

Lincoln's Example: Executive Power and the Survival of Constitutionalism

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In the wake of the Bush administration's use of executive power since 9/11, Abraham Lincoln's executive actions during the Civil War have received more attention than usual. Typically associated with the idea that constitutions should recede in favor of the rule of one during crisis situations, Lincoln's actions have been used on one side as the implicit and even explicit basis of presidential claims to increased power and on the other side as the example par excellence of what presidents should not do. Taking issue with this conventional interpretation and continuing the more recent scholarly recovery of Lincoln's profound concern for constitutionalism, I explicate the principles that guided Lincoln's use of executive power during the Civil War. By drawing out the importance of political necessity as the basis for "prerogative" over and against both popular approval and unlimited constitutional powers, I show how this principle also provides an alternative perspective and even an antidote to the current scholarly debate concerning whether constitutions are better preserved by "Jeffersonian" or "Hamiltonian" prerogative. Lincoln's example also shows us that we should not legalize, regularize, or institutionalize those powers that may be necessary to avert a crisis. Perhaps most importantly, Lincoln's statesmanship teaches us that constitutions can moderate and limit discretionary executive power only if the people learn an attachment to their Constitution that does not come naturally to them.

The Bush administration's actions since 9/11 have made scholars and commentators reexamine questions concerning the proper sphere for executive power within a constitutional system of separated powers. Unlike much political research, which disappears into academic journals, newspaper articles abound with conclusions reached by political scientists regarding the need for, and the limits and consequences of, an expanded executive power.¹

The issue has arisen because of the perception by many policy makers that 9/11 has precipitated a crisis requiring extraordinary executive powers that would not otherwise be countenanced in ordinary times. Underlying this perception is the more general question of whether constitutionalism itself can survive in an age of increased insecurity. Locke describes constitutional government as follows: "Whoever has the Legislative or Supreme Power of any Commonwealth, is bound to govern by establish'd stand-

ing Laws, promulgated and known to the People, and not by Extemporary decrees."² A constitution seemingly proscribes any governmental action not envisioned and thus legitimized by the laws of the land. But what is to be done when standing laws do not address the actions required to meet present security threats? As good constitutionalists, must we deny ourselves safety for the sake of legal purity? Should we allow the law to impose shackles on the government's power, despite the risk, in order to avoid the alternative risk that an unshackled government poses to our security?³ Or must we agree with Justice Thomas, whose dissenting opinion in *Hamdi v. Rumsfeld* claims that the founders "chose to create a Federal Government that necessarily possesses sufficient power to handle any threat to the security of the Nation?"⁴ And, as has been generally true at least since Locke's doctrine of executive prerogative, in Thomas's dissent the extraordinary powers believed necessary to handle "threats" naturally flow into the executive branch.⁵

Thomas's reasoning is sound: the president's "structural advantages," especially the unity of the executive branch, are best suited to protecting our national security. But, as Scalia's dissenting opinion argues, such indefinite and illimitable authority is particularly dangerous in a system of law. While recent Supreme Court opinions are more nuanced, too often the debate does not move beyond the level of simplicity for which Lucius Wilmerding chastised the public fifty years ago in the aftermath of President Harry Truman's seizure of the steel mills:

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Two doctrines . . . equally fallacious and equally dangerous, have been started. One is that the President, as sole possessor of the executive power, has a legal authority, granted him by the Constitution itself, in cases of imperious necessity, to do whatever needs to be done in the public interest. The other is that, under no necessity whatsoever, can an officer, even the President, be excused from departing from the law.⁶

Having moved beyond this level of simplicity, the scholarly debate and, to a lesser extent, the public discourse has been characterized by a second debate, which agrees on the need for executive prerogative, but questions whether or not it is properly considered a constitutional exercise of power. One view, broadly associated with Thomas Jefferson and which finds its most prominent modern proponent in Arthur Schlesinger, understands the prerogative power as outside the Constitution and thus, strictly speaking, as illegal though justifiable by extraordinary necessities. In this view, it is better to maintain an established, almost pristine, Constitution that establishes what can and cannot be done while acknowledging that necessity may force presidents outside its bounds, than to allow the Constitution itself to bend with claims of necessity.⁷ The alternative view, broadly associated with Alexander Hamilton, holds that it is preferable to understand the Constitution as inherently flexible and as possessing within it whatever powers are necessary for its own preservation—an interpretation that typically points to the executive as possessing Lockean prerogative.⁸

Lincoln's Precedent

The American Civil War was the watershed event during which the survival of a constitutional order was most in jeopardy. Could a constitutional government withstand external and internal threats and yet remain *constitutional*? As Lincoln asks with uncommon grace, "Must a government, of necessity, be too strong for the liberties of its own people or too weak to maintain its own existence?"⁹ Not surprisingly, it is during this war that the question of executive prerogative became most salient, both then and to generations of historians and political scientists since. Also, not surprisingly, Lincoln's actions and justifications form a central core of the research on the broad question of executive power in American government.¹⁰

In the aforementioned second debate, there is no clear consensus regarding with which side Lincoln himself would have agreed. Schlesinger cites Lincoln, along with Franklin D. Roosevelt, as examples of defensible prerogative, claiming that "by declining to use claims of inherent presidential power to justify their actions, Lincoln and Roosevelt took care not to give lesser men precedents to be invoked against lesser dangers."¹¹ Sotirios Barber unequivocally cites Lincoln's decisions and justifications as the preeminent example of prerogative as illegal but justified.¹² Robert Scigliano concurs, but claims that Lincoln's actions and, especially, the claims he made to justify them

departed from this standard, introducing a much broader notion of executive prerogative than either Locke or the founders would have defended.¹³ By contrast, George Thomas points to Lincoln's actions to disprove what he calls the "legalist" theory regarding the illegality of executive prerogative, instead placing Lincoln in the Hamiltonian tradition.¹⁴ Similarly, Larry Arnhart defends a version of the Hamiltonian theory of prerogative, but finds Lincoln guilty of setting "an example of violation of the Constitution that could only have a pernicious effect upon his successors."¹⁵

As this brief survey shows, much of the literature on Lincoln's use of executive power analyzes his actions in terms of a larger theory regarding the proper relation between constitutionalism and prerogative. Lincoln's arguments are often treated as illustrative and are not explicated in terms of what they can teach us about this relationship on their own. As we can see by the tremendous disparity in the literature concerning the substance of Lincoln's lesson, Lincoln's "internal" argument demands more explicit attention than it has heretofore received to clarify his own understanding of these matters. More importantly, Lincoln's thoughts on executive prerogative actually provide a corrective to this second debate. This debate's concern about the constitutionality of prerogative has obscured a more publicly useful point concerning the necessarily extraordinary nature of prerogative. As I will explore below, Lincoln points to executive action that is extraordinary and cannot—and *should* not—be regularized, institutionalized, or legalized.

