Lincoln and Congress, Myths Aside

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LINCOLN & CONGRESS, MYTHS ASIDE

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I. INTRODUCTION

Most of Abraham Lincoln's critics characterize his actions throughout the Civil War as unlawful and unconstitutional exercises of unilateral power. On the other hand, many of his supporters who herald him as one of the greatest presidents in U.S. history still regard his actions as sacrifices of lesser constitutional values for the preservation of the Union. The truth is that Lincoln acted within the scope of his constitutional powers. More importantly, Lincoln acted with the express, implied, and retroactive authorization of Congress in four main categories: (1) his preliminary exercise of "war" powers; (2) the blockade on Southern ports; (3) the suspension of the privilege of the writ of habeas corpus; and (4) the issuance of the preliminary and final Emancipation Proclamations. Because Lincoln has been the subject of immense criticism for supposedly expanding presidential war powers and boldly asserting general authority to preserve, protect, and defend the Constitution, it is important to explore this topic and understand that Lincoln acted within Congress's statutory authorization.

Section II details the history leading up to the Civil War and the context within which Lincoln acted in the four main actions addressed in this note. Section III places Lincoln's actions in a constitutional context, by detailing the main provisions that governed Congress's and Lincoln's actions during the Civil War. Finally, Section IV addresses: (1) the consistency between Lincoln's and Congress's actions during Lincoln's preliminary Civil War efforts to demonstrate that he acted under Congress's express authorization; and (2) Lincoln's blockade, suspension of the privilege of the writ of habeas corpus, and Emancipation Proclamations by pointing to Congress's express,

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Lincoln & Congress, Myths Aside

implied, and retroactive authorization. Although Lincoln had unilateral authority to act in some areas, this article focuses on congressional statutes before and after each of Lincoln's adopted policies to illustrate his deference to Congress.

II. HISTORY LEADING UP TO THE CIVIL WAR

Several differences throughout the 1850s had emerged between the North and the South, including differences in education, industries, population makeup, and, predominantly, different views on slavery. Within three weeks of Lincoln's election as President, South Carolina, Alabama, Mississippi, Florida, and Georgia had all called conventions to pursue secession from the Union. By the end of January 1861, those states, in addition to Louisiana and Texas, voted to secede, gathered in a convention, adopted a constitution, and elected Jefferson Davis as President. Although compromise with southern states toward the end of President Buchanan's administration had failed, Lincoln assured the South in his inaugural address that he would enforce existing federal laws, including the Fugitive Slave Act. The Fugitive Slave Act was a federal law that Congress had passed on September 18, 1850, to enforce the constitutional provision requiring the return of runaway slaves to their masters. Like Buchanan, Lincoln rejected secession of the southern states and claimed that the Constitution did not include any provision for Union dissolution. He therefore did not recognize any right of secession and asserted the South had no moral right to revolt. Interpreting Lincoln's inaugural address as a "war message," the Confederacy officially started the Civil War by leading an aggressive attack on Fort Sumter on April 12, 1861.

Mere days after the attack on Fort Sumter, Lincoln adopted the controversial actions at issue throughout the insurrection. In response to the Confederate attack, Lincoln issued his Proclamation Calling Militia and Congress on April 15, 1861, just three days after the Fort Sumter attack. His proclamation called on the states to supply seventy-five thousand militiamen, requested additional volunteers, and called a special session of

2. Id. at 13; see also Susan Poser & Elizabeth R. Varon, U.S. v. Steinmetz: The Legal Legacy of the Civil War, Revisited, 46 ALA. L. REV. 725, 726 (1995).
3. FARBER, supra note 1, at 14; see also ABRAHAM LINCOLN, First Inaugural Address (Mar. 4, 1861), in SELECTED SPEECHES AND WRITINGS 284, 285-86 (Gore Vidal ed., 1992).
4. Id. supra note 1, at 14.
5. Id. at 13-14.
6. Id. at 14-15.
7. LINCOLN, Proclamation Calling Militia and Convening Congress (Apr. 15, 1861), in SELECTED SPEECHES AND WRITINGS, supra note 3, at 296, 296-97.
Congress in early July.\textsuperscript{8} On April 27, 1861, Lincoln authorized his commanding general to suspend the privilege of the writ of habeas corpus and issued a further proclamation in September of 1861 to this effect.\textsuperscript{9} To successfully support his proclamation, Lincoln invoked Article I, Section 9 of the U.S. Constitution, detailed below, and stated his oath to “take care that the laws be faithfully executed” in response to Southern resistance of the laws.\textsuperscript{10} In addition to Lincoln’s suspension of the privilege of the writ of habeas corpus, he imposed a blockade on Southern ports on April 19, 1861, with the explicit purpose to serve as a temporary measure until Congress acted. The constitutionality of this blockade was upheld by the Supreme Court in The Prize Cases.\textsuperscript{11} Finally, on September 22, 1862, Lincoln issued the Preliminary Emancipation Proclamation as part of the Union war effort, which was followed by his Final Emancipation Proclamation on January 1, 1863.\textsuperscript{12}

