congress the power to announce the legal state of war (in other words, to “declare War”) and to authorize the raising of an army and a navy, to supervise the state militias, and to “provide for” calling out those militias “to execute the Laws of the Union, suppress Insurrections and repel Invasions”; but Article II, § 2, lodges the responsibility for putting those forces into play in an entirely different branch of the government—the President, who shall be “Commander in Chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual Service of the United States.” And once such wars were over, the power to conclude peace was also split: the President was given the power to “make Treaties,” but only with the consent of two-thirds of the Senate. Dividing the power to wage war between the legislative branch and the executive branch looked odd against the background of the English past, where the making of both war and peace were prerogatives of the Crown. However, the split made sense to the architects of the Constitution, who had been bred on John Locke’s division of governmental powers into domestic (governed by the legislature) and the “federative” (the relations between a society and other nations, which Locke confined to the executive branch). The framers were



also convinced that “the history of human conduct does not warrant that exalted opinion of human virtue, which would make it wise in a nation to commit interests of so delicate and momentous a kind ... to the sole disposal of a ... president of the United States.”³

But supposing that the power to make war actually could, according to this new model, be divided between Congress and the presidency, what exactly were the powers comprehended under the President’s title of “Commander in Chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual Service of the United States”? And no one had any very clear answer. In discussing the powers of the presidency in his celebrated *Commentaries*, Chancellor James Kent never breathed a word about any “war powers.” In fact, Kent limited the operation of wartime powers of seizure and confiscation to an act of Congress. Alexander Hamilton, in the *Federalist*, No. 69, believed that the office of commander in chief “would amount to nothing more than the supreme command and direction of the military and naval forces, as the first general and admiral of the Confederacy,” but he saw this is little more than acting as a sort of general coordinator of military actions—similar to the power that “the governor of New York” exercised over the militia—rather than serving as a military officer in direct command of armies in the field. And the venerable Justice Joseph Story actually believed that Congress ought to pass a consent resolution before allowing a president to take up personal military command. But in 1795, George Washington took the commander in chief title literally and rode out at the head of United States forces (with Hamilton at his side) to suppress the Whiskey Rebellion. Similarly, when the HMS *Leopard* shot up the U.S. frigate *Chesapeake* in 1807 for refusing an order to heave to and allow a search of the American crew

for British “deserters,” Thomas Jefferson immediately took steps to purchase military supplies entirely on his own authority as President.⁴

The nearest legal cognate to the war powers of the President was martial law, but even here, the parallels were almost useless. In fact, there was only one significant example of the American use of martial law, and it did not bode well for any attempt to create a broad-based doctrine of presidential war powers. In December 1814, Gen. Andrew Jackson proclaimed a state of martial law in New Orleans, thereby suspending the writ of habeas corpus and imposing a curfew, a civilian draft, and a requirement that any movements in or out of the city be registered with his adjutant-general. Federal District Judge Dominick Hall defied Jackson, and Jackson expelled Hall from the city. But when news of the Treaty of Ghent arrived in New Orleans on March 13, 1815, Hall promptly cited Jackson for contempt of court and fined him; Secretary of War Alexander Dallas unsympathetically advised Jackson to pay the fine. As Jackson learned, the use of martial law—which chiefly involved suspension of the writ of habeas corpus and closure of the civil courts, temporary seizures of property, and rule by the military—stuck grotesquely in American throats as a throwback to British tyranny.⁵ Martial law, wrote Supreme Court Justice Levi Woodbury in 1849, could be used by “a commanding officer of troops” only to govern his “camp” and “its environs and the near field of his military operations,” but not an inch beyond. “The writ of habeas corpus ... is as much in force in intestine war as in peace,” Woodbury declared, “and the empire of the laws is equally to be upheld.”⁶

But not without opinions, however. In 1842, John Quincy Adams had warned Southerners that, in the event of a slave insurrection or a war with Great Britain, Congress

had the “full and plenary power” to emancipate slaves if it thought such an emancipation would be useful in restoring national order or repelling invasion. “It is a war power,” and even though that power had never actually been “called into exercise under the present Constitution of the United States,” it was “a settled maxim of the law of nations” that, in time of war, “the military supersedes the civil power.”⁷ Adams made no attempt to explain whether he thought this “war power” belonged jointly or separately to Congress or the President; at times, Adams seemed to be doing nothing more than justifying the use of martial law as a weapon of emancipation. That was enough for Charles Sumner, though, who liked to think of himself as Adams’ Elisha: 19 years to the day after Adams’ “war powers” speech, Sumner was in Abraham Lincoln’s office, beseeching the President to do what Adams had done.