Perhaps the relative inattention to Lincoln's internal argument among scholars of executive power derives from the conventional wisdom regarding Lincoln's example. It had been thought that, if we can learn anything from Lincoln, it is what not to do. Wendell Phillips calls Lincoln an "unlimited despot" and describes his government as a "fearful peril to democratic institutions."¹⁶ Dwight Anderson calls him a "tyrant who would preside over the destruction of the Constitution in order to gratify his own ambition."¹⁷ More sympathetic criticism of Lincoln maintains that he was a man pressed by necessity into becoming a dictator, though a benevolent or a "constitutional dictator."¹⁸ Though friendly to him, these defenses of Lincoln's dictatorship typically point out that there were little to no limits upon his conception of his power during the Civil War.¹⁹ In other words, in the words of one not altogether unsympathetic scholar, Lincoln remains a "revolutionary figure" because he appealed "beyond the Constitution."²⁰ More floridly, William Weeden writes, "To call that man a monarch and despot showed a jurist intoxicated with the musty fumes of legal lore; inebriate with texts and unfitted for the necessary deeds of any desperate time. And the simple, uninstructed, but not ignorant people knew it."²¹ James Ford Rhodes concludes: "never had the power of a dictator fallen into safer and nobler hands."²²

As much as they may redeem Lincoln from his critics, such defenses cannot guide us because we cannot be confident that the present man in the White House (or, for that matter, anyone) has the virtues necessary to put our trust in him as dictator. As Hugh Gallagher writes: “The danger of allowing a President like Lincoln to act without regard to constitutional restraints in a great crisis is that lesser men may take Lincoln as precedent in lesser causes.”²³ If these arguments are correct, one must conclude that we should not learn the only thing Lincoln’s example appears capable of teaching us: that in grave crises the Constitution should recede in favor of the rule of one.²⁴

This view of Lincoln as establishing the necessity of a “constitutional dictatorship” during a time of crisis finds its way into contemporary discourse. In fact, much of scholars’ worry about Lincoln found new life during Richard Nixon’s presidential overreaching. In a fascinating (though chilling) interview with David Frost in 1974, Nixon provided fuel for this worry when he justified his authorization of the dubious activities of federal officials in the “Huston Plan” by claiming “when the President does it, that means it is not illegal,” citing as precedent Lincoln’s activities during the Civil War:

Lincoln said, and I think I can remember the quote almost exactly, he said, “Actions which otherwise would be unconstitutional, could become lawful if undertaken for the purpose of preserving the Constitution and the Nation.” Now that’s the kind of action I’m referring to. Of course in Lincoln’s case it was the survival of the Union in war time, it’s the defense of the nation and, who knows, perhaps the survival of the Union.²⁵

Nixon believed that presidential power conferred upon him an illimitable power to take any steps necessary for the defense of the nation. On the other side, Mario Cuomo wishes that President George W. Bush “had not been inspired by Lincoln when it came to the suspension of constitutional rights in the name of security.”²⁶ Whether Cuomo is right that Bush actually was inspired by Lincoln is another question; what is important is that a certain view of Lincoln as dictator persists into the present.²⁷

As we see in the example of Nixon, Lincoln’s precedent can empower presidents to take actions they might not otherwise take, serving as their implicit or explicit justification for taking any action deemed necessary for the public good. And insofar as those opposing such actions evaluate Lincoln’s precedent in the same manner, they must show that Lincoln was wrong. The struggle this imposes on some is clear in Cuomo’s chapter on Lincoln and civil liberties. Though finding that Lincoln “promised a return to strict compliance with the Constitution as soon as peace returned” and that “at least he acknowledged that only in the kind of emergency he faced should a president ignore the Constitution as he did,” Cuomo still writes, “I wish that the great Lincoln had stood by the Constitution despite the strong temptation not to.”²⁸

This opinion regarding Lincoln’s dictatorship has begun to change, however. The historian Herman Belz, for example, concludes that “Lincoln was neither a revolutionary nor a dictator, but a constitutionalist who used the executive power to preserve and extend the liberty of the American founding.”²⁹ The legal scholar Daniel Farber similarly defends Lincoln’s attention to the Constitution, claiming that “many of the acts denounced as dictatorial . . . seem in retrospect to have reasonably good constitutional justifications under the war power.”³⁰

By continuing to recover just how much Lincoln remained devoted to the preservation of a *constitutional* Union during the Civil War, we can extract timely political and constitutional lessons. By piecing together his various speeches on this subject, several principles emerge that articulate the constitutional bounds on his use of executive power. These principles constitute an important antidote to the current debate between Jeffersonian and Hamiltonian prerogative, not because Lincoln points to a new alternative legal theory, but because he emphasizes the political necessity, rather than the legal justification, for his actions. By recognizing his principles, we can also perceive Lincoln’s attempt to create precisely that political culture that would not allow subsequent executives to misuse his precedent to enlarge their power at the expense of the constitutional order. Finally, Lincoln’s principles cast important light on the problematic nature of any legalization of those actions that may be necessary in the “war on terror.”

Dangers of Executive Discretion

Edward Corwin once famously called the Constitution an “invitation to struggle.” He was speaking about the “privilege of directing American foreign policy,” but the point applies more generally.³¹ Our system of separated powers seems to invite each branch to enlarge its power as much as possible over and against the other branches.³² But Lincoln’s example teaches some caution in accepting this “invitation to struggle” during national crises. While the executive branch must enlarge its domain to respond to a crisis, such a crisis should not be treated as an opportunity to enlarge permanently the executive domain. Instead, we should expect the executive to proceed with the prudence and caution commensurate with an awareness that such crises could, even unintentionally, destroy the constitutional republic. The founders warn us that executive power, necessarily enlarged during a crisis, can subsume all other aspects of government even after the initial crisis has passed.³³ Insofar as the people perceive a kind of permanent crisis. Hamilton writes, “[T]he continual effort and alarm attendant on a state of danger, will compel nations the most attached to liberty to resort for repose and security to institutions which have a tendency to destroy their civil and political rights.”³⁴

While our present national crisis is obviously different, the dangers of exaggerated executive power seems as pressing now as during the Civil War. After all, there is little that creates more “effort and alarm” than the threat of terrorism.³⁵ Yet as it aggregates extraordinary powers, the Bush administration seems insensitive to the danger it poses to the constitutional order. In a recent issue of *Presidential Studies Quarterly* examining the effects of 9/11 on presidential power and constitutional government, one theme united nearly all of the otherwise disparate articles: the Bush administration is seeking strenuously to increase the executive power permanently.³⁶ Given “an invitation to struggle,” these attempts to use the crisis to increase executive power permanently make some sense. The executive has merely seized the opportunity that exists in the post-9/11 world. However, because the executive’s enlarged discretionary power is “extra-constitutional,” it can undermine and, ultimately, destroy constitutional power even after the initial crisis has subsided.

Once discretion is permitted outside the ordinary course of law, the potential for arbitrary and unnecessary prerogative arises. What Locke calls “the power of doing good without a rule” can quickly become the power to do whatever one desires. Locke solves this problem by arguing that the people will be the “umpire,” determining whether executive discretion truly aims at their good.³⁷ But this safeguard has troubling implications for constitutionalism if Locke is also correct in claiming that the “People are very seldom, or *never scrupulous*, or nice in the point: they are *far* from examining Prerogative, whilst it is in any *tolerable* degree employ’d for the use it was meant.”³⁸ If constitutionalism requires extra-constitutional discretionary power that is, by its nature, difficult for other branches of the government to check, one would hope that the people are quite scrupulous in determining whether such power aims at their good. Unfortunately, the people are not as scrupulous as they may need to be. In claiming that the people will accept prerogative so long as it is not “manifestly against” their good, Locke emphasized this conclusion. Anecdotally, William Rehnquist makes the same point when discussing the fact that some of Lincoln’s subordinates went far in suppressing the freedom of speech of several New York newspapers: “Remarkably, other New York papers did not rally round the sheets that were being suppressed. Instead of crying out about an abridgement of First Amendment rights—as they would surely do today—their rivals simply gloated.”³⁹

The dangers of an enlarged executive power attend even if the executive intends to preserve the people’s security. The problem is not only that the people will permit an executive to do “good without a rule” in order to protect them; citizens may also find the immediacy and flexibility of executive power more satisfying than the constitutional process itself.