III. CONSTITUTIONAL LIMITS ON EXECUTIVE POWER

Lincoln and his critics both pointed toward different provisions of the U.S. Constitution to support their view of whether the President’s actions were lawful. Although this article does not explore the stand-alone constitutionality of Lincoln’s efforts outside of congressional authorization, an overview of the constitutional balance of power between Lincoln and Congress may be helpful. First, Lincoln rightfully argued that the Constitution did not include any provision for secession. To the contrary, the Constitution vested Lincoln and all other presidents with the sole oath-abiding power to “faithfully execute the office of the President of the United States, and will do the best of [his] ability to preserve, protect, and defend the Constitution of the United States.”\textsuperscript{13} This provision and the lack of any self-terminating provision of the Constitution generally served as the basis for Lincoln’s refusal to recognize the legality of Southern secession, the suspension of the writ of habeas corpus, and the blockade on Southern ports.

Second, Article I, Section 8 of the Constitution invests Congress with the power to call forth the militia, declare war, and to suppress insurrections.\textsuperscript{14} Lincoln never denied that Congress had this power, but in

\textsuperscript{8} FARBER, supra note 1, at 15. This proclamation led to the secession of Virginia, Tennessee, North Carolina, and Arkansas.
\textsuperscript{9} LINCOLN, Proclamation Suspending the Writ of Habeas Corpus (Sep. 24, 1862), in SELECTED SPEECHES AND WRITINGS, supra note 3, at 348, 348.
\textsuperscript{10} LINCOLN, Special Message to Congress (July 4, 1861), in SELECTED SPEECHES AND WRITINGS, supra note 3, at 300, 306.
\textsuperscript{11} FARBER, supra note 1, at 17; see also The Prize Cases, 67 U.S. 635 (1863).
\textsuperscript{12} FARBER, supra note 1, at 19–20.
\textsuperscript{13} U.S. CONST. art. II, § 1.
\textsuperscript{14} U.S. CONST. art. I, § 8.
fact, as explored below, implicated Congress’s prior authorization through The Militia Act and implied the retroactive authorization that soon followed Lincoln’s proclamation calling forth the militia. Congress had the sole power to perform both actions, but had previously vested the President with such powers in the event of domestic insurrections, which was consistent with Lincoln’s characterization of the Civil War.

Similarly, Lincoln’s critics rely on Article I, Section 9 of the Constitution to argue that the power to suspend the privilege of the writ of habeas corpus rested with Congress and not with the President. That section provides the “privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.” Because this power to suspend it in the case of rebellion or invasion rests in Article I, which details all other powers of Congress and not the President, critics argue that Lincoln exceeded constitutional boundaries when he suspended the privilege. However, Section 9 includes other provisions that limit both Congress and the President from performing certain actions, and thereby suggests that the Framers did not intend Section 9 to apply only to Congress.

Finally, Congress’s powers under Section 8 to provide for all aspects of the war effort formed the basis for Lincoln’s constitutional blockade on Southern ports and issuance of the Emancipation Proclamations. As Congress had the power to govern the war and had invested Lincoln with those powers traditionally vested in Congress, Lincoln acted both within constitutional boundaries and consistent with congressional authorization during the Civil War.

IV. LINCOLN’S ACTIONS DURING THE CIVIL WAR

A. PRELIMINARY WAR EFFORTS

On April 15, 1861, Lincoln issued a Proclamation Calling Militia and Convening Congress, an official exercise of presidential authority after the Confederate attack on Fort Sumter. In the proclamation, Lincoln called for seventy-five thousand militiamen, called for volunteers to join the regular military, and directed increases in the regular army and navy. The justification for these actions was based on the “inherent right of every government to ‘use its military power to put down an armed insurrection,
too strong to be controlled by the civil authority.’” 19 Setting aside arguments that Lincoln was fully justified in engaging militia through his independent constitutional authority, Congress expressly authorized presidents to call forth the militia in the circumstances that Lincoln faced, and retroactively authorized the measures he took in response to the attack on Fort Sumter.

1) Prior Congressional Authorization

The first reason Lincoln’s actions were justified is because of previous congressional action and the practical needs of executive initiative in Lincoln’s circumstances. Congress expressly authorized Lincoln to call forth the militia to execute the laws in the circumstances he faced. In 1795, pursuant to Article I, Section 8, Congress “authorized the President to employ the militia both to suppress insurrections and to execute the laws.” 20 Furthermore, an 1807 statute also “empowered him . . . to use the navy and army” in the same circumstances. 21 Lincoln consistently characterized the Civil War as a domestic insurrection, rather than a foreign war, which then enabled him to act under Congress’s authorization to use the militia to respond to the attack on Fort Sumter. Lincoln also expressed that the domestic insurrection was “too strong to be controlled by the civil authority,” which, under The Militia Act of 1792, was the prerequisite for the President to be able to call forth the militia. 22 The Southern states had engaged in the unconstitutional act of secession, and Lincoln faithfully executed the laws that the Confederacy violently disobeyed, including the Constitution.