Sumner liked to boast that he was “the first, who in our day, called for this exercise of power.” This claim, strictly speaking, was not true. William Lloyd Garrison issued a pamphlet-sized reprint of John Quincy Adams’ speeches on war powers in order to make his case, and Adams’ son, Charles Francis Adams (whom Lincoln would pick to represent the United States as American minister to Great Britain) agreed that “under the war power we can do what is ... necessary for the purposes of the war, as justified by humanity, good sense, and the consent of Christendom. I know no other limits.”⁸ Necessity, however, could take a number of astonishing forms: military tribunals acting under different rules of justice than civil courts, arrests without warrants and imprisonment without trials, surveillance, and (even if indirectly) intimidation of the press.

Nor was it clear what the appropriate reactions from the courts should be: Should the courts yield the ground to executive unilateralism on the grounds that the President and the military have to operate by their own rules and expertise in time of war, or is it the task of the courts to exercise a skeptical restraint on executive powers? Judges, after all, are not soldiers and do not have access to the information soldiers possess about enemy intentions, nor are the courts in the position to move as swiftly as the military does in response to enemy threats. On the other hand, the very atmosphere of wartime emergency has a nasty habit of causing public panic and a jittery willingness to acquiesce when the military begins chipping away at civil liberties; and the nation’s executive and military may display an equally nasty penchant for ratcheting up their demands for more powers once one level of special powers has been conceded. Moreover, this perspective spoke to only potential conflicts between the executive branch and the judiciary. What role, if any, should Congress play? All these questions, wrapped in a combined atmosphere of novelty and crisis, were presented to Lincoln, Congress, and the courts in 1861, and it took the first two years of the Civil War—and Lincoln’s increasingly messy and unpopular use of suspensions of the writ of habeas corpus, the creation of federal military districts with authority to detain and try suspected rebels, the enlistment of volunteers and the diversion of funds to equip them without congressional sanction, the blockade,

and, most momentous of all, the emancipation of the Confederacy’s slaves by presidential proclamation—before a set of specific justifications for the exercise of presidential “war powers” began to crystallize into a reasonable doctrine.

That doctrine came to rest on three legs: (1) the presidential oath of office, (2) the constitutional requirement to guarantee the states a republican form of government, and (3) the dictates of necessity. The “oath” justification was posed most forcibly in 1863 by a New York lawyer, Grosvenor Lowrey, who would become more famous after the war as Thomas Edison’s lawyer and fund-raiser. According to Lowrey, “It is the duty” (and Lowrey wanted the emphasis placed squarely on the word “duty”) “of the Commander-in-chief to subdue a great number of persons actively engaged in supporting the war.” His oath to “preserve, protect, and defend” obligated Lincoln to use any and all means to subdue the rebellion, and neglecting the use of any means to do so would be grounds for impeachment.⁹ Similarly, Joel Prentiss Bishop, a Boston jurist, argued that Lincoln was obligated to flex the powers of war because of the Constitution’s guarantee “to every State in this Union” of “a Republican Form of Government” (Article IV, § 4). After all, “A republican form of government implies the voluntary suffrage of the people,” Bishop reasoned; because such a government did not exist in rebellious South Carolina, “the Constitution ... lays its power ... upon the President” and authorizes him to take any measure that will restore a “Republican Government.”¹⁰ For the radical Republicans in Congress, those measures could include the creation of “a military tribunal ... to follow the army, and as we conquer their territory, sell to the highest bidder the lands of every rebel, to military occupants, who, with arms in their hands, shall take resident possession by themselves, or their tenants, and be ready to defend it against all comers.” But it was Horace Greeley, who used the pages of the *New York Tribune’s* short-lived monthly magazine, *The Continental Monthly*, to bypass any constitutional niceties and justified the use of war powers by the president purely on the grounds of necessity. “Who but a fool would question the right of a man to strike a dagger to the heart of the assassin whose grasp was on his throat, because there is a law against the private use of deadly weapons?” the *Monthly* asked in its October 1862 issue. Just so in war: the right of survival overrides any constitutional restraint ordinarily applied to the President. According to *The Continental Monthly*, “In such a time, they must all give way to the supreme necessity of saving the national existence.”¹¹

But were the people who questioned the war powers doctrine really fools?¹² Lincoln’s own party in Congress was a good deal less than united over the presidential war powers doctrine, partly because the radical Republicans wanted the war powers for themselves, and partly because a number of moderate Republicans were convinced that equipping the President with nonconstitutional powers for the purpose of defending the Constitution might create a cure worse than the disease. Orville Hickman Browning, one of Lincoln’s closest friends and the Illinois resident appointed to fill Stephen A. Douglas’ empty seat in the Senate in 1861, balked at “the doctrine ... in favor of absolute power in the

hands of the President, under the name of Commander-in-Chief," calling it "the most dangerous doctrine ever advocated under a constitutional Government. ... Unless we can save the Constitution with the Union, we had better let them both go." Benjamin Curtis, who had co-authored the minority dissent in the *Dred Scott* decision in 1857, did not doubt that Lincoln was "honestly desirous to do his duty to the country," but Justice Curtis drew the line at recognizing Lincoln's possession of some "implied powers of the President as commander-in-chief in time of war." The title "commander in chief" only allowed Lincoln to "do what generals in the field are allowed to do within the sphere of their actual operations." That did not, however, include the various powers that Lincoln seemed to be exercising under the rubric of that title. "I do not yet see that it depends upon his executive decree whether ... my neighbors and myself ... should be subjected to the possibility of military arrest and imprisonment, and trial before a military commission. ..." Even Grosvenor Lowrey had to admit that, even though the war powers "are the faithful friends and servants of the Constitution, they are not constitutional powers; and I am compelled to call them extra-constitutional for want of a better name."¹³

