Lincoln Did Not Free the Slaves: Critical Analysis and Its Role in History

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It was a dark and stormy night on the evening of April 12, 1861, when Massachusetts Senator, Charles Sumner, a leader of the Radical Republicans, rushed to the White House upon learning news of the attack on Fort Sumter. Senator Sumner (now having recovered from the brutal beating he received on the Senate floor from South Carolina representative Preston Brooks in 1856) remembered his short conversation with President Lincoln this way: "I told him that under the war power, the right had come to him to emancipate the slaves...the existence of this power is something nobody questions" (Donald 388; "The Honorable C. Sumner").

Sumner was wrong about that; the other person in the room did "question" the existence of any power in the President—war power or otherwise—to emancipate slaves. Abraham Lincoln himself had long held this position, and had stated it most succinctly only one month earlier in this First Inaugural Address:

> I have no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists. I believe I have no lawful right to do so, and I have no inclination to do so. […]
>
> There is much controversy about the delivering up of fugitives from service or labor. The clause I now read is as plainly written in the Constitution as any other of its provisions:
>
> "No person held to service or labor in one State, under the laws thereof, escaping into another, shall in consequence of any law or regulation therein be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due."
>
> It is scarcely questioned that this provision was intended by those who made it for the reclaiming of what we call fugitive slaves; and the intention of the lawgiver is the law. All members of Congress swear their support to the whole Constitution […]. (4:263)

Lincoln also stood full square

that state secession was not legally possible, and that his Oath of Office provided the legal authority to oppose it.

> Descending from these general principles, we find the proposition that in legal contemplation the Union is perpetual confirmed by the history of the Union itself. The Union is much older than the Constitution. It was formed, in fact, by the Articles of Association in 1774. It was matured and continued by the Declaration of Independence in 1776. It was further matured, and the faith of all the then thirteen States expressly plighted and engaged that it should be perpetual, by the Articles of Confederation in 1778. And finally, in 1787, one of the declared objects for ordaining and establishing the Constitution was "to form a more perfect Union." […] (4:265)
>
> It follows from these views that no State upon its own mere motion can lawfully get out of the Union; that resolves and ordinances to that effect are legally void, and that acts of violence within any State or State against the authority of the United States are insurrectionary or revolutionary, according to circumstances.
>
> I therefore consider that in view of the Constitution and the laws the Union is unbroken, and to the extent of my ability, I shall take care, as the Constitution itself expressly enjoins upon me, that the laws of the Union be faithfully executed in all the States. […] (4:266)
>
> Plainly the central idea of secession is the essence of anarchy. (4:268)[1]

Lincoln also made clear that, as president, he was not bound to follow Supreme Court decisions as policy dictates. In rejecting the 1857 Dred Scott Decision (U.S. Supreme Court, 19 Howard 393 [1857], C.J. Roger Taney), which had ruled slaves were property and not citizens, Lincoln said:

> I do not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court, nor do I deny that such decisions must be binding in any case upon the parties to a suit as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the Government. […]
>
> At the same time, the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal. (4:268)

Lincoln identified the "central issue," declared a constitutional amendment was necessary, and recommended a new Constitutional Convention.

> One section of our country believes slavery is right and ought to be extended, while the other believes it is wrong and ought not to be extended. This is the only substantial dispute. […]
>
> This country, with its institutions, belongs to the people who inhabit it. Whenever they shall grow weary of the existing Government, they can exercise their constitutional right of amending it or their revolutionary right to dismember or overthrow it. I can not be ignorant of the fact that many worthy and patriotic citizens are desirous of having the National Constitution amended. […]
>
> I will venture to add that to me the convention mode seems preferable, in that it allows amendments to originate with the people themselves […]. (4:269-70)

Finally, he warned that; if some wanted war, he would give them one, using his Presidential Oath and his power as Commander-in-Chief:

> In your hands, my dissatisfied fellow-countrymen, and

> not in mine, is the momentous issue of civil war. The government will not assail you. You can have no conflict without being yourselves the aggressors. 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." (4:271)

Lincoln was right. As part of the checks and balances in the U.S. Constitution, legal responsibilities for war are divided between Congress and the Executive. Article I, Section 8 gives Congress the power to announce the legal state of war, in other words, to "declare War," to authorize the raising of an army and navy, to supervise the state militias, and to "provide for calling forth the militia to execute the laws of the Union, suppress insurrection and repel invasions." The power to "declare" is in the active voice and offensive in nature, the legal act which takes a sovereign nation *from a state of peace into a state of war*.

* * *

The executive powers are much different and are not dependent upon a "declaration" of war. In *The Prize Cases*, the Supreme Court ruled that the President's war power need not wait for "Congress to baptize it with a name." In authorizing the seizing of foreign shipping during the Civil War, the Supreme Court validated the presidentially-declared blockade under the War Powers in Article II, Section 2 of the Constitution, and the President's powers as "Commander-in-Chief of the army and navy of the United States, and of the militia of the several states, when called into actual service of the United States." Of course, Lincoln was also presented with the conundrum during the Civil War because he never wished to acknowledge the Confederacy as a sovereign nation, nor even to acknowledge that any state could secede from the Union. Thus, President Lincoln depended heavily upon his executive powers under the Constitution to suppress domestic insurrections (under Article II, Section 2), and also under the powers he inferred from the Presidential Oath of Office to "preserve, protect and defend" the Constitution itself, and to guarantee "to every state in the Union a republican form of government" (Article IV, Section 4).