2) Retroactive Authorization

Congress also retroactively authorized Lincoln’s call to the militia and his request for volunteers to join the regular militia. In his initial proclamations and exercises of “unilateral” presidential authority, Lincoln promised to “submit his actions to legislative authority when Congress came together in July.” 23 Lincoln did not request Congress to authorize or continue down the path that he had chosen, but instead convened both Houses of Congress “to consider and determine, such measures, as, in their wisdom, the public safety, and interest may seem to demand.” 24 He obtained retroactive authorization on August 8, 1861, when Congress

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19. FARBER, supra note 1, at 133 (based on a previously issued Opinion by Chief Justice Taney); Currie, supra note 17, at 1135.
20. Currie, supra note 17, at 1133.
21. Id.
23. Currie, supra note 17, at 1135.
24. LINCOLN, supra note 7 (emphasis added).
passed a resolution endorsing the President’s military actions up until that point. The resolution stated that “all the acts, proclamations, and orders of the President . . . respecting the army and navy of the United States . . . are hereby approved and in all respects legalized as if they had been issued and done under the previous express authority and direction of the Congress of the United States.”25 The language in this statute communicates wholehearted support for Lincoln’s military response to the Southern attack. Congress could have simply approved Lincoln’s actions without addressing or suggesting its own authority to declare war or to raise and support armies. Instead, by giving the statute retroactive effect, Congress openly admitted its own power to implement Lincoln’s measures, but took the extra step to justify Lincoln’s actions as if they were issued under previous express authority.

Professor Daniel Farber characterizes Lincoln’s unilateral call for volunteers to the regular militia as contrary to the express will of Congress. However, a congressional committee in 1861 concluded that volunteers were militiamen, therefore subjecting this portion of Lincoln’s unilateral action to the prior congressional authorization for the President to use the army and navy to suppress insurrections.26 Congress also authorized Lincoln to call for up to five hundred thousand additional volunteers during its special session in 1861, and retroactively authorized Lincoln’s request for volunteers.27 Congress made it clear that both payment for the militia and volunteers were authorized beginning the date that they were called into service by Lincoln—not when Congress authorized the order.28

3) Prospective Authorization - Additional Congressional Acts

Finally, Congress adopted several other measures during the special session in 1861 to promote the war against the Confederacy that were consistent with Lincoln’s main proclamation that the Union had to be preserved. Besides authorizing the President to raise volunteers for the militia as described above, Congress: authorized Lincoln to borrow money for the war effort; increased customs duties and closed Southern ports; “made conspiracy a crime if its object was to overthrow the government, to levy war against the United States, to obstruct the execution of the laws, [or] to seize government property;” outlawed recruiting soldiers to fight against the United States; required federal officers to take an oath of allegiance to the nation; authorized Lincoln to prohibit commercial intercourse with rebel states; and empowered Lincoln to call out armed forces and militia for that purpose whenever it was impracticable to enforce

25. Currie, supra note 17, at 1140 (emphasis added).
26. FARBER, supra note 1, at 136; Currie, supra note 17, at 1135 (citing S. REP. NO. 37-2 (1861)).
27. Currie, supra note 17, at 1140.
them by ordinary judicial means. None of these measures met "significant" constitutional objection. Congress's initiation of these terms further conveys that it did not simply retroactively authorize Lincoln's preliminary war efforts to avoid an intergovernmental branch conflict, but that it fully supported his actions and endeavored to sustain his future efforts.

B. BLOCKADE ON SOUTHERN PORTS

Similar to Lincoln's preliminary war efforts, Congress retroactively authorized his blockade on Southern ports. On April 19, 1861, Lincoln issued the Proclamation of the Blockade on Southern Ports. It has three important components for purposes of this inquiry. First, Lincoln described that it was to last "until Congress shall have assembled and deliberated on the said unlawful proceedings . . . advisable to set on foot a blockade of the ports." As with his preliminary call to the militia, Lincoln issued the blockade as a space-holder until Congress assembled and could address the issues confronting the Union. Second, Lincoln initially limited the blockade to the deep south, but then extended it to the upper southern states. As with the Emancipation Proclamation, which will be discussed in greater detail, Lincoln confined the scope of the blockade only to that which was necessary to maintain protection for the Union and its purposes against Confederate violence and property seizure. Third, the Supreme Court in The Prize Cases described the ports as:

held in hostility to the General Government. It is no loose, unorganized insurrection, having no defined boundary or possession. It has a boundary marked by lines of bayonets, and which can be crossed only by force—south of this line is enemies' territory, because it is claimed and held in possession by an organized, hostile and belligerent power.