To illustrate this, consider this anecdotal evidence from the Civil War. Mark Neely, in his authoritative book on

Lincoln’s record on civil liberties, describes the extent to which many of Lincoln’s subordinates began using the enlarged military power that resulted from the suspension of the writ of habeas corpus for purposes that were not strictly military.⁴⁰ For instance, they prosecuted those who were pursuing designs of fraud and corruption—crimes that, while they might have been made possible by the war, had little to do with the goals of the war itself.⁴¹

Associate Judge Advocate Levi C. Turner stated some of the reasons for using martial law in these cases. First, “Claim Agents, who advise and aid in the manufacture of false & fraudulent amounts against the Govt. and present them for payment—and obtain payment—violate no existing Law of Congress.” They could only be punished if they “have violated some state Law,” which was often not the case. Further, “A military officer makes out a false account for subsistence . . . The officer takes his money (from \$500 to \$10,000) and then resigns.” In that case, again “there is no law of Congress or of any State authorizing the arrest & punishment of such plundering.” Once these fraudulent and plundering military or civil officers resigned, after having “filled their pockets,” they were “beyond the reach of military or civil Laws.” They were not, however, beyond the reach of a discretionary executive power. Of desertion, Turner writes, “Persons, all over the country, are engaged in procuring bogus substitutes and aiding and promoting desertions.” And while “it is true that a citizen who encourages and aids desertions can be indicted and tried in criminal courts,” the process is “so slow and inefficient, that prosecutions for aiding desertions seldom occur, and convictions never.”⁴² Again, they were not beyond the reach of the martial law imposed by executive decree.

In these cases, the enlargement of executive power stemmed from motivations other than simple avariciousness. Turner’s reasoning had no nefarious intentions. The insufficiency of congressional law and the inefficiency of the criminal courts led to the use of that which was neither insufficient nor inefficient: executive power. For Turner, the use of executive power followed from a desire to see defrauders receive their just deserts and not slip through legal loopholes.⁴³

Precisely because of its great degree of discretion, executive power can promptly and efficiently punish injustice without worrying about legal niceties. Moreover, so long as power is used to effect justice, its solutions are as attractive to the citizenry as they are to those who possess its power; it would be a rare people that could insist on adherence to laws that would allow the unjust to go free. Very few are attached to legal forms as such, no matter the consequences for those protected. In short, the inherent inefficiency and insufficiency in law points toward an extension of that power which possesses the discretion necessary to correct these defects.

In crises, when people’s security seems most threatened, they are even more likely to look to executive power to

keep them safe. Its unique institutional structure makes it most capable of the “energy” necessary to provide safety. One can imagine innumerable situations in which such discretionary power is necessary for the preservation of society: Lincoln argued that such was the case during the Civil War. The difficulty arises because, once such power is used, it becomes easier for future executives to assume the same power for lesser causes. But the problem is not just dangerous usurpation. The deeper problem is the people’s attitude toward what might be called “benevolent” usurpation.⁴⁴ The people’s acceptance of extreme remedies during a crisis—acceptance that often is necessary for their safety—sows the seeds for the ultimate destruction of a limiting constitution.⁴⁵ Upon this insight comes the saying, cited by Locke: “[T]he Reigns of good Princes have been always most dangerous to the Liberties of their People.”⁴⁶

Such unreflective popular opinion about prerogative suggests the problematic nature of the Jeffersonian standard by which public acceptance legalizes an otherwise illegal act. If the public is too willing to accept discretionary activity, then such a standard invites usurpation,⁴⁷ or doing the “publick good without a rule.”⁴⁸ Thus Jeremy Bailey is partly correct when he defends Jefferson’s standard by claiming that “the dazzle of the president’s prerogative, which exposes execution to popular judgment rather than enshrouding it with legal argument, becomes the very guarantee that the power will be used for the public good.”⁴⁹ As we shall see, Lincoln agreed, at least in part, that prerogative should be proclaimed openly and not shrouded in legal argument. In fact, it is precisely because it should *not* be shrouded in legal arguments that the Jeffersonian *and* the Hamiltonian standards remain too legalistic. The difficulty with Bailey’s argument arises from popular judgment itself.

Lincoln’s Example

Before he was a Republican, Lincoln was a member of the Whig Party, which held that presidents should remain deferential to Congress in matters of both domestic and foreign policy.⁵⁰ Lincoln had consistently subscribed to this principle and articulated its underlying logic with persuasive clarity. For instance, in a speech to the House of Representatives in 1848, Lincoln stated the Whig case against presidential involvement in legislative activities, and argued repeatedly that the U.S.–Mexican War was “unnecessarily and unconstitutionally commenced by the President.”⁵¹ In a subsequent exchange of letters with his friend William Herndon, the two debate the constitutionality of the presidential commencement of war. The question before them was whether “if it shall become necessary, to repel invasion, the President may, without violation of the Constitution, cross the line, and invade territory of another country; and that whether such necessity exists in

any given case, the President is to be the sole judge.” In his response to Herndon (in which one assumes that Herndon has made this argument), Lincoln states the republican logic that demands such power *not* be given to presidents: “Kings had always been involving and impoverishing their peoples in wars, pretending generally, if not always, that the good of the people was the object.” For this reason, the Convention explicitly sought to separate the war-making power from the president so “that no one man should hold the power of bringing this oppression upon us.” And, Lincoln says, the view Herndon has espoused, that the president should be the sole judge of the necessity of preemptive war, “places our President where kings have always stood.”⁵²

For Lincoln in 1848, the Constitution is explicit that a president, at least in regard to war with foreign nations, must be controlled by more than his impression of what constitutes the people’s good. Locke’s federative prerogative is denied to the president of this republic, in order to guard against the oppression of the people by one person.⁵³ The oppressor pretends the people’s good as he involves them in wars; so the American Constitution guards against such pretenses by denying to its president even the possibility of preemptive wars without congressional approval.

Lincoln shows, moreover, that it is the constitutional structure that must contain this sort of prerogative, and not popular judgment. In a speech delivered a month before his letter to Herndon, Lincoln claimed that President James K. Polk escaped scrutiny about the beginning of the Mexican war “by fixing the public gaze upon the exceeding brightness of military glory—that attractive rainbow, that rises in showers of blood—that serpent’s eye, that charms to destroy.”⁵⁴ When Polk “unnecessarily and unconstitutionally” commenced war with Mexico, the public succumbed far too easily to the seductive glory that attends military conquest, forgetting the war’s unnecessary and unconstitutional beginnings. The constitutional structure, however, allows Lincoln to do what the public will not, that is, to use his podium as a member of the House of Representatives to call attention to the unsavory beginning of the war, and use his power to vote for a resolution declaring such to be the case.⁵⁵

Lincoln’s crucial problem with Polk’s action was that he took it for “some strong motive” with no basis in necessity. In fact, he repeatedly called on Polk to explain the need for his action—which Polk was unwilling to do. Lincoln claimed that Polk would not defend his decision to go to war because “he is deeply conscious of being in the wrong” and knew “that he ordered General Taylor into the midst of a peaceful Mexican settlement, purposely to bring on a war.”⁵⁶ Perhaps if Polk could show the necessity of his actions even to his strongest critics (something which, as we will see, Lincoln, as president, is willing to at least attempt), Lincoln’s constitutional complaints

might have been appeased. Or, perhaps what is required, at the minimum, is the attempt itself; if Polk had tried to show the need for his actions, he would have conceded that the attempt was necessary, thus also conceding that the Constitution's structure does not simply recede with the promise of glory. The Constitution imposes that which the people might not: the need for an argument regarding the necessity of "extra-constitutional" action. Lincoln's speeches always pair necessity and constitutionality. If Polk could show that his actions were necessary for the preservation of the Constitution itself, they would have become constitutional; because he could and would not, they were unconstitutional.

