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Abstract
Lincoln's Emancipation Proclamation was a gamble. If it were to succeed, it could cripple the economy of the South, decimating its war effort, drive the border states to accept compensated emancipation, ending slavery as an institution in the United States, and accelerate the end of the war, ensuring the endurance of the United States of America. If it were to fail, it could spur the border states to secede, galvanizing the South, render Abraham Lincoln a political pariah with two years remaining in his term, deflating the North, and encourage European states to broker a two-state solution in North America, sending the concept of the American republic to the history books as a failed experiment. Lincoln appreciated these high stakes as he methodically built the case for emancipation during the first two years of his presidency, drawing on his decades of experience in Illinois courthouses to develop what would be the most consequential legal argument he would ever have to make. That Lincoln had long thought slavery was a moral wrong was insufficient justification to decree its demise; he had to build a case that could withstand scrutiny from an adversarial federal court system and avoid a legal challenge until after the war, when he could pursue the permanent recourse available only through a constitutional amendment. This paper explores the legal and political arguments Lincoln and his critics proffered and weighs the constitutionality of the Emancipation Proclamation.

Keywords
Emancipation Proclamation, Abraham Lincoln, Constitutionality of Civil War, Civil War, Executive Power

Destroying the Right Arm of Rebellion: Lincoln's Emancipation Proclamation

By Benjamin Pontz

The Emancipation Proclamation was a gamble. If it were to succeed, it could cripple the economy of the South, decimating its war effort, drive the border states to accept compensated emancipation, ending slavery as an institution in the United States, and accelerate the end of the war, ensuring the endurance of the United States of America. If it were to fail, it could spur the border states to secede, galvanizing the South, render Abraham Lincoln a political pariah with two years remaining in his term, deflating the North, and encourage European states to broker a two-state solution in North America, sending the concept of the American republic to the history books as a failed experiment. Lincoln appreciated these high stakes as he methodically built the case for emancipation during the first two years of his presidency, drawing on his decades of experience in Illinois courthouses to develop what would be the most consequential legal argument he would ever have to make. That Lincoln had long thought slavery was a moral wrong was insufficient justification to decree its demise; he had to build a case that could withstand scrutiny from an adversarial federal court system and avoid a legal challenge until after the war, when he could pursue the permanent recourse available only through a constitutional amendment.

In building that legal case, Lincoln relied upon the notion of military necessity, arguing that the Constitution vested in the president war powers that enabled him to subdue an enemy using means that extend beyond the peacetime confines of Article II's authority. Almost immediately upon issuing the proclamation, Lincoln faced a panoply of criticism from radical Republicans who thought he had not gone far

enough, congressmen who thought he had seized their (or their states') rightful prerogatives, and legal scholars who thought the war powers he cited were totally fabricated and patently unconstitutional. In the years since, Lincoln has drawn criticism that the dense legalese in the proclamation's text demonstrates a reluctance to actually free slaves, that he deliberately obfuscated the proclamation's legal status to dodge legal scrutiny, and that he exercised an extraconstitutional power grab that amounted to the same tyranny Americans once fled in Britain. Each of these critiques has a rational basis, but each fails to appreciate the president's ultimate obligation to preserve, protect, and defend the United States Constitution. The proclamation was Lincoln's final move after his attempts to secure gradual, compensated emancipation failed and the Union's prospects on the battlefield looked bleak. Therefore, having exhausted all other options, Lincoln developed the Emancipation Proclamation with meticulous attention to the Constitution so that he could continue his endeavor to secure slaves' ultimate freedom upon winning the war and saving the Union.

The question of how to handle slaves that reached Union-held territory presented itself almost immediately at the outset of the war. On May 23, 1861, three slaves who were property of Confederate Colonel Charles Mallory presented themselves to Union troops at Fortress Monroe. Major General Benjamin Butler, a lawyer, reasoned that these slaves were effectively Confederate property being used in the war effort, and, according to international law, could be considered "contraband" and seized accordingly. That is exactly what Butler did, and the War Department approved of his action, which simultaneously deprived the enemy of labor and provided that labor to the Union Army. That August, Congress approved of Butler's policy by passing the Confiscation Act of 1861, which Lincoln, fearful of its

constitutional ramifications as well as its potential effect on the border states, reluctantly signed.[1]

Later that month, Maj. Gen. John Fremont declared martial law in St. Louis and then the entire state of Missouri amid Confederate rebel activity that created a "desperate military and political situation." In his declaration, he claimed the right to confiscate all property – including slaves – of anyone who had taken the rebels' side in the war. The proclamation sparked an outcry in both the Unionist and southern rights press from Missouri to Kentucky, and, on September 11, Lincoln ordered Fremont to change the act to comply with the Confiscation Act "in relation to the confiscation of property and the liberation of slaves." Lincoln later fired Fremont, but, in a letter to Senator Orville Browning, said military emancipation could potentially be authorized by Congress and that Fremont could even have seized slaves temporarily but lacked the power to do so permanently by military proclamation. That was a job for lawmakers, not the military.[2]