The Supreme Court supported Lincoln's blockade because it was directed at an organized war party.

1) Retroactive Authorization

There are several justifications for Lincoln's blockade aside from its independent legality. First, the 1861 Act that Congress passed during its special session, which authorized Lincoln's call to the militia, also extended its retroactive authorization to the blockade. The Act approved, legalized, and validated "all the acts, proclamations, and orders of the President, as if

29. Currie, supra note 17, at 1140-41.
30. Id.
32. FARBER, supra note 1, at 138.
33. The Prize Cases, 67 U.S. at 673.
they had been issued and done under the previous express authority and
direction of the Congress of the United States.” 34  Some congressmen
claimed that the Act only applied to Lincoln’s initial military
appropriations. 35

However, there are three main problems with this interpretation. First,
the expansive words in the statute reflect Congress’s justification of every
single action respecting the army and navy that Lincoln had previously
issued during the war. If Congress intended for the Act to apply only to
Lincoln’s initial call to the militia and for volunteers, the words in the
statute could have been written more narrowly. Second, blockades require
militiamen, so Lincoln’s blockade still qualifies under Congress’s
retroactive authorization respecting the army and navy. Finally, this narrow
reading of Congress’s intent is inconsistent with the myriad war measures it
issued to allow Lincoln to vigorously prosecute the war. Congress did not
blindly endorse Lincoln’s war efforts. It provided him with manpower to
preserve the Union.

2) The Supreme Court and The Prize Cases

In The Prize Cases, the Supreme Court validated the constitutionality of
Lincoln’s blockade by relying on congressional authorization. The Court
explained that, “it is plain that if the President had in any manner assumed
powers which it was necessary should have the authority or sanction of
Congress, that on the well known principle of law . . . [the 1861] ratification
has operated to cure the defect.” 36 However, as Currie described, there is
one main problem with the argument that Congress retroactively authorized
the blockade, even though “ratification of unauthorized acts had a long and
honorable history in the law of agency.” 37 A congressman explained that
retroactive ratification of the blockade would be the equivalent of an ex post
facto law relating to forfeiture for acts done before they were outlawed. 38
The Supreme Court similarly recognized that congressional ratification
could be problematic in the context of criminal law, but considering that
there was no criminal indictment at issue, it was unnecessary to explore the
issue further. 39

The Court instead looked to the international law principle of “the right
of one belligerent not only to coerce the other by direct force, but also to

34. Currie, supra note 17, at 1140.
35. Id. (citing Maine Senator William Pitt Fessenden’s belief that the Act only referred to
military appropriations).
36. The Prize Cases, 67 U.S. at 671.
37. Currie, supra note 2, at 1139.
38. Id.
39. The Prize Cases, 67 U.S. at 671.
cripple his resources by the seizure or destruction of his property.”

Even though Lincoln issued the blockade without prior congressional authorization, the Supreme Court explained why it was permissible for him to go beyond his constitutional limitations:

If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be “unilateral.”

Furthermore, the Supreme Court justified Lincoln’s activities by explaining that the independence of a rebelling territory was not a prerequisite for its qualification as a belligerent party under the law of nations. Dissenters characterized the blockade as illegal until Congress authorized the President’s actions on July 13, 1861, but a declaration of war is not what indicates that one exists. When Lincoln issued the blockade, a de facto war existed.

Finally, Congress prospectively authorized the blockade on August 5, 1861, when it increased customs duties and facilitated collection by closing Southern ports. Congress authorized this action in the context of several other war measures to help Lincoln put down the domestic insurrection. Congress, like the Supreme Court, recognized the relevance and necessity of the international laws of war in Lincoln’s blockade. Congress retroactively and prospectively authorized Lincoln to issue a blockade on Southern ports throughout the war.

C. SUSPENSION OF THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS

Under Article I, Section 9, “the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.” On April 27, 1861, Lincoln authorized his commanding general to suspend the privilege of the writ of habeas corpus, and issued a further proclamation in September of 1862 to this effect. In support of the suspension, Lincoln explained that, “he who dissuades one man from volunteering, or induces one soldier to desert, weakens the Union

41. The Prize Cases, 67 U.S. at 668 (emphasis added).
42. FARBER, supra note 1, at 140.
43. Currie, supra note 17, at 1140 (citing Act of August 5, 1861, ch. 45, 12 Stat. 292, §§ 1–5 (1861)).
44. U.S. CONST. art. I, § 9 (emphasis added).
45. Currie, supra note 17, at 1134; LINCOLN, supra note 9.
cause as much as he who kills a Union soldier in battle.” Lincoln justified the suspension as a necessary war measure by qualifying it under the constitutional “public safety” exception to the prohibition on suspension. He recognized that dissuasion had the same power to impair the Union as Southern soldiers taking up arms did—public safety required him to act.

