LINCOLN'S EXECUTIVE PREROGATIVE AND CONSTITUTIONALITY: THE PRESIDENT'S ACTIONS JUSTIFIED

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Abstract: *Despite President Abraham Lincoln's heralded accolades as one of America's most cherished presidents, there still exists – both then and now – a chord of distrust among some historians and academics against Lincoln's use of executive power. While this growing cadre of critics condemns the president's actions as unconstitutional, this paper maintains the opposite by defending Lincolwn's actions as fully constitutional. Acting on the grounds of a thoughtful interpretation of executive prerogative, President Lincoln clearly demonstrated his commitment to the Constitution by understanding the preeminent function of his office in upholding the Union at all costs, evidence of which can be found in Lincoln's actions during the Civil War.*

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Perhaps no U.S presidency in history has probed the limits of Constitutional executive power more than Abraham Lincoln's presidency during the Civil War. Lincoln's actions launched a war against the Southern secession, raised an army independently from Congress, controversially suspended habeas corpus through exclusive use of the executive branch, and used the Article II power of "Commander in Chief" to "seize" and free Southern slaves.[1] His liberal use of power yielded a widespread response of criticism and fear from figures of the 19th century and modern historians and politicians ever since, citing Lincoln's "unconstitutional" abuse of the executive branch. Despite this criticism, Abraham Lincoln consistently acted constitutionally in accord with a rational understanding of constitutional executive action, confirming his commitment to reasonable and justified action while demonstrating his actions may have been less "despotic" than some have assumed. This constitutional commitment is demonstrated by Lincoln's pattern of

1 HOWARD GILLMAN, ET AL., 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Oxford Univ. Press 2013), 296.

executive prerogative in the midst of special circumstances and backed by subsequent constitutional justifications for each action, illuminating Lincoln's understanding of an "elastic" Constitution permitting dubiously lawful acts "necessary" to protect the Constitution itself. Three succinct examples of this pattern are found in 1) Lincoln's action and response regarding the *Ex Parte Merryman* decision, 2) the narrative surrounding the *Prize Cases,* and 3) Lincoln's response to the *Dred Scott* decision, all of which defend Lincoln's actions as constitutional given the dire situation of the war.

The most foundational claim made against President Lincoln both at the time of the Civil War and in decades since was his alleged disregard for the meaning, spirit, and restraint of the Constitution, provoking a "tyrannical" and unlimited dictatorship (albeit a benign one).[2] Author of *The Real Lincoln,* Thomas DeLirenzo comments that Lincoln's long list of constitutionally non-provisioned actions including suspension of freedom of the press

2 Benjamin A. Kleinerman, *Lincoln's Example: Executive Power and the Survival of Constitutionalism,* 3 Perspectives on Politics 4, 802 (2005).

in newspapers and assembly of a "secret police" were "incidents of waging war on civilians", concurring with Clinton Rossiter's contempt for Lincoln's "amazing disregard for the …Constitution."[3] Harsh critics of Lincoln's executive power denounce the president as a "tyrant," "unlimited despot," and "monarch," while more approving critique only admits that the "benevolent" dictatorship had "never fallen into safer and nobler hands."[4] Despite these bold claims, one must first consider if these questionably constitutional actions were, in fact, reflective of constitutional disregard on Lincoln's part or instead a thoughtful understanding of the meaning and purpose of the Constitution in the first place rendering his actions reasonable and justified. His actions, it would seem, appear to support the latter view in which Lincoln's wartime measures were a thoughtful and reasonable execution of the Constitution.

The most basic response to Lincoln's critics and the

3 THOMAS J. DILORENZO, THE REAL LINCOLN, (Crown Publisher 2003).

4 Benjamin A. Kleinerman, *Lincoln's Example: Executive Power and the Survival of Constitutionalism,* 3 Perspectives on Politics 4, 802 (2005).