Further south, on May 9, 1862, Maj. Gen. David Hunter issued General Order 11, which declared slaves in South Carolina, Georgia, and Florida – states in rebellion who had thus opened themselves to martial law as militarily necessary – forever free. He also sought to enlist black men into the Union Army. Similar to his response in Missouri, Lincoln immediately recognized the political and legal ramifications of such an order, and he rescinded it on May 19. Perhaps

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[1] Benjamin Butler, *Butler's Book* (Boston, 1892), 256-257; Butler to Lt. Gen. Winfield Scott, May 24-27, 1861, *O.R.*, ser. 2, vol. 1, 752-754; Simon Cameron to Butler, May 30, 1861, *O.R.*, ser. 2, vol. 1, 754-755; "An Act Used to Confiscate Property Used for Insurrectionary Purposes," Aug. 6, 1861, 12 Stat. 319 (1863).

[2] William Harris, *Lincoln and the Border States: Preserving the Union* (Lawrence: University Press of Kansas, 2011), 98-102; Proclamation of Fremont, Aug. 30, 1861, *O.R.*, ser. 1, vol. 1, 466-467; Lincoln to Fremont, Sep. 11, 1861, *Collected Works of Abraham Lincoln*, (Roy Basler, ed. New Brunswick, New Jersey: Rutgers University Press), 4: 517-518; Lincoln to Browning, Sep. 22, 1861, *C.W.*, vol. 4, 531-532.

foreshadowing his own actions to come, he added that only the president could determine such an act a military necessity: "[Such power] I reserve to myself, and which I cannot feel justified in leaving to the decision of commanders in the field." Even so, Union generals from Missouri all the way to the Gulf sought to impress upon Lincoln the military necessity of emancipation throughout the early part of 1862. Lincoln recognized, however, that a piecemeal approach to emancipation driven by commanders in the field would neither be politically nor legally feasible and that the Confiscation Act, too, was legally tenuous. As such, he focused on building support in the political arena for a more stable solution.[3]

From the beginning, it was clear that Lincoln would endeavor to act within the bounds of the law in how he managed the war, and his policy towards slaves was no exception. Although Lincoln was personally opposed to slavery, a subject he had discussed at length during the 1858 Lincoln-Douglas debates and would note again in a famous letter to Horace Greeley in August 1862 stating his "oft-expressed personal wish that all men every where [sic] could be free," personal misgivings could not justify a national policy of blanket emancipation. Particularly (though not exclusively) in the border states, Lincoln instead promulgated gradual, compensated emancipation, which, in his estimation, was cheaper than ongoing execution of the war, was clearly constitutional, and would cripple an insurrection predicated on winning the allegiance of border states to protect slavery. While legislators such as John Crittenden of Kentucky, who argued that slavery was a state institution, resented federal meddling in slavery,

[3] Proclamation by Abraham Lincoln, May 19, 1862, Presidential Proclamations, Series 23, Record Group 11, National Archives; Kristopher Teters, *Practical Liberators: Union Officers in the Western Theater during the Civil War* (Chapel Hill, North Carolina: North Carolina University Press, 2018), 36-41; David Livingstone, "The Emancipation Proclamation, the Declaration of Independence, and the Presidency: Lincoln's Model of Statesmanship," *Perspectives on Political Science* 28 (1999): 206-207.

many expressed openness to the proposal provided the compensation was sufficient. Lincoln had high hopes throughout late 1861 and early 1862 that his scheme would find supporters. Such hope soon evaporated. With the passage of a bill ending slavery in Washington D.C. in April, Hunter's emancipation endeavor in May, and the passage of the Confiscation Act of 1862, which opened the door to federal emancipation, in July, border state opposition hardened. After Lincoln had convened a delegation of border state congressmen to make a final appeal, they replied in a majority report on July 13, "Our people … will not consider the proposition in its present impalpable form." Disapproval from border state congressmen along with a growing sense of military urgency after Lincoln reviewed the Army of the Potomac at Harrison's Landing spurred him to begin work on a more sweeping solution.[4]

That approach became known as the Emancipation Proclamation. His sense of military exigency heightened after General George McClellan had used the word "capitulate" in connection to the Army of the Potomac's fate absent more reinforcements, Lincoln set to work on a first draft of the proclamation. "I felt that we had reached the end of our rope on the plan of operations we had been pursuing; that we had about played our last card, and must change our tactics, or lose the game," Lincoln later wrote of his decision to begin formulating a new plan for emancipation. In an 1899 *McClure's Magazine* article,

[4] Lincoln, *Letter to Horace Greeley, August 22, 1862,* in *The Emancipation Proclamation: A Brief History with Documents,* Michael Vorenberg, ed. (Boston: St. Martin's Press, 2010), 58; Harris, *Lincoln and the Border States,* 161-162, 179-182; Don Fehrenbacher, *Prelude to Greatness: Lincoln in the 1850s* (Stanford: Stanford University Press, 1962), 75-79; Border State Congressmen to Lincoln, Jul. 14, 1862, Lincoln Papers, ser. 1, Library of Congress; Brian Danoff, "Lincoln and the 'Necessity' of Tolerating Slavery Before the Civil War," *Review of Politics* 77 (2015): 69; Speech of John J. Crittenden, of Kentucky, on emancipation, Mar. 11, 1862, in Slavery Source Material and Critical Literature (Louisville, Kentucky: Lost Cause Press, 1977), microfiche.