This emphasis on necessity, first and foremost, provides the first lesson from Lincoln's words and deeds.⁵⁷ In an 1864 letter to Albert G. Hodges, a newspaper editor, in which Lincoln had been asked "to put in writing the substance of what I verbally said the other day," Lincoln reflects on the actions he took during the course of the war. Lincoln writes, "I felt that measures, *otherwise unconstitutional*, might become *lawful*, by becoming indispensable to the preservation of the constitution, through the preservation of the nation."⁵⁸ For Lincoln, the Constitution only countenances actions taken outside its bounds when those actions can be justified by the strictest understanding of necessity, namely the preservation of the document itself. In this letter, Lincoln's understanding of prerogative is neither Hamiltonian nor Jeffersonian, but some combination of both—which removes the potential for abuse otherwise inherent in both views. He understands his measures as "otherwise unconstitutional," which reminds one of the Jeffersonian standard; however, his measures "become lawful," not through public affirmation, as in Jefferson's standard, but through necessity—the Hamiltonian standard. Because the public is insufficiently vigilant, it is dangerous to claim that an unconstitutional action becomes constitutional if the public accepts it as aiming at the public good. And because there is always the danger that Nixons will become president, the Hamiltonian view is insufficient insofar as it slides into a limitless Constitution.⁵⁹

In Lincoln's formulation, the Constitution remains limiting because it only permits action outside its bounds that aims at its own preservation. Thus, Lincoln's famous metaphor, in the same letter to Hodges, may limit as much as it empowers: "Often a limb must be amputated to save a life; but a life is never wisely given to save a limb."⁶⁰ As much as this may empower an executive to take those steps he believes necessary in crises, it also limits an executive from taking extralegal or illegal steps when no crisis exists. Thus, Lincoln's metaphor may resemble what Justice David Davis wrote in *Ex parte Milligan*: "As necessity creates the rule, so it limits its duration."⁶¹

Because of this singular focus on necessity, Lincoln abandoned the congressional deference with which he began the war.⁶² Lincoln became less deferential to Congress as

he became more convinced that only necessity, not public approval or congressional legislation, could justify action outside the Constitution. At the beginning of the war, Lincoln claimed that actions "whether strictly legal or not, were ventured upon, under what appeared to be a popular demand, and a public necessity." He continued: "[I]t is believed that nothing has been done beyond the constitutional competency of Congress." At this time, Lincoln's notion of prerogative remained close to the Jeffersonian standard. While this position maintains the importance of necessity, Lincoln also justified his actions by citing "popular demand,"⁶³ thus eroding constitutionalism because the people will ask only that the action improves the public good. Perhaps the same could be said of Congress. For instance, Congress's willingness to approve Jefferson's Louisiana Purchase may have legalized his action, but it did not prove that the action was truly necessary and so justifiably unconstitutional.

By the end of the war, Lincoln wrote to General Butler a statement that indicates both that he thought discretionary power must rest firmly on necessity and that this position had become more clear for him over the course of the war: "Nothing justifies the suspending of the civil by the military authority, but military necessity, and of the existence of that necessity the military commander, and not a popular vote, is to decide."⁶⁴ If martial law is needed, the military commander is in a much better position to decide than the public. At first, this position seems to stem from a political calculation on Lincoln's part—his worry being that the public will not vote to create martial law even if it is necessary. However, the public had *already* voted to create martial law,⁶⁵ thus Lincoln's position seems truly to stem from what he writes subsequently: "In your paper of February, you fairly notified me that you contemplated taking a popular vote; and, if fault there be, it was my fault that I did not object then, which I probably should have done, had I studied the subject as closely as I have since done." In fact, Lincoln implies that this standard, rather than popular opinion, will better limit the spread of martial law: "Whatever is not within such necessity should be left undisturbed." Henceforth, he counseled his general to place "whatever you feel is necessary to be done, on this distinct ground of military necessity, *openly* discarding all reliance for what you do, on any election."⁶⁶

For Lincoln, the Constitution itself pointed to the necessity of its preservation through the habeas corpus clause; more than that, it pointed to a distinction between ordinary times and extraordinary times—the second lesson of Lincoln's words and deeds. In an 1863 letter to Erastus Corning, he claimed that "certain proceedings are constitutional when, in cases of rebellion or Invasion, the public safety requires them, which would not be constitutional when, in absence of rebellion or invasion, the public safety does not require them." Lincoln understood his extraordinary use of executive power as necessary precisely because

the situation was truly extraordinary. In using it, he did so constitutionally, but *only* because the situation was, in fact, extraordinary: “[T]he constitution is not its application in all respects the same.” It is different “in cases of Rebellion or invasion, involving the public safety” than it is “in times of profound peace and public security.” Lincoln thus broadened the habeas corpus clause, claiming that the Constitution allows whatever strong measures are necessary for its preservation. They are “good medicine for a sick man.”

But these measures may not be “good food for a well one,”⁶⁷ insofar as they are necessary departures from ordinary law, they should not be institutionalized or regularized. The existing law is not the problem and so need not be changed to meet the crisis. Just as a doctor must give a sick man certain medicines that would destroy his healthful life, Lincoln administered “medicines” to a sick and divided nation that would destroy it if permanently institutionalized.

Lincoln believed that maintaining this critical distinction between the ordinary and the extraordinary substantially removed the danger of his actions.⁶⁸ His own worries about the permanent increase of executive power influenced his response to his critics. It is not enough to say that the requirements of a crisis override concern about individual liberty. If, in responding to the crisis, Lincoln destroyed the constitutional basis of the Union, his actions would have been self-defeating. Because his overriding concern was the survival of a *constitutional* Union, any departure from the bounds of the Constitution must also point back to its restoration. Because of this distinction between the ordinary and the extraordinary, Lincoln claimed to be unable

to appreciate the danger, apprehended by [others], that the American people will, by means of military arrests during the rebellion, lose the right of public discussion, the liberty of speech and the press, the law of evidence, trial by jury, and Habeas Corpus, throughout the indefinite peaceful future which I trust lies before them.⁶⁹

In the next clause of this letter, Lincoln repeated but slightly modified the metaphor comparing executive power to a drug. He was as unable to believe that a danger existed for the nation in the future as he was “[un]able to believe that a man could contract so strong an appetite for emetics during temporary illness, as to persist in feeding upon them through the remainder of his healthful life.”⁷⁰

This rephrasing of the medicine metaphor should not, however, quiet our worries as much as Lincoln claimed it should. While medicine good for a sick person may be bad for a healthy one, it is less clear that that truth will cause him to cease feeding upon it. Lincoln must have known of soldiers who began taking morphine while sick and did not stop once healthy. Isn't there always the danger that drugs one takes while sick will become addictive? Couldn't this same danger exist for the nation with regard

to executive power—that the people will become addicted to the expedient justice of which the executive is uniquely capable. Because the executive can achieve the public good in a more immediate and comprehensive manner than the legislature, the people will not be willing to return to the constitutional separation of powers at the conclusion of the war.⁷¹ Lincoln did his best to establish a strict distinction between the ordinary and the extraordinary to prevent such a sickness; but perhaps this last metaphor indicates that dangers still abound once a constitutional government departs from the constitutional form.