primary basis of Lincoln's interpretation of the Constitution lies first in a brief note to Lincoln's reverent admiration of the Constitution. Lincoln's high regard for constitutional government is found early in his political career in 1938, when at a speech to the Young Men's Lyceum of Springfield, Illinois, he called for a deep "reverence" and "attachment" to the Constitution in order to resist the dangerous ambitions of abusive regimes: for Lincoln, public support for constitutionalism alone could repel the dangers of an abusive dictator.[5] It was to this rallying cry and standard that Lincoln answered throughout the War. Above all, it appeared throughout his presidency that Lincoln was deeply concerned with justifying his executive actions through constitutional means in order that he might *uphold*—not tear down—the constitutional republic he was pledged to protect. "Lincoln makes clear his adherence to the orthodox conception of the Constitution as a written instrument," writes Herman Belz in his work on Lincoln's constitutionalism, "[and] his approach to constitutional

5 HERMAN BELZ, ABRAHAM LINCOLN, CONSTITUTIONALISM, AND EQUAL RIGHTS, 76, (Fordham Univ. Press 1998).

interpretation remained firmly text-bound."[6] Or, in the words of Benjamin Kleinerman, "If, in responding to the crisis, Lincoln destroyed the constitutional basis of the Union, his actions would have been self-defeating."[7]

Historical evidence also supports Lincoln's constitutionality, yet at the onset of Lincoln's presidency in the summer of 1861, many Americans had justified reason to question Lincoln's swift use of expansive executive power to combat the growing rebellion in the South. Never before had America witnessed such a utilization of powers as Lincoln demonstrated in his first months in office: in response to the "[un]lawful" secession of the South that he denounced during his Inaugural Address in March of 1961, he quickly raised an army to quell the rebel states, ordered a naval blockade in South Carolina, suspended habeas corpus in Maryland, and effectively instituted full wartime measures against the secession.[8] Despite cautious deliberation on the issue, the suspension

6 *Id.*

7 Benjamin A. Kleinerman, *Lincoln's Example: Executive Power and the Survival of Constitutionalism,* 3 Perspectives on Politics 4, 807 (2005).

8 HOWARD GILLMAN, ET AL., 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Oxford Univ. Press 2013), 281-296.

of habeas corpus quickly evolved into a hotly contested legal battle.[9] Lincoln understood the dangers of suspending the right to habeas corpus (which ordinarily protects the right to regular civilian procedures and trials in response to crimes), but the growing danger of rebel insurrection and the destruction of bridges surrounding Baltimore presented a threat to the Union Army's ability to quickly move troops in and out of the capital. Suspending habeas corpus would allow Lincoln and his generals to seize anyone suspected of rebellion absent of any criminal charges.[10] While the suspension of habeas corpus is a constitutional power, the power is enumerated in Article I under the list of the legislature's powers, and had thus been assumed to be exclusively enumerated to Congress.[11] Knowing the legal dangers of employing executive power in this way, Lincoln felt compelled by the situation to order its suspension as Congress was not yet even in session: awaiting the ordinary

9 BRIAN R. DIRCK, LINCOLN AND THE CONSTITUTION, 72, (Southern Illinois Univ. Press 2012).

10 HOWARD GILLMAN, ET AL., 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Oxford Univ. Press 2013), 299.

11 BRIAN R. DIRCK, LINCOLN AND THE CONSTITUTION, 74, (Southern Illinois Univ. Press 2012).

procedure risked the dissolution of the Union.

Chief Justice Roger Taney, sitting as a circuit court judge, swiftly objected to Lincoln's action. In coming to the aid of a Baltimore man by the name of John Merryman who had been detained under Lincoln's provision, Taney issued a writ of habeas corpus in *Ex Parte Merryman,* demanding that formal charges be brought forth against Merryman in a federal court or otherwise release him. In the writ, Taney argued that he saw "no ground whatever for supposing that the president, in any emergency, or in any state of things, can authorize the suspension of…habeas corpus," lamenting that he "supposed [the suspension of habeas corpus] to be one of those points of constitutional law upon which there was no difference of opinion."[12] Taney went on to support the traditional expectation that such powers were enumerated solely in the legislature, and that Lincoln's actions proved "the jealousy and apprehension of future danger which the framers…felt in relation to [the executive] department."[13] While the case remained a circuit

12 HOWARD GILLMAN, ET AL., 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Oxford Univ. Press 2013), 300.

13 *Id.*

court case and never reached the Supreme Court, Taney's decision and the implications of the writ piqued national attention. Despite Taney's harsh rhetoric, Lincoln ignored both Taney's writ and his constitutional interpretation, instead awaiting his message before Congress to address the matter.