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Also embedded here was the essential legal right of every person or entity to protect itself. Some cite this as the ultimate executive evil—necessity. Horace Greeley helped give birth to much of this rhetoric of "necessity" in the *New York Tribune*'s short-lived monthly magazine, *The Continental Monthly*, justifying the use of presidential war powers to free the slaves purely on those grounds, saying:

> 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, simply because there is a law against the private use of deadly weapons? *In such a time*, [all Constitutional restraints] *must give way to the supreme necessity of saving the national existence*. ("'The Constitution…'," 379; emphasis added)

In 1862 and 1863, when the Emancipation Proclamation was being written, Treasury Secretary Salmon Chase urged Lincoln to expand the scope of the Emancipation Proclamation to include the slaves in the border states, and also those located in the entirety of the Confederacy. Lincoln declined to do so, firmly stating, "The exemptions were made because the military necessity did not apply to the exempted localities" (Lincoln 6:428-429).

Lincoln also frequently reiterated his belief that, no matter how sweeping his war powers might be, they all terminated the moment that hostilities ended—including the power to grant limited emancipation. In February 1865, at the Hampton Roads Peace Conference, Lincoln 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 choice he would exercise, forcible presidential resistance was not one of the options (Lincoln 8:152; Stephens 2:613).

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. The Court set a pattern of avoiding explicit challenges to the war powers during hostilities—historically, in time of war, the Constitution is more or less suspended. In fact, no doubt, this is one of the reasons the Emancipation Proclamation depended so heavily upon the presidential war powers for its authority; it avoided a judicial challenge at the time.

Moreover, Lincoln had already pressed the outside of the envelope on presidential war powers in several other areas, such as suspension of *habeas corpus*, which dated from the Great Writ of Runnymede and Magna Carta; confiscation of rebel property; imprisonment and trial of rebel sympathizers and northern dissidents. Our checks and balances system does not prevent the president from doing such things, at least during the war itself, and Congress and the courts usually wait until after the end of hostilities to assert what they deem to be their competing constitutional powers.[2]

The courts and Congress have never attempted to define the war powers with any detail, knowing that, at the point of a loaded gun (or nuclear weapon), the people will allow the president to do what the president needs to do. That great evil, "necessity," will prevail. Thus, exotic political creatures like the "War Powers Resolution of 1973" go largely unattended, and are never made the subject of decisive litigation or Supreme Court review. It is only a "resolution," like that which in some states designated the third Saturday of every October "Sweetest Day."

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* * *

Five days after the Union victory at Antietam (with 23,000 dead and wounded, the bloodiest single-day battle in American history), on September 22, 1862, Lincoln convened his Cabinet and announced his intention for the Emancipation Proclamation. It would not be made official for four months (that is, January 1, 1863) in order to give rebel states a chance to surrender first, in which case slaves in those states would *not* be emancipated.

This is because the Proclamation (No. 95) was a *war measure*, limited to wartime:

> Now, therefore I, Abraham Lincoln, President of the United States, 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 fit and necessary war measure for suppressing said rebellion* […]. ("Transcript," emphasis added)

It has only limited geographic scope, restricted to those parts of the states *not* under Union control:

> Arkansas, Texas, Louisiana, (except the Parishes of St. Bernard, Plaquemines, Jefferson, St. John, St. Charles, St. James Ascension, Assumption, Terrebonne, Lafourche, St. Mary, St. Martin and Orleans, including the City of New Orleans) Mississippi, Alabama, Florida, Georgia, South Carolina, North Caroline, and Virginia, (except the forty-eight counties designated as West Virginia, and also the counties of Berkley, Accomac, Northampton, Elizabeth City, York, Princess Ann, and Norfolk, including the cities of Norfolk and Ports-

> mouth), *and which excepted parts, are for the present, left precisely as if this proclamation were not issued*. ("Transcript," emphasis added)

Slaves in Union control (that is, those in the loyal border states, twelve Louisiana parishes, 55 Virginia counties, and the cities of Norfolk, Portsmouth and New Orleans) *were never freed by the Emancipation Proclamation*.

The proclamation also carried the clear implication that, if the covered states surrendered, the Constitution would require that the slaves freed earlier be returned to their owners. Lincoln had not changed his legal position. The proclamation was a temporary measure, justified by legal necessity.

> And upon this act, sincerely believed to be an act of justice, warranted by the Constitution, *upon military necessity*, I invoke the considerate judgment of mankind, and the gracious favor of Almighty God. ("Transcript," emphasis added)

Did Lincoln, or the Emancipation Proclamation, free the slaves? Most certainly, no. Mr. Lincoln did not believe he could legally do that, as the contemporaneous documents prove.