And that was only what Lincoln's friends were saying. Former Whigs (whose party had come into being to oppose the armed despotism of Andrew Jackson, the "military chieftain"), outright Southern sympathizers, racist demagogues horrified at the prospect of emancipation, and Northern Democrats struggling to regain their equilibrium after the electoral defeat of 1860—all joined in a wail of denunciation, complaining that (1) no presidential war powers existed or had ever existed; (2) if they did exist, nothing that Lincoln had done qualified as a war power; and (3) if they did exist, exercising them required the cooperation of Congress and the judiciary. According to Lincoln's opponents on this issue, by ignoring those objections, Lincoln was a far greater threat to the Constitution and liberty than the Confederacy was.¹⁴ The nonagenarian Kentucky jurist Samuel Smith Nicholas was shocked that any president would think of using "that immemorial tyrants' plea, *necessity*," which Nicholas believed the Founders had "intended to extirpate utterly from our system. ... I have not the language to express the surprise, not to say horror, with which I have witnessed the promulgation of these opinions." Robert Winthrop, the venerable Massachusetts Whig and one-time Speaker of the House, agreed that invoking such a thing as "war powers" was "abhorrent to every instinct of my soul, to every dictate of my judgment, to every principle which I cherish as a statesman or as a Christian." Joel Parker, the Royall Professor of Law at Harvard Law School, upheld Lincoln's suspension of habeas corpus in 1861, but he stumbled at the extension of military powers further than an officer's "camp ... its environs and the near field of his military operations." And not only did Parker attack the legitimacy of issuing a presidential Emancipation Proclamation, but in 1862 he also launched a failed bid to oust Charles Sumner from his Senate seat. The idea that a president could emancipate slaves generally across the Confederacy and declare them "forever free," even after

the conclusion of hostilities, was injecting "the poison of despotic principles ... into the system of the Constitution."¹⁵ And Montgomery Throop, a New York lawyer, complained that having any such war power in the President's hands "in connection with the power of arbitrary arrests, will give the Constitution a speedy and effective coup-de-grace." The Democratic newspaper *The Old Guard* simply announced: "There is no such thing as a war power known to this country." The "war power," complained Philadelphia Democrat Thomas Jefferson Miles, was merely a tool of the "so-called Republican, but really Abolition party," to silence free speech as part of a "premeditated conspiracy to destroy the Constitution," the first step of which had been "the nomination of Abraham Lincoln at Chicago."¹⁶

None would have been more surprised at being fingered as the figurehead of a conspiracy to impose a war powers despotism than Abraham Lincoln. Lincoln had never shared much of Victorian Romanticism's glorification of men-at-arms; he had burned his fingers as a member of Congress in 1848 by questioning James K. Polk's rationale for war with Mexico, and he largely suspected that most of the professional military men of the republic were Democrats and unsympathetic to his administration. Jefferson Davis, Lincoln complained "had known all the officers of the regular army. I had never seen but three of them before I came to Washington as President."¹⁷ Nor, for that matter, did Lincoln ever try to construct a comprehensive doctrine of presidential war powers for use in the ways Thomas Jefferson Miles and Joel Parker feared. If anything, Lincoln's earlier Whig political inclinations inclined him to defer to Congress in taking up any national initiatives. "By the Constitution, the executive may recommend measures which he may think proper; and he may veto those he thinks Unproper; and it is supposed he may add to these certain indirect influences to affect the action of congress." But for more than that, Lincoln maintained that his "political education strongly inclines me against a very free use of any of these means, by the Executive, to control the legislation of the country. As a rule, I think it better that congress should originate, as well as perfect its measures, without external bias."¹⁸