1) Prior Authorization – The Militia Act

Aside from arguments supporting Lincoln’s independent authority, several congressional acts previously and retroactively authorized Lincoln’s exercise of the Article I, Section 9 suspension power. First, Congress passed the Militia Act on May 2, 1792, which provided Lincoln with implied authorization to suspend the privilege of the writ of habeas corpus. The Militia Act authorized the President to call forth the militia when the laws were forcefully opposed, to suppress the opposition, and to duly execute the laws. A federal circuit court advanced that justification when it held that, by empowering presidents with the ability to call forth the militia under certain circumstances, the Militia Act also “implicitly authorized him to declare martial law, and hence to suspend habeas.”

When considering the validity of Congress’s prior authorization, it is important to ensure that the circumstances for martial law were satisfied. First, under Article I, Section 8, Congress has the power to make rules and regulations for the military and call forth the militia. The Militia Act was a proper exercise of that power. Second, martial law is generally established when civil authority in the community becomes subordinate to the military for the purpose of repelling invasions or when the “ordinary administration of the laws fail to secure the proper objects of the government.” Martial rule can exist de facto, and has a component of necessity. By calling forth the militia under Congress’s prior authorization in the event of a domestic insurrection and use of force, martial law was implicated de facto. Lincoln proclaimed his responsibility to preserve, protect, and defend the Constitution, and to ensure that the laws are faithfully executed. Therefore, he had the power to impose martial law by calling forth the militia to preserve the Union.

Lincoln justifiably called forth the militia, and thereby rightfully suspended the privilege of the writ of habeas corpus under constitutional,

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46. LINCOLN, Letter to Erastus Coming and Others (Jun. 12, 1863), in SELECTED SPEECHES AND WRITINGS, supra note 3, at 373, 376.
48. FARBER, supra note 1, at 162 (discussing Ex parte Field, 9 F. Cas. 1 (1862)).
50. Id. at 86–87.
51. Id.
52. See generally id. at 88.
not extra-constitutional, necessity. First, as described above, he had to act to preserve the Union and the Constitution.\(^5^3\) Second, although Justice Taney argued that the suspension power belonged to Congress alone since it resided in Article I, Lincoln further justified the necessity of his actions by claiming that public safety would be at further risk if he had waited to act until Congress could be called to session.\(^5^4\) Furthermore, if the Framers intended only Congress to exercise the suspension power, there would be circumstances under which the power would remain unexercised when necessary for the public safety.

Finally, other debates prompted further analysis of express powers in Section 9, which suggest that Congress did not solely bear the suspension privilege. Section 9 banned Congress and the President from granting titles of nobility, while it restricted only the President from spending money without legislative appropriation.\(^5^5\) These two restrictions are on two different branches of government, which suggest that the Framers did not intend Section 9 to apply only to Congress. Because Lincoln acted pursuant to prior congressional authorization in calling forth the militia, he was justified in suspending the privilege of the writ of habeas corpus as incidental to martial law.\(^5^6\) Under this interpretation, Lincoln was also justified to unilaterally suspend the privilege.

2) Retroactive Authorization – 1861 Act

In the extreme, if Lincoln was not justified in suspending the privilege pursuant to prior congressional authorization, Congress retroactively authorized his exercise of the Article I, Section 9 power. As explained above, Congress’s Act, passed during a special session in 1861, retroactively authorized “all the acts, proclamations, and orders of the President.” This Act was issued on August 6, 1861, and Lincoln suspended the privilege of the writ of habeas corpus on April 27, 1861. Therefore, since Lincoln suspended the privilege before Congress passed this Act, the retroactive authorization also extended to his suspension of the privilege of the writ of habeas corpus. The retroactive authorization was not limited to his Proclamation to Call the Militia. Moreover, ratification of

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53. It is here where Lincoln asked, “Are all the laws but one to go unexecuted, and the Government itself go to pieces lest that one be violated? Even in such a case, would not the official oath be broken if the Government should be overthrown when it was believed that disregarding the single law would tend to preserve it?” LINCOLN, Message to Congress in Special Session (Jul. 4, 1861), in SELECTED SPEECHES AND WRITINGS, supra note 3, at 300, 307.

54. Id. See also Currie, supra note 17, at 1135.

55. See Currie, supra note 17, at 1138, for one senator’s support of Lincoln’s suspension for these specified reasons.

56. The general understanding of martial law is not consistent with the Court’s assertion that martial law can only exist when the courts are closed. Davies, supra note 49, at 100.
“unauthorized” acts was justified under the law of agency, so Congress was justified in endorsing Lincoln’s actions.

3) Prospective Authorization – The Habeas Corpus Act

Finally, on and after March 3, 1863, Congress prospectively authorized Lincoln to suspend the privilege of the writ of habeas corpus anywh...
belief that Congress’s acts comprised the “plain unmistakable spirit of that age.” Over this span of twenty-six years, Congress gradually took steps to limit slavery in the Union. Lincoln echoed this exact sentiment on numerous occasions. In his appeal to border states on the idea of compensated emancipation, Lincoln clarified his preference for gradual, not immediate, emancipation, before war necessity.