Lincoln addressed Taney's complaints during his "Fourth of July Message to Congress" in 1861 and defended both the necessity and constitutionality of his actions, illuminating the first example of Lincoln's pattern of wartime executive action and justification.[14] During the speech, Lincoln concluded that his actions were motivated not by reckless disregard for constitutional bounds, but instead by the legitimate belief of the "imperative duty… [of the] Executive, to prevent, if possible, the consummation of such attempt to destroy the Federal Union."[15] Lincoln continued by claiming that the executive's oath to protect the Constitution transcends

14 BRIAN R. DIRCK, LINCOLN AND THE CONSTITUTION, 83, (Southern Illinois Univ. Press 2012).

15 HOWARD GILLMAN, ET AL., 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Oxford Univ. Press 2013), 296.

the letter of specific laws in special circumstances and justifies actions that would otherwise be non-legal. In response to harsh criticism of his actions, Lincoln famously continued: "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?"[16] The executive's primary role, then, is to implement and carry out the law in order to protect the Union itself. According to Lincoln, if the implementation of specific laws inadvertently subverts, undermines, or destroys the very Union the law is intended to protect, the law must be ignored or entirely contradicted by the President. The preservation of the Union and the Constitution, then, lays higher claim on the decisions of the executive than the submission to individual laws, out of which breeds the theory of executive prerogative. This understanding of the President's role not only justifies

16 BRIAN R. DIRCK, LINCOLN AND THE CONSTITUTION, 83, (Southern Illinois Univ. Press 2012).

Lincoln's suspension of habeas corpus to protect the Union in the first place but subsequently defends his objection towards and disregard for Taney's *Merryman* decision as such a decision would directly undermine the protection of the Union.

As Lincoln suggests in his message, certain matters of national security and preservation of the government demand an expanded understanding of executive power, as this office is naturally the most equipped to deal efficiently with such circumstances.[17] However, while it is clear that Lincoln himself believed his actions were constitutional, defending Lincoln's actions requires that outside justification exist for his interpretation of the Constitution. Such justification is found not only in outside figures and commentators, but also in the Constitutional text itself.

Support for this concept of executive prerogative is found in both Lockean political philosophy and political commentators of our and Lincoln's day. Firstly, Lincoln's understanding of executive prerogative is firmly grounded

17 Benjamin A. Kleinerman, *Lincoln's Example: Executive Power and the Survival of Constitutionalism,* 3 Perspectives on Politics 4, 801 (2005).

in the political thought of John Locke: a bulwark of political philosophy in the American political formation. Locke's *Second Treatise of Government* clearly emphasizes the need for executive prerogative in extraordinary situations in order to uphold public interest, defend the natural law, and protect the very purpose of the government in the first place.[18] According to Locke, this power (well demonstrated by Lincoln), was the prerogative "to act according to discretion, for the public good, without the prescription of the Law, and sometimes even against it."[19] Locke did, however, admit that the discretion and judgement to use this power could not be easily accounted for in a constitution, producing a certain amount of tension between constitutionally provisioned actions and executive judgement—this admission easily applies to Lincoln's own situation and explains the controversy that arises around action out of executive prerogative.[20] Locke's

18 Sean Mattie, *Prerogative and the Rule of Law in John Locke and the Lincoln Presidency,* 67 Review of Politics 1, 77 (2005).

19 Larry Arnhart, *The God-Like Prince: John Locke, Executive Prerogative, and the American Presidency,* Presidential Studies Quarterly 9, 121 (1979).

20 Sean Mattie, *Prerogative and the Rule of Law in John Locke and the Lincoln Presidency,* 67 Review of Politics 1, 77 (2005).

thorough defense of the necessity of executive prerogative to properly defend the nation lends itself to Lincoln's own interpretation of the Constitution as the Founding Fathers of the United States relied heavily on Lockean thought and overtly modelled our Union with Locke's ideas in mind.