What Lincoln did take seriously, however, was his oath of office, and as Lincoln developed a doctrine of war powers, this is what became his starting point. "You can have no conflict, without being yourselves the aggressors," he warned the secessionists in his first Inaugural Address, "You have no oath registered in Heaven to destroy the government, while I shall have the most solemn one to 'preserve, protect and defend' it." The oath imposed on him a "duty ... to administer the present government, as it came to his hands, and to transmit it, unimpaired by him, to his successor." Preserving the Union, he repeated, is what "the Constitution itself expressly enjoins upon me," and he wanted to add (but struck out from the final version) the ominous promise that while secessionists "can forbear the assault upon it, I can not shrink from the defense of it."¹⁹ This was not a particularly aggressive way of announcing that disunion would be resisted by whatever

means Lincoln decided to use; as in so many of his key writings, the voice is a passive one, as though he were being forced into a task he would normally find unpleasant were it not for the dictates of the situation. But anyone who mistook Lincoln's use of the passive voice as a statement of uncertainty soon learned that his conviction—that the scope of presidential response is narrowed by the actions of others—made him take the most vigorous forms of action. And anyone who imagined that Lincoln took the oath of office as a mere rhetorical formality would soon discover how painfully dear the idea of honor—of fidelity to promises above all else—was to him.²⁰

Lincoln did not expect, however, that the oath would plunge him into civil war. "It shall be my endeavor to preserve the peace of this country so far as it can possibly be done, consistently with the maintenance of the institutions of the country," he promised a pre-inaugural crowd in Harrisburg, Pa. "With my consent, or without my great displeasure, this country shall never witness the shedding of one drop of blood in fraternal strife."²¹ He negotiated strenuously to avoid a clash over Fort Sumter, even to the point of promising Alexander Boteler that he would discourage the final session of the 36th Congress from passing a bill authorizing the militia to be called up.²² And, unlike Andrew Jackson in 1832, he sent, not an army, but an unarmed transport to relieve the Sumter garrison—only to have the Confederates bombard Fort Sumter into submission before the supplies could reach the fort. Lincoln was surprised yet again when, under the terms of the Militia Act of 1795, he called up 75,000 state militia for the statutory three months of service—only to have the governors of Delaware and Maryland reply that their militia would be available for defending only the capital, and the governors of Virginia, Tennessee, Kentucky, and Arkansas state frankly that their militias would "not be furnished to the powers at Washington for any such use or purpose as they have in view."²³ But worst of all, Lincoln had to endure an agonizing four weeks after the firing on Sumter waiting for the militia of the Northern states to force their way through to the capital, while government employees were mustered to defend the White House, General Winfield Scott sandbagged the Treasury building as a last-stand bunker, and Lincoln's two small sons anxiously built a pitiful little fort of their own on the White House roof. "All the troubles and anxieties of his life had not equaled those which intervened between this time and the fall of Sumter," he told Orville Hickman Browning on July 3, 1861.²⁴ And it was out of that dilemma that Lincoln grasped the second leg of the war powers doctrine: necessity.

It was primarily necessity that impelled Lincoln to issue, after the fiasco of the militia call-up, a call for state volunteer units and for an expansion of the regular army (and an appropriation of funds for equipment). It was also necessity that led him to suspend the writ of habeas corpus in order to assist in the detention of rebel saboteurs along the Maryland rail and telegraph lines.²⁵ Congress was not in session at the time Fort Sumter was fired on, and it was impossible to call a special session before the summer, because too many congressional districts in the vital border states were still holding congressional elections through the spring. "No choice was

left but to call out the war power of the Government." He would not state categorically whether "these measures" were "strictly legal or not," but they did meet "a public necessity." After all, it seemed to Lincoln absurd that "all the laws" were to be overthrown by the rebels, while "the government itself" should "go to pieces" as the President observed the constitutional requirements of congressional approval. But necessity was not Lincoln's only argument: harking back to the sanctity of his oath, he asked, "In such a case, would not the official oath be broken, if the government should be overthrown" while Lincoln had the power to preserve it by "yielding to partial, and temporary departures, from necessity?" And, he added (reaching for the third leg of the war powers doctrine), was the war power not also mandated by the constitutional guarantee of "Republican" government? "The Constitution provides, and all the States have accepted the provision, that 'The United States shall guarantee to every State in this Union a Republican Form of Government.'" Secession, however, was the very antithesis of a republican government, and "to prevent" secession "is an indispensable means, to the end, of maintaining the guaranty mentioned; and when an end is lawful and obligatory, the indispensable means to it, are also lawful, and obligatory." As he confidentially told Lyman Trumbull, he "did not know of any law to authorize some of the things he had done; but he thought there was a necessity for them, & that to save the constitution & the laws generally, it might be better to do some illegal acts, rather than suffer all to be overthrown."²⁶