Most importantly, the constitutional form prevents the arbitrary use of power by its possessors either for personal gain or out of moral conviction. As discretionary power increases, so too does the possibility that it will be used in an arbitrary manner that does not seek the public good, or by executives who imagine that precisely their concern for the public good necessitates arbitrary and unconstitutional action. So, the people must beware first that, having given up their constitution for the benevolent rule of a trustworthy executive, they find themselves defenseless against one less trustworthy. The second would not be worrisome if one could be sure that “trustworthy” executives would take such action only when it was demanded by true political necessity—saving constitutionalism itself. But they may also find that the “trustworthy” executive had a moral agenda far grander than the limited ends of a constitutional politics.⁷² Because one might go so far as to say what Franklin said of the people: “[T]here is a natural inclination in mankind to Kingly government,”⁷³ and because powerful executives can exploit this tendency to their detriment, the people must learn an attachment to their Constitution that does not come naturally to them.⁷⁴

For instance, Lincoln often appears unconcerned with the moral urgency of slavery because he insisted upon the unconstitutionality of a simple emancipation proclamation by Congress or the president.⁷⁵ Many would have had him abandon the Constitution to fulfill a higher moral demand. In a letter to Orville Browning concerning John C. Fremont's proclamation freeing the slaves,⁷⁶ Lincoln shows an awareness of these people: “[G]oing the whole figure [freeing the slaves by simple proclamation] I have no doubt would be more popular with some thoughtless people, than that which has been done.”⁷⁷ In fact, Mark Neely claims, “One cannot be certain without public opinion polls, but it seems likely that the most unpopular measure taken by President Lincoln in the first year of the war was his revocation of Fremont's emancipation proclamation for Missouri.”⁷⁸ The people are not just willing to accept prerogative, they are naturally attracted to it because of its ability to effect justice immediately and uncompromisingly. So, Lincoln chose to revoke Fremont's proclamation not because such an extension of executive power was not popular but, at least in part, because it was: “You [Browning] speak of it as being the only means of saving

the government. On the contrary it is itself the surrender of the government."⁷⁹ The people's willingness to embrace such actions by their executive would spell the end of constitutional government.

To avert this danger, Lincoln drew the brightest line possible between that which the survival of the Constitution mandates and that which his personal moral feelings might desire. After revoking General Fremont's proclamation freeing the slaves, he explained to Orville Browning that such a proclamation, at that time in the war, was "purely political, and not within the range of military law, or necessity"—and so, "simply dictatorship." Even though if he were a member of a state legislature, he would have supported emancipation, his position as president during a crisis did not allow him to "expressly or impliedly seize and exercise the permanent legislative functions of the government." In his 1864 letter to Hodges, Lincoln repeated this distinction between personal moral feelings and constitutional duty: "I am naturally anti-slavery. If slavery is not wrong, nothing is wrong." But he did not understand the presidency to confer upon him "an unrestricted right to act officially upon this judgment and feeling."⁸⁰ Earlier, in his 1862 public letter to Horace Greeley, written after Lincoln had decided he would issue the Emancipation Proclamation, he made clear that his "paramount object in this struggle is to save the Union, and not either to save or to destroy slavery." Again he claimed to have "stated my purpose according to my view of *official duty*" intending "no modification of my oft-expressed *personal* wish that all men every where could be free."⁸¹ He drew this line because of, not despite, his discretionary actions as executive during the crisis. In drawing this line and thus merely fulfilling his oath of office, to preserve the Constitution, he remains within the broader bounds of a constitutional polity.⁸² Drawing such a line also teaches the people restraint: they learn that they should neither ask nor allow a *constitutional* executive to use his extra-constitutional power to fulfill either his or their moral wishes. Only this education can prevent the descent of the constitutional order into absolutism.

I have uncovered three principles from Lincoln's action. First, action outside and sometimes against the Constitution is only constitutional when the constitutional union itself is at risk; a concern for the public good is insufficient grounds for the executive to exercise discretionary power. Second, the Constitution should be understood as different during extraordinary times than during ordinary times; thus discretionary action should take place only in extraordinary circumstances and should be understood as extraordinary. Since it is only necessitated by the crisis, the action should have no effect on the existing law. To preserve constitutionalism after the crisis, the actions must not be regularized or institutionalized. Third, a line must separate the executive's personal feeling and his official duty. He should take only those actions that fulfill his

official duty, the preservation of the Constitution, even, or especially, if the people want him to go further.

Conclusion

Long before he became president, Lincoln delivered a speech before the Young Men's Lyceum of Springfield, Illinois in 1838. This speech, made much more famous by scholars over the last fifty years than it was then, concludes with a call for a "reverence for the constitution and the laws."⁸³ Such reverence, which Lincoln argued must be grounded by "reason, cold, calculating, unimpassioned reason," is needed because of the threat that future men of great ambition—those from the "family of the lion, or the tribe of eagle"—pose to the constitutional regime. These men will, to fulfill their ambitions, attempt to destroy the "beaten path" of constitutionalism, seeking instead "regions hitherto unexplored." When such a man does arise, "it will require the people to be united with each other, attached to the government and laws, and generally intelligent, to successfully frustrate his designs."⁸⁴

In the context of Lincoln's words and actions during the Civil War, it is useful to return to this speech because it reveals much about Lincoln's underlying worries about the relation between the rule of one and constitutionalism. Prior to the aforementioned passage, Lincoln had discussed what he called the "mocratic spirit"—a lack of respect for the laws in adjudicating justice and a preference for the immediacy of mob justice. Such a spirit would cause not only the mob but other good men—"men who love tranquility"—to turn away from the Constitution in search of that which would once again make them feel secure.⁸⁵ In such a country, men of the greatest ambition would find the citizenry necessary to fulfill their ambition. Instead, a "Government . . . constituted like ours," Lincoln wrote, requires the "attachment of the People" for its maintenance. Constitutions require popular attachment, especially to avert the ambitions of those few who would destroy the constitutional order to fulfill their own ambition or even to promote what they think is the public good.

In the Civil War, Lincoln was presented with precisely that situation which, as he showed in this earlier speech, often leads to the destruction of constitutional orders. He also found a people insufficiently attached to their Constitution. In such a situation, Lincoln did more than merely take those actions necessary for the preservation of the Constitution; he also publicly announced his reasons behind the constitutionally questionable actions he took. In fact, it is only because of this that we can discern the three lessons I have drawn. Lincoln attempted to avert the danger, suggested by the medicine metaphor, that the public will become "addicts" of executive power, by trying to teach the public that his questionable actions were acceptable only within the limits imposed by the Constitution's

preservation.⁸⁶ If he had simply assumed new powers without acknowledging the extraordinary nature of the extension, the public would have been unprepared to retake such power at the conclusion of the crisis.

In a letter to Edwin M. Stanton in 1864, Lincoln wrote, “While we must, by all available means, prevent the overthrow of the government, we should avoid planting and cultivating too many thorns in the bosom of society.”⁸⁷ He attempted to do even more than this; he tried to create that constitutional attachment his Lyceum speech had claimed was so necessary to maintain a constitutional order. That is, he tried to forge in the American people an awareness of both the necessity that permits the abrogation of the Constitution and, as importantly, the limits upon such abrogation. With this education in mind, it is perhaps not accidental that two of the boldest strikes at the claims of executive power occurred immediately after the Civil War: the *Milligan* decision and President Andrew Johnson’s impeachment, both of which claimed that extraordinary executive power was permitted only by extraordinary situations.⁸⁸ Lincoln had perhaps created a constitutional attachment so strong that it was willing to strike even at claims of executive power associated with Lincoln himself.