Ida Tarbell observed, "Lincoln never came to a point in his public career where he did not have a card in reserve, and he never lacked the courage to play it if he was forced to." His military on the ropes and talking of surrender, Lincoln had no choice but to move to the final card in his hand. As William Harris wrote,

> The huge and demoralizing losses suffered by General McClellan in the ill-fated June 1862 Peninsula campaign to take Richmond brought intense pressure from Republicans for the president to take more vigorous measures against the rebels. Lincoln's view of southern resistance also hardened, which increased his determination to find legal authority to move against slavery in the insurrectionary states.

On July 13, 1862, he discussed the potential proclamation with Secretary of State William Seward and Navy Secretary Gideon Welles, emphasizing the notion of military necessity as the legal justification for such an edict. Having signed – again with reluctance – the Confiscation Act of 1862 on July 17, Lincoln framed his draft Emancipation Proclamation pursuant to section six of that act, which required the president to issue a proclamation enabling seizure of rebel property. He presented the draft to his cabinet on July 22. It found general, though not unanimous, agreement. Seward advised waiting until a military victory so the proclamation would not look desperate, and Lincoln agreed.[5]

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[5] William Klingman, *Abraham Lincoln and the Road to Emancipation, 1861-1865* (New York: Viking, 2001), 139-140, 157-158; Ida Tarbell, "Lincoln and the Emancipation Proclamation," *McClure's Magazine* 12 (1899): 514; Harris, *Lincoln and the Border States*, 189; Gideon Welles, *Diary of Gideon Welles, Secretary of the Navy under Lincoln and Johnson*, ed. John Torrey Morse (New York: Houghton Mifflin, 1911), vol. 1, 70; "*An Act to suppress Insurrection, to punish Treason and Rebellion, to seize and confiscate the Property of Rebels, and for other Purposes*," U.S., *Statutes at Large, Treaties, and Proclamations of the United States of America*, vol. 12 (Boston, 1863), 589-592; Preliminary Draft of Emancipation Proclamation, Jul. 22, 1862, Lincoln Papers, ser. 1, Library of Congress.

Lincoln found that victory, such as it was, in the Battle of Antietam on September 17. On September 22, Lincoln issued the preliminary version of the Emancipation Proclamation. Notably, this was just weeks before the midterm elections. Lincoln had long taken what Fehrenbacher has called an "extreme" view that the people – through their voice at the ballot box – are the ultimate arbiters of what is constitutional. If the people's initial utterance was any indication, they had concerns. Republicans lost 31 seats in the House as well as several important governorships in the fall of 1862. Although Lincoln never admitted this was a result of the preliminary proclamation – and, certainly, other factors such as rising inflation, high taxes, imposition of conscription, and the general malaise of a long war likely played a role – the people's initial feedback was hardly resounding support. When Congress reconvened in December, Lincoln made a final attempt to rekindle gradual, compensated emancipation in his annual address, but the proposal was defeated by both radicals on the left and pro-slavery factions on the right. Lincoln, therefore, spent the week after Christmas putting the finishing touches on his proclamation, carefully exempting Union-held territories in the South to ensure his argument of military necessity remained sound despite protest from Secretary of the Treasury Salmon Chase that doing so would create administrative nightmares. Lincoln was careful not to overstep his constitutional bounds, and the exemptions stood. He signed the proclamation on January 1, 1863.[6]

In the constitutional debate that surrounded the issue of emancipation, Lincoln proved to be his own best advocate.

[6] Preliminary Emancipation Proclamation, Sep. 22, 1862, Lincoln Papers, ser. 1, Library of Congress; Don Fehrenbacher, "Lincoln and the Constitution," in *The Public and Private Lincoln*, Cullom Davis et al., eds. (Carbondale, Illinois: Southern Illinois University Press, 1979), 134; Klingman, *Lincoln and the Road to Emancipation*, 205-207, 228-229; Harris, *Lincoln and the Border States*, 204-205; Emancipation Proclamation, Jan. 1, 1862, Lincoln Papers, ser. 1, Library of Congress.

Fundamentally, Lincoln's argument rested on the idea that the president had inherent war powers that he could exercise when militarily necessary on issues beyond the reach of Congress or the peacetime executive power. Emancipation was one such issue. Crucially, however, it was not the only one. As Fehrenbacher noted,

> [Lincoln] responded to the attack on Fort Sumter by enlarging the army, proclaiming a blockade of Southern ports, suspending the writ of habeas corpus in certain areas, authorizing arbitrary arrests and imprisonments on a large scale, and spending public funds without legal warrant. He never yielded the initiative seized at this time.