The constitutionality of Lincoln's executive prerogative also found support outside of Locke. The following day after Lincoln's response to Taney's *Merryman* decision, Attorney General Edward Bates issued his own opinion of Lincoln's suspension of habeas corpus and endorsed executive prerogative in "extraordinary" situations.[21] Bates argued that "it is the plain duty of the President (and his peculiar duty, above and beyond all other departments of the Government) to preserve the Constitution" which prescribes the "bounden duty to put down the insurrection… [in a manner] upon his discretion."[22] Since the Constitution enumerated such a large responsibility upon the president without

21 Benjamin A. Kleinerman, *Lincoln's Example: Executive Power and the Survival of Constitutionalism,* 3 Perspectives on Politics 4, 806 (2005).

22 HOWARD GILLMAN, ET AL., 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Oxford Univ. Press 2013), 302.

specifications on the manner of its employment, claimed Bates, the executive possesses not just the constitutional approval to "lawfully" supersede the law, but also the constitutional "duty" to do so.[23] These affirmations from Bates concur with both Locke's and Lincoln's distinction between ordinary and extraordinary times and the executive powers and discretion associated with each. Lincoln specifically argued that the suspension of habeas corpus was intended by the Founders for a particularly "dangerous emergency," agreeing with Bates that the executive, therefore, is the most equipped branch to address national security.[24] Commentators of our day likewise concur with Locke's premise, particularly as Benjamin Kleinerman succinctly notes that a constitutional government can hardly exist in a nation without security, which demands, as Locke argued, for an executive with enough power to respond accordingly to such threats.[25]

Lincoln clearly understood the principle of

23 *Id.*

24 BRIAN R. DIRCK, LINCOLN AND THE CONSTITUTION, 83, (Southern Illinois Univ. Press 2012).

25 Benjamin A. Kleinerman, *Lincoln's Example: Executive Power and the Survival of Constitutionalism,* 3 Perspectives on Politics 4, 806 (2005).

prerogative in accordance with Locke, Bates, and Kleinerman, as his policy indicated that certain acts, while normally unconstitutional, were only constitutionally justified for the preservation of the Constitution itself: "Often a limb must be amputated to save a life; but a life is never wisely given to save a limb," Lincoln sagely observed.[26] Lincoln furthered this line of thought in a letter to newspaper editor Albert G. Hodges in 1864, where he noted that he "felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the Constitution, through the preservation of the nation."[27] Lincoln's actions, therefore, were not merely "morally justified unconstitutional acts." Instead, even Lincoln's more severe actions were legitimately constitutional through a proper understanding of executive prerogative and the President's primary responsibility to uphold the Union. As Locke, Lincoln, and others demonstrate, even unconstitutional acts

26 *Id.*

27 HERMAN BELZ, ABRAHAM LINCOLN, CONSTITUTIONALISM, AND EQUAL RIGHTS, 94, (Fordham Univ. Press 1998) and Benjamin A. Kleinerman, *Lincoln's Example: Executive Power and the Survival of Constitutionalism,* 3 Perspectives on Politics 4, 806 (2005).

may, at times, become truly constitutional. While these arguments set up a particularly "Lincolnian" understanding of executive prerogative, Lincoln's defense of prerogative was not solely based on his Fourth of July Message. Lincoln offered textual evidence from the Constitution itself.

After concluding that the extraordinary and dangerous situation demanded pragmatic executive action in order to properly defend the constitutional government, Lincoln continued by defending the textual constitutionality of his actions, rather than simply defending his actions on the circumstances, he justified them as legitimate, constitutional executive powers. In his typical "lawyer-esque" manner, Lincoln noted, unlike the other enumerated powers found in Article I of the Constitution, that the authorization to suspend habeas corpus in Article I, Section 9 was written in the past tense, failing to specify which branch actually possessed the power. The possession of the power, argued Lincoln, was at best constitutionally ambiguous and, contrary to previous assumption, did not fall securely within the powers of Congress. This shrewd

inspection of the constitutional text again illuminates Lincoln's commitment to the constitutionality of his presidency, while his Fourth of July Message, then, serves as a "case study" to the pattern of Lincoln's wartime executive action: bold executive prerogative in the midst of special circumstances followed by a legitimate defense for the constitutionality of his action.[28] Furthermore, his suspension of habeas corpus subsequently received further constitutional justification when Congress passed the Habeas Corpus Act of 1863 which offered increased legal protection to the government when habeas corpus was suspended, effectively offering retrospective congressional approval of Lincoln's decision and further justifying Lincoln's actions as constitutional. [29]

Lincoln's pattern of constitutional executive action and justification continues in the narrative of the Lincoln-ordered Union naval blockade in South Carolina followed by *The Prize Cases*. Following the strategic blockade

28 Benjamin A. Kleinerman, *Lincoln's Example: Executive Power and the Survival of Constitutionalism,* 3 Perspectives on Politics 4, 806 (2005).