2) Other Implied Authorization

Once Lincoln became President, he acted pursuant to the implied authorization of Congress under six categories of analysis: (1) prior to the Civil War, both Congress and Lincoln endorsed the concept of compensated emancipation; (2) Lincoln directly quoted the Second Confiscation Act (SCA) in his Preliminary Proclamation; (3) Lincoln followed Congress’s footsteps in limiting emancipation measures to that which was necessary to aid the Union effort in the war; (4) Lincoln, like Congress, failed to address the immorality of slavery in his measures; (5) after Congress’s Acts declaring that slaves would be free forever, Lincoln reiterated those sentiments with war justifications; and (6) Lincoln’s emancipation provisions generally resembled the forfeiture provisions in both the First Confiscation Act (FCA) and SCA.

a) Pre-Civil War Necessity: Concept of Compensated Emancipation

Before emancipation became a necessary war tool, Congress and Lincoln proposed the idea of compensated emancipation to express their anti-slavery sentiments and desire to gradually rid the Union of slavery. Before Congress passed the SCA, Congress implemented other measures leading toward complete emancipation. From April to June of 1862, Congress abolished slavery in the territories and in the District of Colombia completely. In the prohibition, Congress provided for compensated emancipation, which is consistent with Lincoln’s earlier appeal to the border states. Lincoln stressed his interest in gradual emancipation when he proposed compensated emancipation to the border states to encourage their acceptance.

62. Id.
64. Currie, supra note 17, at 1147.
65. COLLECTED WORKS, supra note 63.
66. Id.
b) Citation to the SCA in the Preliminary Proclamation and the Use of Different Terminology

Lincoln directly relied upon Congress’s SCA when he issued the Preliminary Proclamation in spite of the different terminology he used for forfeiture. He acted within Congress’s expressed will in the Acts for four main reasons. First, Lincoln expressly relied upon Congress’s SCA when he initially discussed emancipation in the Preliminary Proclamation—a majority of the content in it was Congress’s SCA.67

Second, although Congress used the word “forfeiture” in both Acts and Lincoln referred directly to the concept of “emancipation,” Congress still provided sufficient support for Lincoln’s emancipation. There is a significant distinction between confiscation and forfeiture, the latter of which applied to slaves. As Professor Fabrikant explained,

> Slaves were covered by the forfeiture provisions of the . . . [Acts] that declared escaped slaves to be forever free. It was *not necessary to confiscate a slave* in order for the slave to be subject to forfeiture by his master under the FCA or to be declared forever free under the SCA, *just as a slave emancipated under the Proclamation did not first have to be confiscated or seized.*68

Even though Lincoln used the term “emancipation,” he acknowledged that “by virtue of . . . [the Acts] . . . the legal claims of certain persons to the labor and service of certain other persons have become forfeited.”69 Forfeiture and emancipation were thus synonymous as applied to slavery, because neither Congress’s Acts, nor Lincoln’s proclamations, required confiscation for slaves to become “forever free.”

Third, Congress passed a resolution endorsing the Final Proclamation shortly after Lincoln issued it. Professor Guelzo claims that Congress had a hidden purpose to ratify the Proclamation—that it understood that the Acts were “plainly defective” constitutionally, and such a resolution would serve its original purpose.70 However, Professor Guelzo too easily presumes that Congress had this hidden motive when it ratified Lincoln’s actions. This was not the first time that Congress ratified Lincoln’s actions. Congress previously ratified all of Lincoln’s preliminary war measures, including the blockade and suspension of the writ of habeas corpus. Ratification and its constitutionality were never previously questioned. Considering any questions that Lincoln’s critics may have had for the validity of his

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67. Robert Fabrikant, *The Emancipation Proclamation Unveiled: A Reply to Professor Guelzo*, 50 How. L.J. 417, 424 (2007); see also id. at 427 (“Lincoln recognized that slaves could be asked to fight, and would fight, but only if they were promised that they would not be returned to slavery at the end of the War.”).
68. *Id.* at 426 (emphasis added).
70. *Id.* at 406.
proclamations, Congress's ratification served to eliminate any confusion of his "unilateral" exercise of authority.

Finally, the Supreme Court supported Congress and Lincoln jointly when it "upheld the seizure and destruction of Confederate property in aid of the war effort" and deemed it a "means for carrying on the war." Since Lincoln acted consistently with Congress via the Confiscation Acts, his Emancipation Proclamation uttered the same sentiment and qualified under Congress's implied authorization. Emancipation was consistent "with the general trend of congressional action against slavery, including the Confiscation Acts."  