That emancipation was another area that required executive initiative was not a unanimous legal opinion; while even most Radical Republicans conceded that ending slavery was beyond the scope of the legislative power, Massachusetts Senator Charles Sumner, for one, argued in 1864 that Congress had always had the power to regulate slavery by simple statute as "commerce among the states." For Lincoln, however, military necessity put this issue squarely within the sphere of a wartime executive power. Since the outset of the war, many Union officers had gradually come to see the fruits of emancipating slaves within enemy territory as militarily advantageous and had urged Lincoln to consider a broader regime to assist them in the field. That was the aim of this wartime emancipation.[7]

Relying on the notion that Article II's commander-in-chief clause necessarily vested the president with war powers with which to preserve, protect, and defend the Constitution, Lincoln felt he had the authority to subdue the rebellion in states that had removed themselves from the civil law regime that had put slavery in the states beyond the reach of the federal government. In a public letter to James Conkling,

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[7] Fehrenbacher, "Lincoln and the Constitution," 127; "Universal Emancipation Without Compensation," Speech by Charles Sumner, Apr. 8, 1864, in Slavery Source Material and Critical Literature (Louisville, Kentucky: Lost Cause Press, 1977), microfiche; Teters, *Practical Liberators*, 41.

Lincoln wrote, "I think the constitution invests its commander-in-chief, with the law of war, in time of war. … Is there--has there ever been--any question that by the law of war, property, both of enemies and friends, may be taken when needed? And is it not needed whenever taking it, helps us, or hurts the enemy?" During wartime, this assertion put the proclamation beyond the reach of the federal courts, but Lincoln acknowledged that war powers end when war ends. As such, he freely admitted that the courts would rule on the proclamation after the war and that such a ruling may not be favorable to the permanence of emancipation particularly given the presence atop the Supreme Court of Roger Taney, author of the *Dred Scott* opinion. In July 1863, Lincoln said in a letter to Stephen Hurlbut, "I think it is valid in law, and will be so held by the courts." Two months later, Congressman-Elect Green Clay Smith of Kentucky asked Lincoln to affirm the right of "repentant rebels" in the border states to redress grievances arising from the Emancipation Proclamation in civil courts. Lincoln replied that he was "perfectly willing" to allow the Courts to have their say at the appropriate time and pledged to "abide by judicial decisions when made." Cognizant that the courts likely would not uphold a proclamation rooted in an argument of military necessity after the war, Lincoln acknowledged the need for a constitutional amendment to permanently end slavery. The 13th Amendment would come to be what Lincoln called a "king's cure for all evils."[8]

In the years since Lincoln made his constitutional case for emancipation, some scholars have concluded either that he was not confident in the case he had made and sought an opportunity to escape the situation or that he deliberately obfuscated the constitutional arguments to sow confusion. Neither argument seems to fully hit the mark. The first, proffered by Barry Schwartz, is predicated on the notion

[8] Lincoln to Conkling, Aug. 26, 1863, *C.W.* vol. 6, 407-409; Lincoln to Hurlbut, Jul. 31, 1863, *C.W.* vol. 6, 359; "An Amnesty Suggested," *New York Times*, Sep. 10, 1863, 5; Response to a Serenade, Feb. 1, 1865, *C.W.* vol. 8, 255.

that, were the Confederacy to agree to rejoin the Union in exchange for rescinding the Emancipation Proclamation, Lincoln would have readily acquiesced. "Lincoln probably feigned his uncertainty over the postwar status of the proclamation," Schwartz writes. "The prospect for an abolition amendment aside, he knew the restoration of the prewar Constitution was certain when the war ended." Schwartz contends that Lincoln vacillated on the end of emancipation; what appears more likely is that Lincoln vacillated, or, more accurately, evolved, on the means to end slavery. Harold Holzer's thinking is in a similar vein to Schwartz's, though Holzer contends Lincoln was deliberately inconsistent and ambiguous in his framing of emancipation. In Holzer's view, the "microscopic precision" with which the proclamation was crafted to avoid legal challenges had an ulterior motive: to avoid inflaming passions that would cause political problems and give Lincoln an opportunity to "spin" the proclamation in the media. It is certainly the case that Lincoln's legal argument for emancipation evolved from his early plans for compensated gradualism to the ultimate proclamation, but that is more evident of the changing conditions on the ground and an earnest desire to comply with the Constitution than any cold-footed apprehension or nefarious manipulation. In sum, Lincoln's constitutional argument for the proclamation he issued was tightly rooted in his power as commander-in-chief.[9]

Other constitutional arguments in support of the Emancipation Proclamation meandered onto more tenuous legal ground. In a pamphlet responding to charges that Lincoln's assertion of war powers was antithetical to constitutional principles, Grosvenor Lowrey responded that, in subduing "rebellious communities," the president can free slaves, but he conceded that such power is extraconstitutional. "The military

[9] Barry Schwartz, "The Emancipation Proclamation: Lincoln's Many Second Thoughts," *Society* 52 (2015): 594; Harold Holzer, *Emancipating Lincoln: The Proclamation in Text, Context, and Memory* (Cambridge: Harvard University Press, 2012), 93-94.