29 HOWARD GILLMAN, ET AL., 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Oxford Univ. Press 2013), 303.

of Southern naval ports during the early secessionist insurrection in the summer of 1861, Southern merchants pressed charges after Union ships seized their cargo while being overtaken during enforcement of the blockade.[30] The merchants argued not only that Lincoln illegally enacted wartime measures before Congress was in session and therefore without congressional approval of the war, but also that Lincoln's blockade could only legally apply in the instance of a war declared against another nation, which directly opposed Lincoln's own posture that the Confederacy was merely a rebellion.[31] While Lincoln quickly sought congressional consent to justify his decision (which Congress readily accommodated), the merchants claimed Lincoln's blockade was only legally binding if preceded by an official, congressional declaration of war (none of which existed).[32] The 5-4 court decision delivered by Justice Grier, however, confirmed the lawfulness of Lincoln's executive prerogative in the circumstance of

30 *Id.* at 311.

31 JOHN YOO, CRISIS AND COMMAND: A HISTORY OF EXECUTIVE POWER FROM GEORGE WASHINGTON TO GEORGE W. BUSH, (Kaplan Publishing 2010), 20.

32 *Id.*

rebellion and supported the executive "military and naval" powers in circumstances of "insurrection," regardless of prior congressional authorization.[33]

Lincoln's order for the Union blockade, the retrospective consent of Congress, and the decision of the *Prize Cases* all further endorse Lincoln's growing pattern of executive prerogative. In Lincoln's determination, the blockade of Southern ports was a necessary response to protect national security, not only permitting, but demanding dubiously constitutional action by the executive. He did not settle for executive prerogative, however, as his justification for his decision, Lincoln also pursued post factum congressional approval in July of 1861, which legitimized the constitutional justification of the naval operation (of note, remarkably similar to Lincoln's pursuit of post factum congressional support of his suspension of habeas corpus with the 1863 Habeas Corpus Act).[34] The decision of the *Prize Cases* only further solidified Lincoln's constitutional use of the executive

33 HOWARD GILLMAN, ET AL., 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Oxford Univ. Press 2013), 311

34 Rodger D. Criton, *Did Lincoln Violate the Constitution?* (Find Law 2003).

power by providing external legal sanction for his liberal, but necessary use of executive power, similar to Edward Bates' endorsement in 1861.

Although it does not follow the precise replica of the previous examples, Lincoln's interpretation of *Dred Scott* and the "Emancipation Proclamation" likewise exhibit a pattern of Lincoln expanding the executive power for an extraordinary situation. They simply do so on constitutional grounds. While Lincoln has been critiqued for apparent apathy towards the plight of slaves in 19th century America, which Benjamin Kleinerman describes as "[seeming unconcern] with the moral urgency of slavery," Lincoln simply held caution in approaching the issue as "he insisted upon" a constitutional solution to slavery. Had Lincoln abused power—even for the great cause of freedom—his efforts to defend a constitutional government would have been no more legitimate than the Confederate's claim to secession. In 1857, Justice Taney's majority opinion in *Dred Scott v. Sandford* infamously upheld slavery as constitutional, defended slave ownership as a "substantive"

right, and legally defined slaves as "property."[35] Lincoln strongly opposed the "erroneous" decision in his "Speech on the Dred Scott Decision," where he denied the Supreme Court the ability to "[establish] a settled doctrine for the country" and defended the responsibility of other federal branches to resist court decisions.[36] While Lincoln insisted that Court decisions on specific cases must be observed by the other branches, he endorsed federal departmentalism in interpreting the Constitution as a whole, holding that each branch held the authority and duty to interpret the document coequally and that the Court's opinion was not binding on the executive.[37]

Departmentalism, while definitional variances exist to the extent to which it applies, generally indicates the view that the departments of the government (executive, judicial, and legislative) independently interpret the meaning of the constitution while the interpretations of

35 Abraham Lincoln, *Speech on the Dred Scott Decision* (1857) and HOWARD GILLMAN, ET AL., 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Oxford Univ. Press 2013), 218.