**c) Limit to War Necessity Measures**

Lincoln acted pursuant to Congress's implied authorization through the Confiscation Acts and other resolutions when he limited the scope of emancipation to deal only with the war effort. Congress took more strident measures during the Civil War to debilitate the Confederate front. On August 6, 1861, before Lincoln issued his Preliminary Proclamation, Congress passed the FCA, which made any property used in furtherance of the rebellion, including slaves, subject to forfeiture. By this point, "forfeiture of tools of crime had a long and respectable history that saved it from due process and other objections." By passing the FCA, Congress recognized slavery as a tool of crime, and recognized, as Lincoln later did, that this would be an act to dismantle much of the Confederacy's manpower.

Congress then passed the SCA on July 16, 1862, which punished treason and related offenses with forfeiture of slaves. It made it an offense to give aid to the rebellion, which was punishable by fine and imprisonment, declared guilty persons "forever incapable and disqualified to hold any office under the United States," and directed the President to "seize all the property of . . . leading rebels . . . [and] lesser rebels." The SCA again focused on slavery in the context of Confederate power, and the inherent need to cripple Southern manpower.

Lincoln acted under Congress's implied authorization regarding the war in two ways: (1) their primary shared purpose was to impair the Southern front; and (2) they expressed the same dual motives. First, Lincoln's Final Emancipation Proclamation, issued on January 1, 1863, focused purely on military concerns because he limited the effect of the Proclamation to the conflicting Southern states. Similarly, one congressman described the

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71. FARBER, supra note 1, at 155 (citing Miller v. U.S., 78 U.S. 268 (1870)).
72. FARBER, supra note 1, at 156.
73. Currie, supra note 17, at 1141.
74. Id.
75. Id. at 1154 (citing Second Confiscation Act, ch. 190, 12 Stat. 589 (1862)). Furthermore, the Supreme Court upheld the constitutionality of both the First and Second Confiscation Acts.
SCA's purpose as saying "to the slave population . . . leave the support of your rebel masters; come within the lines of the Union armies, and your shackles shall fall off; henceforth and forever you shall be a free man."76 Emancipation was used by Congress to target rebel masters who fought for the Confederacy and was a valid war measure, because:

the legitimate use of force against an enemy power in time of war traditionally has been understood to include the power to seize and confiscate property within the area or areas under the territorial control of the enemy force or power, if and when it becomes militarily possible to do so, so as to deprive the enemy of those resources and to add those resources to one's own military and economic capabilities.77

Lincoln's Emancipation Proclamation was solely a prospective measure, which applied only to property and resources "under the control of the hostile enemy's military and political force at the time of the Proclamation's preliminary and final issuance."78 Slavery was critical to the Confederate economy,79 and both Lincoln and Congress sought to cripple it. Congress's combination of forfeiture provisions, treason, and punishment of rebels similarly suggests that Congress passed the Acts to suppress the strength of Southern armies.

Second, Congress and Lincoln both recognized the same dual motives for the Acts and Proclamations. Congress provided that slaves owned by rebels, together with families, would be freed if they performed military service,80 which corroborates the idea that Congress intended to weaken the Confederacy and additionally strengthen the Union. Lincoln similarly declared that emancipated slaves would be received into the armed service, which indicates a dual war-focused motive: to impair the southern war effort and to improve the Union war effort. As support that the dual war-focused motive was Lincoln's primary justification, he referenced the one hundred thousand emancipated slaves who were afterwards in the U.S. military service, and the fifty thousand who bore arms, "thus giving the double advantage of taking so much labor from the insurgent cause, and supplying the places which otherwise must be filled."81 In addition, several congressmen publically supported his actions by emphasizing Lincoln's consistency with Congress regarding emancipation. Ohio Representative

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76. Fabrikant, supra note 67 (quoting CONG. GLOBE, 37th Cong., 2d Sess., 3380 (1862)) (emphasis added).
77. Paulsen, supra note 40, at 814 (emphasis added).
78. Id. at 817.
79. Id.
80. FARBER, supra note 1, at 153.
81. Currie, supra note 17, at 1151.
82. LINCOLN, Annual Message to Congress (Dec. 8, 1863), in SELECTED SPEECHES AND WRITINGS, supra note 3, at 406, 407.
John Hutchins considered the Proclamation the equivalent of a military order, and stated:

If it will weaken the resources of the rebels, it will cripple their power and diminish their capacity for resistance. If it will weaken the rebels, and at the same time strengthen the Government, it will in a double aspect aid in crushing the rebellion. . . . Laborers in the Army, laborers in raising provisions and procuring supplies, are as essential elements of military power as soldiers.\(^2\)

Congress’s ratification implies its understanding of Lincoln’s act as purely a war measure and that it shared his dual motives in using slavery as a tool to win the war.

d) Failure to Address Immorality

Lincoln, like Congress, failed to express interest in appealing to slavery’s immorality, aside from his calls for gradual emancipation before it became a necessary war tactic. Congress did not discuss civil rights for slaves who were affected by the statute, or any other provisions granting slaves rights and freedoms beyond emancipation. In addition to the SCA, Congress passed a resolution “declaring that the purpose of the war was to preserve the Union, not to interfere with the ‘established institutions’ of the states,” which was confirmed by an overwhelming vote by both Houses.\(^3\) Congress made it clear that the Acts represented guerilla warfare.