power suspends, but never destroys the law. Inter arma silent [in the midst of war, the law is silent]," he wrote. Others contended that exacting vengeance justified emancipation. Before a raucous crowd at Boston's Emancipation League in 1861, former Massachusetts Governor and future congressman George Boutwell argued that the president should pursue military emancipation as a matter of military necessity, but that, regardless, the South had ceded its right to constitutional protection. "The rebels have no right to complain," he said, to thunderous applause. Such a punitive argument could, however, have been used to construe the Emancipation Proclamation as a bill of attainder, which the Constitution expressly forbids. While William Whiting, the War Department's solicitor, had issued a pamphlet arguing that nothing in the Emancipation Proclamation could be so construed because bills of attainder had been punishable only by death in Britain, not seizure of property, that argument was certainly weaker than the notion that slaves could be freed since they were helping the Confederacy's war effort.[10]

A handful of arguments did buttress Lincoln's claim that emancipation was a military necessity that the commander-in-chief power justified. Sumner, an ardent abolitionist, had long been motivated by the moral arguments against slavery, but he also trumpeted the practical advantages of emancipation in a speech at Boston's Faneuil Hall in October 1862, arguing that freed slaves could enlist in the Union Army. Perhaps a rhetorical flourish, but one he repeated again in

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[10] Grosvenor Lowrey, *The Commander-in-Chief: A Defence upon Legal Grounds of the Proclamation of Emancipation,* (New York, 1863), quoted in *Union Pamphlets of the Civil War, 1861-1865*, Frank Feidel, ed. (Cambridge: Harvard University Press, 1967); "Emancipation: Its Justice, Expediency and Necessity, As the Means of Securing a Speedy and Permanent Peace," speech by George Boutwell, Dec. 16, 1861, in Slavery Source Material and Critical Literature (Louisville: Lost Cause Press, 1977), microfiche; Henry Chambers, "Lincoln, the Emancipation Proclamation, and Executive Power," *Maryland Law Review* 73 (2013): 125-126; William Whiting, *The War Powers of the President and the Legislative Powers of Congress in Relation to Rebellion, Treason, and Slavery* (Boston: Rand & Avery, 1873), 92.

February 1863 and April 1864, Sumner added, "There is no blow which the President can strike, there is nothing he can do against the rebellion, which is not constitutional. Only inaction can be unconstitutional." Sumner's fellow Bay Stater Edward Everett incorporated international law in his defense of the Emancipation Proclamation, writing, "Who can suppose it is the duty of the United States to continue to recognize [slavery]" when states are in rebellion since the institution finds no basis in the law of nations nor in natural law. The potential for an international intervention in the Civil War was something Lincoln considered as he weighed issuing the proclamation, but he ultimately thought the proclamation would not have a substantial effect either way. Indeed, other events in Europe did more to dissuade a brokered peace settlement than the Emancipation Proclamation. Perhaps the most full-throated defense of the proclamation aside from Lincoln came in Whiting's aforementioned pamphlet. Whiting contended that the Constitution is designed to create a perpetual republic and that, therefore, it must grant the president sufficient war powers to preserve that republic regardless of whether the war has been formally declared (which this one had not so as to avoid legitimizing southern secession). Significantly, Whiting quoted the 1827 court decision *Martin v. Mott*, which concluded that "the authority to decide whether the exigency has arisen belongs exclusively to the President, and that this decision is conclusive upon all other persons." While that case dealt specifically with the president's power to call up militias to suppress rebellion, it lent credence to Lincoln's contention that the Constitution had vested certain war powers in the president to use when militarily necessary. Overall, arguments in support of the proclamation were often more spirited than Lincoln's, but they were less tight, a fact on which the proclamation's opponents seized.[11]

[11] Charles Sumner, *Emancipation! Its Policy and Necessity as a War Measure for Suppression of the Rebellion*, Oct. 6, 1862, (Boston, 1862); "Immediate Emancipation as a War Measure!" Speech by Charles Sumner, Feb. 12, 1863, in Slavery Source Material and Critical Literature (Louisville, Kentucky: Lost

Among the sharpest critics of the Emancipation Proclamation was Harvard Law Professor Joel Parker. At the core of Parker's objection lay the notion of ostensibly unlimited war powers, which the president could use to defend any action in the name of military necessity. Emancipation was not, in Parker's view, a legitimate response to a military exigency, but an executive power grab that threatened the constitutional order. He wrote,

> There is nothing in the colonial or revolutionary history, or in the history of the adoption of the State constitutions, or in the adoption of the Constitution of the United States, which can for a moment sustain the assumption of any such war powers, either by Congress or by the President. And there is nothing material to the suppression of the rebellion, which may not be accomplished without the assumption of such a construction of the Constitution.