Hovering behind these points, however, was a larger, vaguer notion of constitutional authority—one that could justify actions that were not just invisible in the Constitution but actually contradicted its express statements. In spring 1861, the westernmost counties of Virginia repudiated the Virginia secession ordinance, organized themselves as the "restored" government of Virginia, and in May 1862, petitioned Congress for recognition as an entirely new state. The West Virginia statehood bill was bitterly opposed in Congress by antiadministration Democrats for its "utter and flagrant unconstitutionality"—and for once, they could quote an explicit ban in the Constitution: in Article IV, § 3, which states that existing states cannot be subdivided "without the consent of the Legislatures of the States concerned." This proviso caught Lincoln in a dilemma of his own manufacturing, because all along he had insisted that secession was a constitutional impossibility and that, therefore, Virginia had never legally left the Union—or, presumably, surrendered its right to consent to its own division. When the bill finally ended up on Lincoln's desk in December 1862, Lincoln was so troubled about signing it that he convened a special cabinet meeting, requiring all members to submit written opinions, to discuss the issue. In the end, however, Lincoln signed the bill, and his justification was almost cloaked in a form of mysticism. The West Virginia seceders were, strictly speaking, asking for something that the Constitution forbade by its letter. But there was more to the Constitution than the letter of the law. In 1861, Lincoln reflected on the struggles of the Revolutionary War, and it struck him that "there must have been something more than common that those men struggled for ... something

even more than National Independence,” and that was the “great promise to all the people of the world to all time to come”—the promise of democracy itself—“that in due time the weights should be lifted from the shoulders of all men, and that all should have an equal chance.” The Constitution, as he wrote during the secession winter of 1860–1861, was a means to preserving that principle, not an end in itself—and certainly not a suicide pact that those opposed to the Union could twist to its own destruction:

The assertion of that principle, at that time, was the word, “fitly spoken” which 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.

The West Virginians, by seceding from secession, had put themselves on the side of the angels, and Lincoln was not about to punish them for violating the letter of the Constitution when they had risked so much to save its spirit. “It is said, the devil takes care of his own,” Lincoln wrote. “Much more should a good spirit—the spirit of the Constitution and the Union—take care of its own. I think it can not do less, and live.”²⁷

Overriding the letter of the Constitution in favor of its democratic spirit was not an argument Lincoln liked to resort to, and using it on this occasion drove his critics to ask whether this was simply a fancy way of saying that Lincoln “can proceed step by step to grasp the reins of absolute power.” Even the argument based on necessity was “one of the most startling exercises of the one-man power—which the history of human government, free or despotic, ever witnessed.”²⁸ And so it went through the course of the war, as the Lincoln administration proceeded to expand its suspensions of habeas corpus, arrest truculent members of the Maryland legislature who were agitating for secession, impose an ever-escalating series of conscription measures, levy direct taxes on incomes, conduct a program of military arrests that were estimated to have imprisoned 38,000 people (including a former U.S. Congressman, Clement Vallandigham) in 1865, and shut down two Northern newspapers. “This assumption of power,” complained the New York State Democratic Committee in a public letter in May 1863, “not only abrogates the right of the people ... but it strikes a fatal blow at the supremacy of law and the authority of the State and Federal Constitution.”²⁹

But did it? Lincoln “was greatly moved—more angry than I ever saw him,” according to Attorney General Edward Bates in fall 1863, over state judges who freed civilians detained by military tribunals, and the President frankly believed that these interpositions had more to do with Democratic resistance to his politics than it did with concern over the implications of the war powers on civil liberties. Lincoln “declared that it was a formed plan of the democratic copperheads, deliberately acted out to defeat the Govt., and aid the enemy.” As Mark Neely showed in 1991, the estimates of the military arrests made under the

Lincoln administration were wildly exaggerated; in fact, the total number of arrests probably amounted to no more than 13,535, by Neely’s reckoning—and of those, vanishingly few occurred north of the Mason-Dixon Line. By far, the bulk of Lincoln’s military detentions were of what we today might call “enemy combatants”—British nationals crewing blockade runners, smugglers, draft rioters, guerrillas—as well as of corrupt war contractors, deserters, and bounty jumpers. If anything, Lincoln once remarked, people were more likely to look back on the Civil War and wonder why he didn’t exercise the war powers with a harder hand: “I think the time not unlikely to come when I shall be blamed for having made too few arrests rather than too many,” Lincoln replied to New York’s Democrats. In fact, rather than stifling liberty, it was precisely the doctrine of presidential war powers that gave Lincoln the opening he needed to proclaim emancipation—“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 the authority and government of the United States, and as a proper and necessary war measure”—and thus to dodge the bullet of a federal court challenge if he had issued the Emancipation Proclamation as a civil decree.³⁰