Positioned in America with a different threat, we must beware of simply asserting that current presidents must “be like Lincoln.” The difference in the nature of the threat matters; there seemed to be a foreseeable conclusion to the Civil War, after which the necessity of Lincoln’s discretionary power would disappear. In the case of the “war on terror,” a conclusion seems less likely and thus it is more difficult to see how events could limit any claimed extraordinary power.

Nevertheless, we can learn some things from Lincoln’s example. First, justifications for using discretionary power should pass the “necessity” test, within which the preservation of the constitutional order itself is at stake. Only political necessity and not popular or congressional approval can legitimate any discretionary action taken by a president. Lincoln shows us that this standard allows the Constitution to be different for different times, but prevents it from becoming wholly indeterminate and unlimited.

Second, Lincoln’s example points to the necessity of a people attached to the constitutional form as such. Precisely because we cannot count on current presidents to educate us as Lincoln did, we must use Lincoln’s example to insist on the limitations imposed by constitutionalism. While the Constitution must accommodate political necessity, it should not accommodate political expediency. As both Lincoln and Locke show us, however, this attachment may require a political acuity that the people do not possess naturally. Indeed, the people may all too easily acquiesce and even encourage discretion that is not “manifestly against” their good.

However, Lincoln’s statesmanship seems to have produced a constitutional people, at least for a while. To the

extent that we are not now, perhaps the example of his statesmanship can begin to produce such a people once again. If the people are sufficiently attached to the limiting powers of the Constitution, then the Constitution can become again a potent tool for controlling presidential overreaching. Presidents will again become compelled to justify their behavior not in terms of the public good, but in terms of their constitutional responsibility—reducing the danger of the people’s natural tendency to accept what a well-intentioned leader claims is for their good.

To create such compulsion, however, we must restore the notion of executive prerogative to the public discourse on power. Legislation such as the Patriot Act points toward the legalization of prerogative, but once prerogative is legalized, it is no longer prerogative. In legalizing such power, we give the government both too much and too little. New situations may call for action not envisioned by the legalization, and so too, the legalization may allow governmental action where it has no legitimate claim. As action that responds to unforeseen exigencies, the necessary powers cannot be envisioned and thus cannot be provided for by the law.

The extraordinary nature of prerogative should instead respond to political exigencies in such a way as to preserve the constitutional order. This compels presidents to justify their actions to the people, thus alerting the people to the dangers of executive prerogative. So long as extraordinary actions are taken outside the public’s gaze, as some would argue has been the case with the recent round-up of potential terrorists on the basis of strained readings of existing law,⁸⁹ the public cannot become sufficiently aware of either the necessity of prerogative or the limits upon it. Because naturally the people are insufficiently attached to constitutionalism, they may not insist upon such justifications on their own. The question becomes: are we, or can we become, a constitutional people attached enough to the rule of law so as to prevent the overextension of executive power? In other words, are we capable of insisting upon our Constitution even when presidents do not?

Notes

- 1 For examples, see Robin Toner, *New York Times*, November 18, 2001; Tamara Lytle, *Orlando Sentinel*, September 9, 2002, <http://www.orlandosentinel.com/>; Charles Lane, *Hartford Courant*, September 4, 2002, <http://www.ctnow.com/about/custom/thcl>. For examples of the scholarly debate since 9/11, see, Fatovic 2004a; Baker 2003; Fisher 2003; Elsea 2003; Kassop 2003; Lindsay 2003; Baker 2002.
- 2 Locke 1988, 353 (IX, 131); see also *ibid.*, 359 (XI, 137). For these and all subsequent references to Locke’s *Second Treatise*, the Roman numerals and numbers in parentheses represent, respectively, the

- chapter and section numbers for those using other editions of the text.
- 3 Here I use *Federalist* 23, which makes the opposite argument: “The circumstances that endanger the safety of nations are infinite; and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed” (Hamilton, Jay, and Madison 1937, 142).
 - 4 *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).
 - 5 As Scigliano (1989) shows, Edward Corwin (1984) first introduced the notion that the Constitution’s executive was based upon Locke’s notion of executive prerogative; see Pious 1979, 46–84. For an account that notes the fact that neither *The Federalist* nor the Constitution specifies that these powers belong to the executive, which at the same time shows—through an examination of Locke—why they would most naturally belong to this branch, see Tarcov 1990.
 - 6 Wilmerding 1952, 321. For a study of Truman’s actions and their implications for presidential power, see Marcus 1977.
 - 7 See Schlesinger 1989, especially the afterword accompanying the second edition. Also see Barber 1984, 168–96; Scigliano 1981; Scigliano 1989; Monaghan 1993; Robinson 1996. In his dissenting opinion in *Korematsu v. United States*, Justice Robert Jackson also articulates this position. (*Korematsu v. United States*, at 242–48). For the “Jeffersonian” roots of this power, see Schmitt 1989; Bailey 2004; Fatovic 2004a. Of Jefferson’s understanding, Fatovic writes: “Although Jefferson believed that an extraordinary act of executive power could be illegal and legitimate, his constitutional theory draws such a close link between legality and legitimacy that each and every exercise of prerogative is necessarily presumed to be criminal until and unless the president convinces the people and their representatives of the merit of his actions” (2004a, 434).
 - 8 See Arnhart 1979; Besette and Tulis 1981; Sorenson 1989; Storing 1995, 377–85; Thomas 2000. As with the Jeffersonian view, there is divergence within this argument. Arnhart, for instance, finds Lincoln’s actions unconstitutional because he went beyond a Constitution that is designed to meet emergencies. Scalia’s dissenting opinion in *Hamdi v. Rumsfeld* concludes with similar reasoning. For the association of this view with Alexander Hamilton, see Rossiter 1964; Walling 1999, 123–52, especially 152; Fatovic 2004a.
 - 9 Lincoln 1953, 4:426.
 - 10 See Corwin 1984, 167, 266–67, 495; Arnhart 1979, 125–30; Pious 1979, 55–60; Besette and Tulis 1981, 21–22; Barber 1984, 187–96; Robinson 1987, 128–29; Schlesinger 1989, 322–23, 458–60; Scigliano 1989, 252–53; Franklin 1991, 46–48; Storing 1995, 382.
 - 11 Schlesinger 1989, 460. Schlesinger seems to think that Lincoln would agree with his understanding of the constitutional basis of prerogative, although this is not quite clear from Schlesinger’s argument. For some indication that Schlesinger thinks Lincoln held the Hamiltonian view, see pp. 148–50.
 - 12 Barber 1984, 185–96. For a criticism, see Franklin 1991, 124–26. Also see Farber 2003, 194.
 - 13 In fact, Scigliano (1989) claims that Locke intends a more limited definition of prerogative than appears on the surface, but “disguised this meaning regarding prerogative in order to defend himself” (p. 243). On the surface, Locke (1988) points to an executive who has the power, at its extreme, “to do several things of their own free choice, where the Law was silent, and sometimes too against the direct Letter of the law, for the publick good” (*Second Treatise*, XIV, 164). For an incisive treatment of Locke’s prerogative, see Mansfield 1989, 181–211. Mansfield would disagree with Scigliano’s interpretation; he finds that Locke points to an executive who is necessarily “‘arbitrary’ . . . the very thing his constitution was formed to prevent” (p. 189). See also Pasquino 1998; Fatovic 2004b.
 - 14 Thomas 2000; see also Besette and Tulis 1981, 26.
 - 15 Arnhart 1979, 130.
 - 16 Quoted in Randall 1963, 1–2.
 - 17 Anderson 1982, 193.
 - 18 Rossiter, 1948, 238. Rossiter endorses Lincoln’s actions and claims constitutional republics must resort to such “constitutional dictatorships” in times of crisis. See also Dunning 1965, 20–21; Stephenson 1920, 120; Milton 1944, 78–80; Roche 1952, 598; Dietze 1968, 38. That Lincoln created a “constitutional dictatorship” to traverse the Civil War has become the textbook view; see Pious 1979, 57. For a critique of the concept of constitutional dictatorships, see Belz 1998, 17–43.
 - 19 Randall (1963), one of Lincoln’s most friendly historians, writes: “It would not be easy to state what Lincoln conceived to be the limit of his powers” (pp. 513–14). Many who ascribe to this view of Lincoln also ascribe to him the origins of twentieth-century statism; see, for instance, Wilson 1962, 99–130; Dietze 1968, 17–62; Kendall and Carey 1970, 84–95.
 - 20 Loss 1990, 90. This seems to be the case even for Rossiter’s concept insofar as it reminds one more of the temporary dictatorships used by the Romans, about which Hamilton writes at the beginning of *Federalist* 70. Hamilton implies that this Constitution will be superior to the Romans’ because it will