* * *

It is those documents created at that time, and not some collection of secondary works (essentially just opinions and after-the-fact commentary), that should control our study of history and the conclusions we draw about it. This is the "Critical Analysis Method" of historical research.

Military dispatches during the Civil War give the clearest picture. In 1861, well before the Emancipation Proclamation, Major General John C. Fremont, Commander of the Western Department of the Army of the United States, issued his own proclamation:

> All persons who shall be taken with arms in their hands within these lines shall be tried by court martial, and, if found guilty, will be shot. […] *and their slaves, if any they have, are hereby declared free men*. ("Important from Missouri"; emphasis added)

Fremont also proceeded to issue purported Deeds of Manumission, freeing individual slaves in Missouri.

Shortly after the proclamation was issued, Lincoln ordered the removal of Major General Fremont and the annulling of Fremont's "proclamation." Fremont was court-martialed, convicted, and eventually pardoned. Later, he ran for president.

In April and May 1862, Major General David Hunter went even further, purporting to free all slaves in Georgia, Florida and South Carolina:

> GENERAL ORDERS, No. 11:
>
> The three States of Georgia, Florida, and South Carolina, comprising the Military Department of the South, having deliberately declared themselves no longer under the protection of the United States of America, and having taken up arms against the said United States, it became a military necessity to declare them under martial law. […] *The persons in these three States, Georgia, Florida, and South Carolina, heretofore held as slaves, are therefore declared forever free*. ("Gen. Hunter of Slavery," emphasis added)

Lincoln immediately annulled that order, too:

> That neither Gen. Hunter nor any other commander or person has been authorized by the Government of the United States to make proclamation declaring the slaves of any State free; and that the supposed proclamation now in question, whether genuine or false, is altogether void, so far as respects such declaration.
>
> I further make known, that, whether it be competent for me, as commander-in-chief of the Army and Navy, to declare the slaves of any State or States free, and whether at any time or in any case it shall have become a necessity indispensable to the maintenance of the government to exercise such supposed power, are

> questions which, under my responsibility, I reserve to myself, and which I cannot feel justified in leaving to the decision of commanders in the field. ("Proclamation by the President")

In contrast, long before in May 1861, General Benjamin ("Spoons") Butler asked pointed questions to Simon Cameron, Secretary of War:

> I hoped to cripple the resources of the enemy at Yorktown, and especially by seizing a large quantity of negroes who were being pressed into their service in building the intrenchments there. […] When I adopted the theory of treating the able-bodied negro fit to work in the trenches as property liable to be used in aid of rebellion, and so contraband of war, that condition of things was in so far met, as I then and still believe, on a legal and constitutional basis. […] Are they property? If they were so, they have been left by their masters and owners, deserted, thrown away, abandoned, like the wrecked vessel upon the ocean. There former possessors and owners have causelessly, traitorously, rebelliously, and, to carry out the figure, practically abandoned them to be swallowed up by the winter storm of starvation. If property, do they not become the property of salvors? (Butler 1:186-87)

Lincoln did not countermand Butler, a talented lawyer. Possibly, Lincoln just liked Butler better.[3] But he also recognized Butler's clever legal analysis: Butler analyzed emancipation as an issue of *property law*, consistent with the Constitution and even with the Dred Scott decision.

Fremont, Hunter and others did not.

Conclusion

The primary documents tell a story much different from the legend. Lincoln did not free the slaves. Instead, he firmly maintained his respect for the rule of law, knowing that, if the law were abandoned, persons like the slaves would suffer far greater harms.

At the same time, Lincoln was willing to be aggressive in his use of that law, both through creative lawyering (like Ben Butler's "contrabands" tactic) and through the use of the Presidential Oath and "military necessity" as a source of presidential power used for the right and with divine inspiration.

No, Lincoln did not free the slaves. We did—we, the people of the United States of America—by adopting the 13th Amendment to the U.S. Constitution.

> Amendment 13
> 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
> 2. Congress shall have the power to enforce this article by appropriate legislation.[4]

In the end, we did it the way Mr. Lincoln told us in his First Inaugural Address—we changed the Constitution by lawful, peaceful process.

And the original documents prove that.

NOTES

[1] In 1869, the Supreme Court agreed. Texas v White, 7 Wallace 700.

[2] Other examples would be seizures of German property during both World Wars, detention of enemy shipping, internment of Japanese nationals, Truman's nationalization of the steel industry, the Vietnam War, the failed Iranian Hostage Rescue, incursions into Lebanon, and Granada, and recent use of Guantanamo Bay, Cuba as a detention facility for enemy combatants.

[3] As Commander of the Occupied City of New Orleans, faced with Southern Ladies routinely spitting on soldiers, Butler issued his famous General Order No. 1: "Any female showing disrespect to the uniform of the Union Army, shall be treated as a woman of the evening."

[4] The Thirteenth Amendment also superseded some of the language in Article IV, Section 2, on state citizens and extradition, specifically the following clause: "No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, But shall be delivered up on Claim of the Party to whom such Service or Labour may be due."

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