In the end, Lincoln’s implementation of presidential war powers went in precisely the opposite direction from the way his critics had feared it would go. More than necessity, or the oath, or the republican guarantee (which might contain little or nothing in the way of self-limitations), it was the constant remembrance in Lincoln’s mind that the war powers were a means, not an end, to the promotion of democracy that kept Lincoln from becoming the outright dictator that his enemies—and some of his friends—feared. “I do not intend to be a tyrant,” Lincoln said in 1863 to a delegation of radical Republicans who wanted more vigorous prosecution of dissidents: “I must make a dividing-line somewhere between those who are the opponents of the government and those who only oppose peculiar features of my administration while they sustain the government.” And when Treasury Secretary Salmon Chase urged Lincoln to expand the scope of the Emancipation Proclamation to include the slaves of the border states as well as those of the Confederacy, Lincoln sharply demurred: “The exemptions were made because the military necessity did not apply to the exempted localities. ... If I take the step must I not do so, without the argument of military necessity, and so, without any argument, except the one that I think the measure politically expedient, and morally right ... would I not thus be in the boundless field of absolutism?”³¹ He frequently reiterated his belief that, however sweeping his war powers might be, they terminated the moment the war was over, and after that moment, he was as subservient to the dictates of Congress and the courts as anyone else; and this even included the power to grant emancipation. At the Hampton Roads Peace Conference in February 1865, he admitted to Alexander H. Stephens that, once the war was over, emancipation would become “a judicial question. How the courts would decide it, he did not know and could give no answer.” If the courts overturned the Emancipation Proclamation, Lincoln

would have to either acquiesce or resign from office, and, although he left no doubt what option he would exercise, forcible presidential resistance was not one of his choices.³² And the federal judiciary, for its part, generally stood aside and refused to use the war as an opportunity to bind the war powers doctrine too tightly by judicial dictum. Consistent with Lincoln's pattern of interposing his war powers only in specific instances, the judiciary set a similar pattern of avoiding explicit challenges to the war powers. Even at moments when the Supreme Court has questioned certain presidential actions, it has done so on grounds other than the president's claim to have the war powers of a commander in chief.³³

Thus, even without articulating a detailed description of presidential war powers, Lincoln succeeded in demonstrating that such war powers could exist outside the normal boundaries of the Constitution without those powers automatically destabilizing the Constitution itself. As Chief Justice Charles Evans Hughes once remarked, "While we are at war, we are not in revolution." Neither the Constitution nor the idea of democracy was so fragile that they could not survive the taking-up of arms—and of unusual powers—in their own defense, and especially when those powers were consigned to the hands of a leader who had such painstaking reverence for constitutional and democratic authority. Thaddeus Stevens, who had weighed Lincoln so often in the balance and found him wanting for *not* exercising his war powers more relentlessly, paid a tribute to Lincoln (which was difficult for Stevens) describing him as "the calm statesman ... who will lead you to an honorable peace and to permanent liberty. ... For purity of heart and firmness of character he would compare well with the best of the conscript fathers."³⁴ Lincoln's construction of the presidential war powers was neither as sweeping nor as dictatorial as the jurists feared or the opposition complained of, and in an ironic way, it was precisely Lincoln's refusal to press the war powers to the extent that they feared that may have cost him his life. He would not surround himself with military escorts, he remarked to Charles Graham Halpine, because it would send too imperial a message about his idea of himself as President. "It would never do for a president to have guards with drawn sabres at his door, as if he fancied he were, or were trying to be, or were assuming to be, an emperor."³⁵ Perhaps, had Lincoln applied those war powers to his own protection, he might not have come to so tragic, and so untimely, an end. **TFL**

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Endnotes

¹David Donald, CHARLES SUMNER AND THE COMING OF THE CIVIL WAR 388 (Knopf 1960); "The Hon. C. Sumner on a War

for Emancipation," THE ANTI-SLAVERY REPORTER 246 (Nov. 1, 1861).

²*Id.*

³John Locke, TWO TREATISES OF GOVERNMENT 277, 411–412 (Peter Laslett ed., Cambridge 1965); Alexander Hamilton, THE FEDERALIST, No. 74 389 (G.W. Carey and James McClellan eds. 2001).

⁴Chancellor James Kent, 1 COMMENTARIES ON AMERICAN LAW 67, 295–303 (G.F. Comstock ed. 1867); Louis Fisher, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 286 (Princeton 1985); Alexander Hamilton, THE FEDERALIST, No. 69 357; Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1486 (1833); Caspar W. Weinberger, *Dangerous Constraints on the President's War Powers*, THE FETTERED PRESIDENCY: LEGAL RESTRAINTS ON THE EXECUTIVE BRANCH 97–98 (G.L. Cravitz and Jeremy A. Rabkin eds. 1989).

⁵Robert V. Remini, ANDREW JACKSON AND THE COURSE OF AMERICAN EMPIRE, 1767–1821 207, 313–315 (1977).

⁶Levi Woodbury, *Martial Law in Rhode Island*, 2 WRITINGS OF LEVI WOODBURY, LL.D., POLITICAL, JUDICIAL AND LITERARY 101, 104 (1852).

⁷John Quincy Adams, *Abolition of Slavery*, CONGRESSIONAL GLOBE 498–499 (May 25, 1836), 24th Congress, 1st session; and "Speech of the Hon. J.Q. Adams" (May 25, 1836), 24th Congress, 1st session (Appendix), 448; John Quincy Adams, *Intercourse with Foreign Nations*, CONGRESSIONAL GLOBE 429 (April 15, 1842), 27th Congress, 2nd session; Charles Francis Adams, *John Quincy Adams and Martial Law*, 15 PROCEEDINGS OF THE MASSACHUSETTS HISTORICAL SOCIETY 439–444 (January 1902).