- constitute a strong executive within it (Hamilton, Jay, and Madison 1937, 454–55).
- 21 Weeden 1906, 351.
 - 22 Rhodes 1899, 3:442.
 - 23 Gallagher 1974, 223. It was such worries that caused Locke (1988) to write “That the Reigns of good Princes have been always most dangerous to the Liberties of their People” (p. 378, XIV, 166).
 - 24 Lundberg (1980) thinks the Civil War teaches that, “Either way, whether he approves or disapproves of the President, every citizen lives under a constitutional sword of Damocles. Or, put another way, he is like a rat in a constitutional trap. In no other constitutional system does so much depend upon one man, whether saintly or evil” (p. 271).
 - 25 *New York Times*, May 22, 1977.
 - 26 Cuomo 2004, 76.
 - 27 It is not clear that President Bush has been inspired by Lincoln in his post-September 11th actions. In fact, it is not clear what has guided his extension of power. This is in part because, unlike Lincoln, Bush has spent little time publicly defending an increase in executive power in response to the crisis.
 - 28 *Ibid.*, 84–85.
 - 29 Belz 1998, 43. Rostow (1989) too claims: “It seems contrary to the most elementary notions of legal theory to claim that Lincoln’s conduct of the Civil War . . . was unconstitutional” (p. 745). He, however, does not develop his grounds for this claim. Adler (1988) also defends Lincoln’s actions as constitutional; he also does not, however, develop the precedents that we can learn from Lincoln.
 - 30 Farber 2003, 174–75. My analysis agrees with both Belz and Farber that Lincoln was attentive to the import of the Constitution and to constitutionalism more generally. For an alternative view, see Neely 1991.
 - 31 Corwin 1984, 171.
 - 32 In fact, such struggle seems to be required for our system of separated powers to succeed as the founders envisioned. “Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.” (Hamilton, Madison, and Jay 1937, 337). For a discussion of the founders’ conception of the separation of powers, see Tulis 2003, 88–91.
 - 33 See, for instance, Hamilton’s argument in *Federalist* 8 and Madison’s arguments as Helvidius in 1793. *Ibid.*, 41–47; Hamilton and Madison 1976.
 - 34 Hamilton, Madison, and Jay 1937, 42 (*Federalist* 8). The best guide to this problem remains Locke’s Second Treatise. While showing the need for executive prerogative, he also shows its dangers to the very constitution it is meant to preserve. Mansfield (1989) writes: “But what exactly is a constitutional executive? It is often thought to be an executive subordinate to the constitution. But could it not also be considered an ambivalent, submissive recognition of the need for a strong executive? What then is the precise relationship between the constitution and this executive power? Locke’s political science shows that the modern constitution and the modern executive are mutually dependent and yet antithetical. Each needs and opposes the other” (p. 181). Also see Dunn 1969, 154.
 - 35 For an account of the effect of fear upon our national security measures, see Rosen 2004. He calls for “enlightened political leadership” that will “have the courage to challenge the public’s emotionalism, rather than encouraging it at every turn” (p. 223).
 - 36 See Kassop 2003; Baker 2003; Elsea 2003; Fisher 2003. Lindsay (2003) is more optimistic about the return of a balance between the three institutions after the crisis subsides. Also see Baker (2002), who writes, “The executive branch has made multiple assertions of unilateral authority to respond to the terrorist threat, including the claim that the other branches lack competence to review its assertions” (p. 775)
 - 37 Locke 1988, 378, 427 (XIV, 166; XIX, 242). Engeman (1982) writes: “Locke recognized the extraordinary danger this [prerogative] power presented to his limited constitutional government. Faced with the evident necessity of such a power—and the danger of executive tyranny which could result from it—he saw no other expedient for its abuse than his famous, ominous, summons of the devil of rebellion: ‘The people,’ Locke says, ‘shall judge’ whether the executive threatens their liberty and hence their preservation” (p. 272). For a discussion of the problem of “popular consultation,” see Kendall 1959, 124–31.
 - 38 Locke 1988, 375 (XIV, 161); italics mine.
 - 39 Rehnquist 1998, 47.
 - 40 The privilege of the writ of habeas corpus is constitutionally guaranteed “unless when in Cases of Rebellion or Invasion the public Safety may require it.” It guarantees to someone detained by the government an appearance in court before a judge to determine whether or not that person is imprisoned lawfully. With its suspension, the government is able to detain people without having to show cause. The writ of habeas corpus is often thought to be the fundamental safeguard against lawless and arbitrary state action.
 - 41 Neely 1991.
 - 42 Quoted in *ibid.*, 93–94.
 - 43 For a discussion of the ways in which post-9/11 laws to prevent terrorism are used to catch other sorts of crime, with the people’s acquiescence, see Rosen 2004, 130–57.