After excoriating Whiting for promulgating "bad law, and, if possible, worse logic," Parker concluded that the Constitution granted sufficient power to the executive and legislative branches to suppress a rebellion: laws against conspiracy and sedition, for example, are constitutional; presidential proclamations seizing property without any semblance of due process, however, are not.[12]

Notably, two years earlier, Parker had defended the Lincoln administration's suspension of the writ of habeas corpus and condemned Taney's dictum in *Ex parte Merryman*, which said that the president had no constitutional authority to suspend the writ. Parker acknowledged that, in times of war, "The military law must be held to supersede the

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Cause Press, 1977), microfiche; "Universal Emancipation Without Compensation," Speech by Charles Sumner, Apr. 8, 1864, in Slavery Source Material and Critical Literature (Louisville, Kentucky: Lost Cause Press, 1977), microfiche; "Everett on Emancipation," *Chicago Tribune*, Oct. 27, 1864, 2; Don Doyle, *The Cause of All Nations: An International History of the Civil War*, (New York: Basic Books, 2015), 220; Whiting, *War Powers*, 66-67; *Martin v. Mott*, 25 U.S. [12 Wheaton] 19 (1827).

[12] Joel Parker, *The War Powers of Congress, and of the President*, (Cambridge: H.O. Houghton, 1863), 6, 32, 9-10, 57-59.

civil law in that exigency, and this in consistency with, and not in antagonism to, the Constitution." Parker argued that the Constitution provides a paramount right for the federal government to suppress insurrection, but he refused to follow that argument to the logical end that someone had to determine what was legitimate to operationalize that right. Whiting contended that it was the president who could make such a determination, but Parker loathed this argument because, as Phillip Paludan observed, it "expanded power, diminished liberty, and glorified both actions as justified by the Constitution." Although Parker supported the war, he loathed the dramatic expansions of power that came in its wake. In his view, the war's goal should have been simply to save the Union in the name of stability and order. Lincoln's assertion of executive power, though ostensibly towards the same end of saving the Union, threatened that stability and order.[13]

Former Supreme Court Justice Benjamin Curtis, who resigned from the Court after he dissented from the *Dred Scott* decision, was more charitable to Lincoln's attempt to act within the bounds of the Constitution, but, like Parker, Curtis thought the Emancipation Proclamation was executive overreach. While Curtis acknowledged that there may be exceptional cases that threaten public safety in which the president may "justly look for indemnity" beyond the scope of the enumerated powers, public safety was not threatened in this matter. As such, the president was confined to his executive powers, which restrict him to executing – not making, suspending, or altering – the laws. He rejected the notion of implied powers justifying disregard for the limits expressed in the Constitution. He wrote,

> It must be obvious … that if the President of the United States has an implied constitutional right, as commander-in-chief of the army and

[13] *Ex parte Merryman* 17 F. Cas. 144 (C.C.D. Md. 1861); Parker, *Habeas Corpus and Martial Law*, (Cambridge: Welch, Bigelow, and Company, 1861), 22; Phillip Paludan, *A Covenant with Death*: *The Constitution, Law, and Equality in the Civil War Era*, (Urbana, Illinois: University of Illinois Press, 1975), 132, 146, 156, 129.

> navy in time of war, to disregard any one positive prohibition of the Constitution … because, in his judgment, he may thereby 'best subdue the enemy,' he has the same right, for the same reason, to disregard each and every provision of the constitution, and to exercise all power, needful, in his opinion, to enable him 'best to subdue the enemy.'

In other words, Lincoln's argument has no limiting principle to constrain the president. The president's commander-in-chief power, Curtis concluded, must be exercised in subordination to the laws of the country, from which alone he derives his authority.[14]

Members of Congress, too, argued that emancipation transcended the president's (or Congress's) constitutional power. Discussing a joint resolution that pledged support for gradual abolition in March 1862, Crittenden argued that the Constitution contained a natural right to self-preservation, but not to use any means in its pursuit. Wholesale abolition, he argued, would go too far in infringing upon the rights of states. In June, Samuel Cox, an Ohio Democrat, contended that emancipation, particularly by executive fiat, violated the Constitution's ban on bills of attainder, its definition of treason (which is confined to "levying war" against the United States), the takings clause, separation of powers, and the right to a trial by jury. Finally, in December 1862, as it was becoming clear Lincoln intended to follow through and issue the proclamation, Unionist Congressman John Crisfield of Maryland argued that allowing such an assertion of war power would be a slippery slope. "Once admitted as a power belonging to this government," he argued, "[necessity] swallows up all other powers, and resolves everything into the mere discretion of the individual who may happen to wield its mighty energies. This is the definition of

[14] Benjamin Curtis, *Executive Power*, (Cambridge, 1862), quoted in *Union Pamphlets of the Civil War, 1861-1865*, Frank Feidel, ed. (Cambridge: Harvard University Press, 1967), 454-455, 461, 467.

despotism." Avoiding despotism undergirded most of the arguments against the Emancipation Proclamation.[15]

Both Parker and Curtis had argued that the legislative branch had sufficient power to suppress the rebellion at hand, which obviated the need for any exercise of emergency powers anyway. In the years preceding the Emancipation Proclamation, Congress had moved against slavery only incrementally. Ignoring Taney's decision in *Dred Scott* under the premise that, because he had ultimately dismissed the case for lack of standing, he could not make a substantive ruling on its merits, Congress moved a legislative agenda that paved the way for blacks to serve in militias, forbade military participation in recapture of fugitive slaves, and banned slavery in federal territories and Washington D.C. Perhaps most notably, Congress had also passed the Second Confiscation Act. However, those measures largely exhausted its legal authority to counteract slavery except for the possibility of appropriating funds to support compensated emancipation in the border states, something those states had rejected. Parker had argued that Congress could have moved against sedition and conspiracy, but neither would have materially affected the economy or politics of the South. As such, it is not clear what options Congress had that would have been remotely as effectual as the Emancipation Proclamation.[16]