⁸Charles Sumner to John Murray Forbes (Dec. 30, 1862), in 2 THE SELECTED LETTERS OF CHARLES SUMNER 136 (Beverly Wilson Palmer ed. 1990); Charles Francis Adams, 2 RICHARD HENRY DANA: A BIOGRAPHY 259–260 (1891); William Whiting, WAR POWERS UNDER THE CONSTITUTION OF THE UNITED STATES 11 (1864, reprint 1971).

⁹Grosvenor Porter Lowrey, THE COMMANDER-IN-CHIEF: A DEFENCE UPON LEGAL GROUNDS OF THE PROCLAMATION OF EMANCIPATION 20 (1863); Leonard Bacon, *Reply to Professor Parker*, 22 NEW ENGLANDER AND YALE REV. 196 (April 1863).

¹⁰Joel Prentiss Bishop, THOUGHTS FOR THE TIMES 24 (Boston, 1863).

¹¹Thaddeus Stevens, *Speech on Conquered Provinces, April 4, 1863, to the Union League of Lancaster*, 1 SELECTED PAPERS OF THADDEUS STEVENS 392 (Beverly Wilson Palmer ed. 1997); *The Constitution as It Is—The Union as It Was*, 2 THE CONTINENTAL MONTHLY 379 (October 1862).

¹²Isaac Newton Arnold, THE HISTORY OF ABRAHAM LINCOLN AND THE OVERTHROW OF SLAVERY 702 (Chicago, 1866).

¹³Orville Hickman Browning, *Confiscation of Property* CONGRESSIONAL GLOBE 1136 (March 10, 1862), 37th Congress, 2nd session, and *Confiscation of Rebel Property* CONGRESSIONAL GLOBE 2972–2973 (June 25, 1862); Benjamin Robbins Curtis, *Executive Power*, 2 A MEMOIR OF BENJAMIN ROBBINS CURTIS, LL.D., WITH SOME OF HIS PROFESSIONAL AND MISCELLANEOUS WRITINGS



310, 313, 320–321 (1879); Lowrey, *THE COMMANDER-IN-CHIEF* 13; W.E. Binkley, *THE POWERS OF THE PRESIDENT: PROBLEMS OF AMERICAN DEMOCRACY* 122–123 (1937).

¹⁴These objections are similar in substance to the arguments for limiting presidential discretion in treaty-making, foreign affairs, and international conflicts made by Louis Henkin, Harold H. Koh, and Michael Glennon; see John Yoo, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* 5, 144 (Chicago, 2005).

¹⁵Samuel Smith Nicholas, *Martial Law*, *CONSERVATIVE ESSAYS, LEGAL AND POLITICAL* 164, 178–179 (1863); Robert Winthrop, *The Presidential Election of 1864*, *ADDRESSES AND SPEECHES ON VARIOUS OCCASIONS, FROM 1852 TO 1867* 621 (1867); Joel Parker, *Habeas Corpus and Martial Law*, 92 *NORTH AMERICAN REV.* 505–506 (1861); Joel Parker, *THE WAR POWERS OF THE CONGRESS AND OF THE PRESIDENT: AN ADDRESS DELIVERED BEFORE THE NATIONAL CLUB OF SALEM, MARCH 13, 1863* 9–10, 31–32, 58 (1863); Joel Parker, *CONSTITUTIONAL LAW AND UNCONSTITUTIONAL DIVINITY: LETTERS TO REV. HENRY M. DEXTER AND TO REV. LEONARD BACON* 33–34 (1863); Philip S. Paludan, *A COVENANT WITH DEATH: THE CONSTITUTION, LAW AND EQUALITY IN THE CIVIL WAR ERA* 130–133, 143–151 (1975).

¹⁶Montgomery Throop, *THE FUTURE: A POLITICAL ESSAY* 265–256 (1864); *The War Power*, 1 *THE OLD GUARD* 164 (July 1863); Thomas Jefferson Miles, *THE CONSPIRACY OF LEADING MEN OF THE REPUBLICAN PARTY TO DESTROY THE AMERICAN UNION* 10 (1864).

¹⁷Abraham Lincoln to John F. Seymour, in *RECOLLECTED WORDS OF ABRAHAM LINCOLN* 400 (Don E. and Virginia Fehrenbacher eds. 1996); Michael Burlingame, *INNER WORLD OF ABRAHAM LINCOLN*, 90 (1994).

¹⁸Abraham Lincoln, *Manuscript Prepared for the Pittsburgh Speech* (Feb. 15, 1861), 4 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 214 (Roy P. Basler et al. eds. 1953).