This is a mirror image of Lincoln’s primary purpose in the Civil War—to preserve the Union, not to abolish slavery. The latter was a prerequisite to achieve the former. After Congress passed the SCA and Lincoln issued the Preliminary Proclamation, Lincoln confirmed that his main object, like Congress, was to implement whatever measure necessary to preserve the Union. Lincoln explained, “[m]y paramount object in this struggle is to save the Union, and is not either to save or to destroy slavery. If I could save the Union without freeing any slave I would do it, and if I could save it by freeing all the slaves, I would do it.”\(^4\) Although Congress and Lincoln exhibited a desire to push toward gradual emancipation before it became necessary to implement as a war tactic, Lincoln acted under the implied authorization of Congress, through the SCA, when he issued the Proclamations. Lincoln did not discuss any substantive rights that he believed former slaves had under the Proclamation, and he did not appeal to natural law principles. He made it about the war, and narrowed his focus to the power that he wielded as the Commander-in-Chief.\(^5\)

\(^2\) Currie, supra note 17, at 1158–59.

\(^3\) Id. at 1147 (citing CONG. GLOBE, 37th Cong., 1st Sess., 223 (1861)).


Professor Guelzo characterizes Lincoln’s failure to address the immorality of slavery when he signed the D.C. emancipation statute as his failure to stand against the institution on humanitarian grounds. However, to defend the merits of Lincoln’s self-imposed limitation, he simply confined his emancipation procedures at the time to war concerns and consistency with Congress. As early as 1854, after Congress engaged in several measures limiting slavery in the Union, Lincoln displayed his distaste and dislike for slavery as an institution:

If A can prove, however conclusively, that he may, of right, enslave B—why may not B snatch the same argument, and prove equally, that he may enslave A?—By this rule, you are to be slave to the first man you meet, with a fairer skin than your own?

On numerous occasions Lincoln confirmed that he considered slavery an immoral and illogical institution, and that he eventually wanted to rid the nation of it. However, Lincoln’s actions with respect to slavery during and immediately after the Civil War were limited to war measures, and consistent with the express and implied will of Congress.

Both Lincoln and Congress failed to express a desire to grant emancipated slaves the right to vote and additional citizenship privileges. They did not do so because they were trying to halt the Civil War; they were not attempting to address inherent immoralties in other regions of the Union. Lincoln acted with the same purpose that Congress bore with the Confiscation Acts. There were no specific provisions that expressed reliance on natural law principles underlying the repugnance of slavery.

e) Declaration That Slaves Would Be “Forever Free”

Lincoln acted pursuant to a key, expressed provision that Congress included in the SCA: that they “shall be forever free.” Lincoln, too, expressed his thought that they had to be forever free, so that they would fight for the Union. Lincoln explained that slaves, “like other people, act upon motives. Why should they do anything for us, if we will do nothing for them? If they stake their lives for us, they must be prompted by the strongest motive—even the promise of freedom.” Lincoln, like Congress, declared slaves forever free to ensure that the war measure would be effective—to encourage the freed slaves to support the Union the appeal

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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? Armies, the world over, destroy enemies’ property when they can not use it; and even destroy their own to keep it from the enemy.

Id. at 391.

86. See generally Guelzo, supra note 69.

87. LINCOLN, Fragment on Slavery (1854?), in SELECTED SPEECHES AND WRITINGS, supra note 3, at 91, 91.

88. Fabrikant, supra note 67, at 431.

89. LINCOLN, supra note 85; see also FARBER, supra note 1, at 153.
needed to be strong enough for them to have a vested interest in Union loyalty. Lincoln and Congress simply acted in the interest of Union preservation.

V. CONCLUSION

It is widely assumed that Lincoln vastly expanded presidential power. This is an unfounded assumption that disregards Congress’s role throughout the Civil War. Lincoln acted chiefly under the umbrella of Congress’s express, implied, and retroactive authorization when he: (1) initiated preliminary war efforts; (2) issued a blockade against Southern ports; (3) suspended the privilege of the writ of habeas corpus; and (4) proclaimed all slaves in the South free. Regardless of whether Lincoln’s unilateral authority validated these measures, Congress paved the way for him to constitutionally adopt these provisions.

Lincoln did not disregard the Constitution to act in the name of “extra-constitutional” necessity. Lincoln did not usurp powers rightfully vested in Congress when he issued effective war measures to respond to confederate attacks. Lincoln did not start the Civil War to promote closet motives of abolishing slavery. These are myths created in the afterthought of war that isolate Lincoln’s actions without considering the constitutional actors around him. Lincoln should be hailed as the “Great President,” not merely because he saved the Union, but because he did so while remaining within the lines that Congress and the Constitution drew for him.