- 44 One observer wrote during the Civil War: "One of the most interesting features of the present state of things is the illimited power exercised by the government. Mr. Lincoln is, in that respect, the equal, if not the superior, of Louis Napoleon. The difference consists only in the fact that the President rests his authority on the unanimous consent of the people of the loyal States, the emperor his on the army." Quoted in Rhodes 1899, 3:442.
- 45 Theodore Roosevelt (1906) wrote: "In great crises it may be necessary to overturn constitutions and disregard statutes, just as it may be necessary to establish a vigilance committee, or take refuge in lynch law; but such a remedy is always dangerous, even when absolutely necessary; and the moment it becomes the habitual remedy, it is a proof that society is going backward" (p. 54).
- 46 Locke 1988, 378 (XIV, 166).
- 47 In fact, Jefferson's presidency itself reveals the problem of his standard. For instance, Levy claims that a study of Jefferson's presidential record reveals a quasi-dictator willing to go to any length to crush his political enemies. That Jefferson's understanding of discretion permitted such activities is suggested by the following: "On great occasions, every good officer must be ready to risk himself in going beyond the strict line of law when the public preservation requires it . . . The Feds, and the little band of Quids, in opposition, will try to make something of the infringement of liberty by the military arrest and deportation of citizens, but if it does not beyond such offenders as Swartwout, Bollman, Burr, Blennerhasset, Tyler, etc., they will be supported by the public approbation." Quoted in Levy 1963, 84–85. For a more favorable view of the effects of Jeffersonian prerogative, see Bailey 2004, 747–52.
- 48 Locke 1988, 378 (XIV, 166).
- 49 Bailey 2004, 749.
- 50 Howe 1979, 87–89. Donald points to a Whig tradition within which an executive could defer to the legislature in matters of legislation while remaining strong in matters of war and security. Donald (2001) writes: "Both in strongly asserting his powers and in weakly deferring to Congress, he [Lincoln] was following the Whig creed in which he was raised" (p. 174). He builds his case upon one speech by John Quincy Adams and the document William Whiting produced during the war. One could produce far greater evidence that the Whigs desired presidential deference in all matters, especially in the Whig reaction to Polk's Mexican-American war.
- 51 Lincoln 1953, 1:515. Binkley (1937) writes: "Surely no one could have guessed that in this harassing critic of the war policy of President Polk there lurked even the possibility of a war President who was to deal with Congress and the Constitution at times in a manner more imperious than any President before or since" (pp. 114–15).
- 52 Lincoln 1953, 1:451. For a discussion of the modern growth of presidential power to encompass Herndon's view, see Fisher 1995.
- 53 Locke 1988, 365–66 (XII, 146–48)
- 54 Lincoln 1953, 1:439.
- 55 *Ibid.*, 1:432.
- 56 *Ibid.*, 1:439.
- 57 Contrary to conventional wisdom according to which Lincoln establishes no precedent of military restraint, Carnahan (1998) concludes: "The reminder that military necessity can limit the destruction of war, beyond serving as a justification for destruction, is the most important legacy of Lieber's development and Lincoln's application of military necessity over 130 years ago" (p. 231). For an investigation into the "nearly-forgotten work of Francis Lieber," an American political scientist who Lincoln asked to encode the laws of war, see Farr 1990.
- 58 Lincoln 1953, 7: 281 (emphasis added). Apparently, this is the quotation Nixon had in mind in the previously cited interview with David Frost.
- 59 Sorenson (1989), a strong proponent of Hamiltonian prerogative, argues that Publius's doctrine "culminates in a government with unlimited powers" (p. 278).
- 60 Lincoln 1953, 7:281.
- 61 *Ex parte* Milligan, at 127. For a similar suggestion that the Milligan decision is not so far from Lincoln's standard. See Storing 1995, 383; Bessette and Tulis 1981, 19–20.
- 62 For a discussion of the modification of Lincoln's attitude toward Congress over the course of the war, see Binkley 1937, 122–30; Nicolay and Hay 1890, 9:121–22. In passing, Corwin (1984) also argues that Lincoln's views of his relation to Congress "underwent a gradual stiffening" (p. 167). Benedict (1991) argues that Lincoln remained a Whig, deferential to Congress on these matters throughout the war.
- 63 Many of those who defend Jeffersonian prerogative make much of this term "popular demand" in this speech. See, for instance, Schlesinger 1989, 458.
- 64 Lincoln 1953, 7:487–88.
- 65 *Ibid.*, 7:488 n. 1: "At a Norfolk election held under Butler's orders, citizens voted to retain martial law."
- 66 *Ibid.*, 7:488; italics mine.
- 67 *Ibid.*, VI: 267.
- 68 Anastaplo (1999) similarly writes: "Lincoln would have had his fellow citizens understand that not all crises are like a civil war and that not all Presidents need be entrusted with extraordinary powers. Fundamental to his approach here is his Fourth of July

- observation that ‘when an end is lawful and obligatory, the indispensable means to it, are also lawful, and obligatory’” (p. 196). See, also, Fehrenbacher 1987, 122. By contrast, Dietze (1968) claims Lincoln did create a precedent for the use of extraordinary powers in ordinary times: “The exercise of emergency power could conceivably not remain confined to emergencies like war or civil war. It could possibly be claimed by a President in times that were normal, or, by objective standards, quite normal. In the end, the state of emergency possibly could become the rule rather than the exception. Under the pretense of executing the will of the people, a President could thus emerge as a rather permanent dictator” (pp. 57–58). It seems precisely for this reason that Lincoln realized he should not claim to execute the will of the people.
- 69 Lincoln 1953, 6:267.
- 70 Ibid..
- 71 For instance, Locke (1988) writes: “And therefore he, that will look into the History of England, will find, that Prerogative was always largest in the hands of our wisest and best Princes: because the People observing the whole tendency of their Actions to be the publick good, contested not what was done without Law to that end. . . . The People therefore finding reason to be satisfied with these Princes, whenever they acted without or contrary to the Letter of the Law, acquiesced in what they did, and, without the least complaint, let them enlarge their Prerogative as they pleased, judging rightly, that they did nothing herein to the prejudice of their Laws, since they acted conformable to the Foundation and End of all Laws, the publick good” (pp. 377–78 [XIV, 165]).
- 72 Roosevelt (1906) writes: “There certainly never was a more extraordinary despotism than this; the despotism of a man who sought power, not to gratify himself, or those belonging to him, in any of the methods to which all other tyrants have been prone; but to establish the reign of the Lord, as he saw it” (p. 213). For a discussion of the more limited ends and disputes of the constitutional polity defended in *The Federalist*, see McDowell 1993.
- 73 Franklin 1787.
- 74 Engeman (1982) writes: “A good cause can be made that Publius and Lincoln, aware of the limits of the Constitution, were all the more adamant in maintaining the public’s attachment to it” (p. 279). For a discussion of cultivating the people’s attachment to their Constitution, see Manzer 2001.
- 75 Consider again Engeman (1982), who explores Lincoln’s thought on the limitations upon Congress’s power of emancipation.
- 76 In a proclamation issued on August 30, 1861, General Fremont had attempted to free the slaves of all rebels against the Union. See Neely 1991, 34.
- 77 Lincoln 1953, 4:532.
- 78 Neely 1991, 49. More generally, Neely claims that, while conscription shook the North and provoked numerous conflicts, the issue of civil liberties provoked little dissent during the Civil War. On this same point, Rhodes (1899) writes: “That the protests against the arbitrary arrests lacked energy and persistence, that the infringements upon the bill of Rights of the Constitution were not actively resisted, is explicable only by the confidence the people had in Abraham Lincoln” (4:171).
- 79 Lincoln 1953, 4:532.
- 80 Ibid., 7:281.
- 81 Ibid., 5:388–89.
- 82 Again, the understanding of Lincoln as remaining within a constitutional polity during the Civil War contrasts with even some of the older views of Lincoln. Henry Adams (1958) claims the civil war “for the time obliterated the Constitution” (p. 195). Even Lincoln’s own Secretary of State wrote: “We elect a king every four years and give him absolute power within certain limits, which after all he can interpret for himself.” Quoted in Schlesinger 1994, 159.
- 83 Lincoln 1953, 1:115.
- 84 Ibid., 1:114–15. Some have claimed that Lincoln was, in fact, such a man who sought distinction not by, as he might have, “enslaving freemen,” but by “emancipating slaves.” See, for instance, Wilson 1962. For the most comprehensive alternative understanding of this speech, see Jaffa 1959.
- 85 Lincoln 1953, 1:11.
- 86 Speaking of Lincoln’s broader education of the public, Belz (1998) writes: “Lincoln possesses in himself and inculcated in the people constitutionalist conviction that regarded preservation of republican self-government as the nation’s defining and paramount purpose” (p. 94).
- 87 Lincoln 1953, 7: 255.
- 88 Ex parte Milligan is often seen as a significant judicial blow to some of the more extravagant claims about the reach of executive power insofar as it rules that a citizen cannot be tried by a military commission appointed by a military commander in a place where the courts remain open and unobstructed.
- 89 See Elsea 2003 and Luban 2005.

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