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[15] Speech of John J. Crittenden, of Kentucky, on emancipation, Mar. 11, 1862, in Slavery Source Material and Critical Literature (Louisville, Kentucky: Lost Cause Press, 1977), microfiche; "Emancipation and its results--is Ohio to be Africanized?" Speech of Samuel S. Cox, Jun. 6, 1862, in Slavery Source Material and Critical Literature (Louisville, Kentucky: Lost Cause Press, 1977), microfiche; Congressional Globe, 37th Cong., 3d Sess. (Dec. 19, 1862), 146-149, quoted in Harris, *Lincoln and the Border States*, 214.

[16] Curtis, *Executive Power*, 469; Parker, *The War Powers of Congress, and of the President*, 59; Paul Finkelman, "The Summer of '62: Congress, Slavery, and a Revolution in Federal Law," In *Congress and the People's Contest*, Finkelman and Donald Kennon, eds. (Athens, Ohio: Ohio University Press, 2018), 92, 105-107.

Congress's inability to act further supports to Lincoln's argument of military exigencies compelling the commander-in-chief to act using war powers. During the war, the courts largely yielded to Lincoln's assertions of those war powers. In *United States v. Cashiel* (1863), which dealt with whether a civilian could be court martialed, the District Court of Maryland ruled only on a procedural issue pertaining to double jeopardy rather than weighing in on the extent of the federal government's war powers, which it acknowledged are "a problem of no easy solution, but one which is now engaging the attention and careful consideration of the statesmen and jurists of the land." The court thus constrained itself from ruling on a federal war power assertion. On two occasions, federal courts upheld the Lincoln administration's assertion of war powers. In *United States v. One Hundred and Twenty-Nine Packages* (1862), the Eastern District Court of Missouri cited the Supreme Court's 1849 ruling in *Luther v. Borden* as it acknowledged the right of the political branches – Congress and the president – to determine the nation's state of peace or war and held that citizens and civil courts are bound by that decision. In *Elgee's Adm'r v. Lovell* (1865), the Circuit Court of Missouri denied the right of a Louisianan to reclaim cotton seized under the Confiscation Act of 1862 since, according to the law of nations, "in time of war, an enemy cannot sue in the courts of the country with which his nation is belligerent … all persons, citizens or subjects of the nations thus at war, are themselves enemies each to the other."[17]

The only two unfavorable rulings in federal court pertaining specifically to presidential assertions of war powers came in *Ex parte Merryman* (1861) and *Ex parte Benedict* (1862). In the former, Chief Justice Roger Taney issued a writ of habeas corpus and ordered General

[17] *United States v. Cashiel*, 25 F. Cas. 318, 321 (D. Md. 1863); *United States v. One Hundred & Twenty-Nine Packages*, 27 F. Cas. 284 (E.D. Mo. 1862); *Luther v. Borden*, 48 U.S. 1 (1849); *Elgee's Adm'r v. Lovell*, 8 F. Cas. 449 (C.C.D. Mo. 1865).

George Cadwalader to bring John Merryman, whom the Army had arrested, before the court to hear the charges against him. Cadwalader declined on the grounds that the Army had suspended the writ of habeas corpus. In the ensuing legal opinion, Taney concluded that the Constitution vests the power to suspend the writ of habeas corpus only in Congress and that neither the president nor the military could do so, but the Lincoln administration declined to comply with Taney's order. The circumstances in *Ex parte Benedict*, a case arising from the Northern District of New York, were similar, and the judge cited Taney's ruling to affirm that the president could not suspend the writ of habeas corpus. However, the judge declined to hold the federal marshal in contempt for disobeying the writ, perhaps a tacit acquiescence to the executive branch's prerogatives. Fehrenbacher observed that most legal scholars would have agreed with Taney's analysis, but that, in the intervening years, few have faulted Lincoln for not complying with the writ. "[This] does not mean that Lincoln condemned the institution of judicial review," Fehrenbacher wrote. "He did, however, reject the doctrine of judicial supremacy." In Lincoln's eyes, the court did not have a monopoly on constitutional interpretation, a job that ultimately rested with the people.[18]

Ultimately, the *Prize Cases* (1863) had established that conditions on the ground establish the presence of a war regardless of any formal declaration and that, when those conditions were present, the president "was bound to meet [belligerent force] in the shape it presented itself," using his powers as commander-in-chief to preserve, protect, and defend the Constitution of the United States. In confronting the issue of emancipation, Lincoln was measured and methodical as he sought first to convince the border states to accept gradual, compensated emancipation, then approved General Butler's contraband policy, then,

[18] *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861); *Ex parte Benedict*, 3 F. Cas. 159 (N.D.N.Y. 1862); Fehrenbacher, "Lincoln and the Constitution," 133.