¹⁹Abraham Lincoln, *First Inaugural Address—Final Version* (March 4, 1861) and *First Inaugural Address—First Edition and Revisions*, *COLLECTED WORKS*, 4:261, 265, 270, 271.

²⁰Lois J. Einhorn, *ABRAHAM LINCOLN THE ORATOR: PENETRATING THE LINCOLN LEGEND* 38, 63–64, 84 (1992); Douglas L. Wilson, *HONOR'S VOICE: THE TRANSFORMATION OF ABRAHAM LINCOLN* 289–292 (1998).

²¹Abraham Lincoln, *Reply to Governor Andrew J. Curtin at Harrisburg, Pennsylvania* (Feb. 22, 1861), *COLLECTED WORKS*, 4:243.

²²A.R. Botleler, *Mr. Lincoln and the Force Bill*, *ANNALS OF THE WAR* 226–227 (Alexander K. McClure ed. 1879).

²³*The “War Power” Called Out*, *THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA, DURING THE GREAT REBELLION* 114–115 (Edward McPherson ed. 1864); Lincoln’s April 15th Proclamation (*COLLECTED WORKS* 4:331–332) strictly copied the language of the Militia Act (see *An Act to Provide for the Calling Forth of the Militia* (Feb. 28, 1795), 1 *STATUTES AT LARGE* 424 (Boston, 1845)).

²⁴Margaret Leech, *REVELLE IN WASHINGTON, 1860–1865* 55–65 (New York, 1941); Julia Taft Bayne, *TAD LINCOLN’S FATHER* 69 (Boston, 1931); Orville Hickman Browning, *Diary entry, July 3, 1861*, in 1 *THE DIARY OF ORVILLE HICKMAN BROWNING* 476 (Theodore Calvin Pease ed. 1925).

²⁵Clinton Rossiter, *THE SUPREME COURT AND THE COMMANDER-IN-CHIEF* 20–25 (R.P. Longacre ed. 1976).

²⁶Lincoln, *Message to Congress in Special Session* (July 4, 1861) *COLLECTED WORKS*, 4:426, 429, 430, 438, 440; Lyman Trumbull to Julia Trumbull, July 2, 1861, Lyman Trumbull Papers, Abraham Lincoln Presidential Library & Museum, Springfield, Ill.

²⁷Abraham Lincoln, *Fragment on the Constitution and the Union* (c. January 1861), *Address to the New Jersey Senate at Trenton, N.J.* (Feb. 21, 1861), *Speech in Independence Hall, Philadelphia* (Feb. 22, 1861), and “*Opinion on the Admission of West Virginia into the Union*” (Dec. 31, 1862), *COLLECTED WORKS*, 4:168, 236, 240, and 6:27.

²⁸Throop, *THE FUTURE*, 268; Winthrop, *The Presidential Election of 1864*, *ADDRESSES AND SPEECHES*, 620–621.

²⁹*Correspondence Between New York Democrats and President Lincoln* (May 19, 1863) *POLITICAL HISTORY*, 163.

³⁰Burlingame, *INNER WORLD OF ABRAHAM LINCOLN*, 179; Mark Neely, *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* 133–137, 167–174 (1991); Abraham Lincoln, *To Erastus Corning and Others* (June 12, 1863), *COLLECTED WORKS*, 6:265.

³¹John Hay, *Memorandum* (Sept. 30, 1863), *AT LINCOLN’S SIDE: JOHN HAY’S CIVIL WAR CORRESPONDENCE AND SELECTED WRITINGS* 63 (Michael Burlingame ed. 2000); Abraham Lincoln, *To Salmon P. Chase* (Sept. 2, 1863), *COLLECTED WORKS*, 6:428–429.

³²Alexander H. Stephens, 2 *A CONSTITUTIONAL VIEW OF THE LATE WAR BETWEEN THE STATES* 613 (1868–1870); Abraham Lincoln, *Annual Message to Congress* (Dec. 6, 1864) *COLLECTED WORKS*, 8:152.

³³Rossiter, *THE SUPREME COURT AND THE COMMANDER-IN-CHIEF* 2–5.

³⁴Thaddeus Stevens, *Speech on the Copperhead Threat at the County Union Convention, Sept. 7, 1864, in Lancaster, and Remarks on the President’s Message and Emancipation, Jan. 5, 1865, in Congress*, *SELECTED PAPERS*, 1:502, 513; see Jonathan Zimmerman, *How Lincoln Finessed Security* (op-ed), *PHILADELPHIA INQUIRER* (Aug. 1, 2006), in which he wrote: “You might reply that our liberties define our nation; if we abandon them, we give up on America itself. But Lincoln said otherwise—and lucky for us.”

³⁵Charles Graham Halpine (pseud “Private Miles O’Reilly”), *BAKED MEATS OF THE FUNERAL: A COLLECTION OF ESSAYS, POEMS, SPEECHES, HISTORIES, AND BANQUETS* at 106–107 (1866).