36 Abraham Lincoln, *Speech on the Dred Scott Decision* (1857).

37 Kevin C. Walsh, *Judicial Departmentalism: An Introduction*, 58 WILLIAM AND MARY L. REV. 1721 (2017).

one branch are not absolutely binding on the others.[38] Lincoln's own adoption of departmentalism appears to be a "departmentalism as to precedents" stance, whereby the executive and legislative branches are generally bound to the specific judgments of the judicial in specific cases[39], but more broadly independent in the Court's interpretation unless successive judicial precedent demands submission to an interpretation.[40] Lincoln's justification for such a stance appears most strongly in his response to the *Dred Scott* case during his inaugural address in 1861, where he warned that unchecked judicial supremacy in interpreting the Constitution allowed for an effective oligarchy of the Court whereby "the people will have ceased, to be their

38 Mike Rappaport, *Departmentalism versus Judicial Supremacy – Part I: Some Preliminary Distinctions,* (Law and Liberty 2015). http://www.libertylawsite.org/2015/06/11/departmentalism-versus-judicial-supremacy-part-i-some-preliminary-distinctions.

39 If Lincoln holds this view that the branches are bound to the judgement of the Court in specific cases, however, why did Lincoln feel empowered to reject Taney's *Merryman* decision on habeas corpus? It appears that Lincoln's argument for executive prerogative and the defense of the Union supersedes his view that the executive must submit to the Court on specific cases. In other words, Lincoln held that the priority of the executive to defend and protect the Union was so paramount that it trumped all other restrictions placed on the executive branch as long as the situation and circumstance justifiably demanded extreme action. For more on this "litmus test" for the necessity of the situation, see below.

40 Mike Rappaport, *Departmentalism versus Judicial Supremacy – Part I: Some Preliminary Distinctions,* (Law and Liberty 2015).

own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal."[41] If "policy…[is]…irrevocably fixed by decisions of the Supreme Court" without any cautionary allowance for their decisions to be "erroneous" and reasonably checked and disregarded by the other branches, argued Lincoln, the Union ceases to be ruled by the people and thus unconstitutional.[42] This posture certainly defended a stronger executive branch. As John Yoo observes, "No other President has challenged the binding scope of Supreme Court decisions as did Lincoln."[43]

Despite Lincoln's support of broader executive power in interpreting the Constitution, he simultaneously felt—even as President—legally handcuffed to personally abolish slavery. Lincoln saw no constitutional or "lawful [executive] right" to permanently outlaw slavery in the United States, but understood that a constitutional

41 HOWARD GILLMAN, ET AL., 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Oxford Univ. Press 2013), 281, 296.

42 *Id.*

43 JOHN YOO, CRISIS AND COMMAND: A HISTORY OF EXECUTIVE POWER FROM GEORGE WASHINGTON TO GEORGE W. BUSH, (Kaplan Publishing 2010), 16.

amendment alone would appropriately address the evil of slavery.[44] The insurgency of the Confederacy, however, provided Lincoln with a constitutionally shrewd opportunity to make a hardline commitment to the slavery debate and a strategic maneuver for the Union. In September of 1862, in the midst of the War, Lincoln famously issued the "Emancipation Proclamation" declaring "all persons held as slaves within any State… in rebellion against the United States, shall be…forever free."[45] Interestingly, Lincoln's pronouncement only applied to slaves held within secessionist states, elegantly taking advantage of Taney's appropriation of slaves as "property." In accordance with Congress's Second Confiscation Act of 1862 and "by virtue of the power in [the executive] vested as Commander-in-Chief…in time of actual armed rebellion against…the United States," Lincoln "seized…the property" of the rebels and declared the slaves free.[46]

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44 David Nicholas, *The Emancipation Proclamation: Abraham Lincoln's Constitutionally Modest Proposal* (Law and Liberty 2015).

45 HOWARD GILLMAN, ET AL., 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Oxford Univ. Press 2013), 308.

46 HOWARD GILLMAN, ET AL., 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Oxford Univ. Press 2013), 308 and Confiscation Act of 1863.