however grudgingly, signed the Confiscation Acts of 1861 and 1862, and finally concluded that the conditions on the ground presented themselves in such a shape that required the Emancipation Proclamation. He had rejected the idea of emancipation in 1861, saying at the time, "No, we must wait until every other means has been exhausted. This thunderbolt will keep." By July 1862, however, he determined the time had come, and he made a good faith constitutional case that the president had the power as commander-in-chief to subdue his enemy through emancipation, which would, in the words of his John Nicolay, "destroy the right arm of the rebellion."[19]

Whether the courts would have upheld the Emancipation Proclamation after the war is a hypothetical whose realization the 13th Amendment obviated. Lincoln had signaled previously that he was unsure, but, given that he justified the proclamation using war powers, it seems unlikely such powers would endure when the war did not, which explained Lincoln's sense of urgency as he pushed Congress to pass a constitutional amendment outlawing slavery. Nevertheless, Lincoln appeared to have the fate of the proclamation on his mind when he appointed his former Treasury Secretary Chase as the Supreme Court's Chief Justice upon Taney's death in October 1864. "We want a man who will sustain the Legal Tender Act and the Proclamation of Emancipation," Lincoln told George Boutwell. "We cannot ask a candidate what he would do; and if we did and he should answer, we should only despise him for it." Lincoln thus implied that Chase's views on the subject were known and he would likely uphold the proclamation

[19] *Prize Cases*, 67 U.S. (2 Black) 635 (1863); Don Fehrenbacher and Virginia Fehrenbacher, eds., *Recollected Words of Abraham Lincoln* (Stanford: Stanford University Press, 1996), 295, quoted in Livingstone, "Lincoln's Model of Statesmanship," 206; John Nicolay, *Daily Morning Chronicle*, Jan. 2, 1863, quoted in Allen Guelzo, *Lincoln's Emancipation Proclamation: The End of Slavery in America* (New York: Simon & Schuster, 2004), 186.

were it to reach the court prior to a constitutional amendment's ratification.[20]

Even if the court had struck down the proclamation after the war, it seems that Lincoln would not have regretted issuing it because, in his view, even if it was beyond the law's enumerated power, the Union must endure. "Are all the laws, but one, to go unexecuted," he asked, "and the government itself go to pieces, lest that one be violated?" Such a line of thinking has led some contemporary scholars to wonder whether, even if the Emancipation Proclamation was unconstitutional, we should care. Law professor Sanford Levinson delivered an address in 2001 asking that very question. "Who cares," he argued, "reflects an important intellectual reality with regard to assessment of political actions: When all is said and done, we place far greater emphasis on whether we substantively like the outcomes, than on their legal pedigree." Certainly, though, Lincoln cared. His adversaries did too. In fact, Curtis was so offended by a "leading and influential" Republican newspaper's declaration that "nobody cares" whether the proclamation is constitutional that he devoted several pages of his pamphlet to defending the rule of law and defended Lincoln, whom Curtis believed cared "that he and all other public servants should obey the Constitution." It is also striking that Lincoln and Parker, though they vehemently differed on prescription, largely agreed on principle: preservation of the Union must be the paramount goal of not only the Civil War, but of the government at large. The 13th Amendment, of course, ultimately sealed the fate of emancipation. The Emancipation Proclamation, then, represented part of the "slow, firm progress toward a revolutionary goal" that had long been Lincoln's modus operandi.[21]

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[20] Fehrenbacher and Fehrenbacher, *Recollected Words*, 38.

[21] Basler, *Collected Works*, 4: 430, 7:281, quoted in Fehrenbacher, "Lincoln and the Constitution," 129; Sanford Levinson, "The David C. Baum Memorial Lecture: Was the Emancipation Proclamation Constitutional? Do We/Should We Care What the Answer Is?" *University of Illinois Law Review* 2001, no. 5

The Emancipation Proclamation stands as part of America's enduring quest to become a more perfect Union. Certainly, it was a dramatic assertion of executive power, one that may even have transcended the formalist bounds of the Constitution, and it is also true that Lincoln's legal argument defined no concrete limiting principle to constrain future exercises of war powers. The ultimate limiting principle, however, comes through the ongoing work of the people to form that more perfect union. As Lincoln argued, it is citizens who are the ultimate arbiters of what the Constitution means. Only the people can decide – as they did in 1776 – that the existing form of government is unacceptable, only the people can decide – as they did in 1787 – that Union is worth forming, and only the people can decide – as they did in 1861 – that such a Union is worth preserving. In executing that final decision, Lincoln determined that the Emancipation Proclamation was necessary. That such a decision had the consequence of bending America towards the liberty imbued in the Declaration of Independence is simply a testament to American virtue. Each great decision in American history has, to some extent, been a gamble. It is only through such gambles, though, that a nation conceived in and dedicated to liberty, committed to the principle of government of the people, by the people, and for the people, has been able to long endure.

(2001): 1150; Curtis, *Executive Power*, 29; Fehrenbacher, *Prelude to Greatness*, 148.

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