Lincoln once again exhibited a liberal use of executive power in both his resistance to the *Dred Scott* case and his emancipation of Southern slaves, but did so within constitutional bounds and justification. While his opinion to Taney's decision was not explicitly executive prerogative, it certainly broadened the understanding of the president's power to interpret the Constitution. This doctrine, however, was not grounded in a desperate aspiration for "despotic" power, but instead in Lincoln's legitimate belief of executive departmentalism, deeming it fully constitutional. Similarly, Lincoln's prerogative in using his Article II powers to liberate Southern slaves incorporated with a constitutional justification of his actions further confirm Lincoln's standard practice of action, while also verifying his admirable constitutional restraint in his commitment to a legal avenue to abolition.[47] In accord with the previous examples, therefore, even Lincoln's dubiously constitutional actions proved not only pragmatically

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U.S., Statutes at Large, Treaties, and Proclamations of the United States of America*, The Second Confiscation Act* (Boston, 1863), 589–92.

47 Even further validated by his great commitment to the passage of the 13th Amendment, ensuring a constitutional means of nationwide abolition.

necessary due to the extreme situation of the war, but also constitutional in themselves.

These brief examples of Lincoln's treatment of wartime executive power, however, deserve a few words of commentary. It was not only Lincoln's profound respect for the Constitution that justified his broad executive action of the War, but instead, his very interpretation of the document itself created incredible lateral in the implementation of his Presidential authority. The Constitution, in the determination of Lincoln, held a certain quality of elasticity of which the Founders specifically intended.[48] For Lincoln, the Founders established constitutional means for "unconstitutional" executive action, a paradox that Lincoln deemed necessary in certain contexts.[49] Unlike Justice Taney who, in the words of Brian Dirck, "saw the Constitution as a strong but brittle instrument," Lincoln accepted a certain fluidity of the document that allowed the executive to constitutionally address crisis

48 Benjamin A. Kleinerman, *Lincoln's Example: Executive Power and the Survival of Constitutionalism,* 3 Perspectives on Politics 4, 806 (2005).
49 *Id.*

situations.[50] As Benjamin Kleinerman eloquently argues, this flexibility mixed a Jeffersonian view of "acceptable—but undoubtedly unlawful—unconstitutional acts" with the elastic Hamiltonian view of "lawful excessive executive action, to the point of potentially limitless bounds."[51] Lincoln's elastic prerogative combined an acceptable use of "unlawful" action only in the face of constitutional necessity, which he thereby believed made the unlawful–or at least questionably lawful–act truly constitutional.

Lincoln's constitutional interpretation of executive power is based on an emphasis of the presidential oath to "preserve, protect, and defend the Constitution," as found in Article II. To this end, Lincoln consistently exhibited debatably extra-constitutional action to the call of preserving the Union and the Constitution for which it stands. For Lincoln, this potentially abusive executive prerogative to defend the nation, however, was only permissible as far as the action was deemed and proven to be "necessary." Concurring to how Lincoln earlier

50 BRIAN R. DIRCK, LINCOLN AND THE CONSTITUTION, 73, (Southern Illinois Univ. Press 2012).

51 *Id.*

defended his 1862 Emancipation Proclamation as "a fit and *necessary* war measure for suppressing said rebellion" (emphasis added), Lincoln later wrote to General Benjamin Butler arguing the contrapositive: "Whatever is *not* within such *necessity* should be left undisturbed."[52]

Lincoln's executive actions throughout the Civil War of suspending habeas corpus, executively emancipating slaves, and engaging in far-reaching military power were, while undoubtedly unprecedented and extensive, consistently constitutional and reasonably justified. Far from being an unlawful dictator, Lincoln's presidency demonstrated a profound commitment to the original Constitution unparalleled by many U.S Presidents and a remarkable devotion to protect the meaning, spirit, and restraint of the Constitution and the nation itself.

52 HOWARD GILLMAN, ET AL., 1 AMERICAN CONSTIUTIONALISM: STRUCTURES OF GOVERNMENT, (Oxford Univ. Press 2013), 308 and Benjamin A. Kleinerman, *Lincoln's Example: Executive Power and the Survival of Constitutionalism,* 3 Perspectives on Politics 4, 806 (2005).