Abraham Lincoln and the US Constitution, 1861-1865

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The Presidential War

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Nicolas Gachon

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In this temple, as in the hearts of the people for whom he saved the Union, the memory of Abraham Lincoln is enshrined forever.[1]

[1] Dedicatory inscription carved on the wall over the head of Abraham Lincoln's statue at the Lincoln Memorial in Washington D.C.

CONTENTS

INTRODUCTION

There was originally nothing that quite resembled a central government in the United States of America at the moment of the Declaration of Independence in Philadelphia, Pennsylvania, in 1776. The new country was at best a loose political assemblage, nothing more than an association of sovereign states that remained highly dependent upon the voluntary participation of each member. However, the need for some form of central authority was dire and had been acutely felt since the early days of the Revolutionary War. After Richard Henry Lee of Virginia proposed a motion calling for the American colonies' independence from Great Britain on June 7, 1776, the Second Continental Congress appointed three committees four days later, on June 11, 1776. One of the committees, composed of one representative from each colony, was to determine what form the confederation of the colonies should take. John Dickinson, from Delaware, was the principal writer and it was after the so-called Dickinson Draft that the Articles of Confederation called the new confederation "the United States of America."

On November 15, 1777, the Articles of Confederation vested a national Congress with centralized authority but were soon to prove unworkable, the principal reason being that the newly created central government had no executive power. The Congress could indeed make laws, as it should, but it could not put them into effect by itself and had to rely instead on the state governments to enforce them. James Madison and George Washington feared that the young country was then, already, on the brink of collapse. On January 18, 1788, in *The Federalist*, 40, "On the Powers of the Convention to Form a Mixed Government Examined and Sustained," Madison wrote:

> Suppose, then, that the expressions defining the authority of the convention were irreconcilably at variance with each other; that a national and adequate government could not possibly, in the judgment of the convention, be affected by alterations and provisions in the Articles of Confederation; which part of the definition ought to have been embraced, and which rejected? Which was the more important, which the less important part? Which the end; which the means? Let the most scrupulous expositors of delegated powers; let the most inveterate objectors against

> those exercised by the convention, answer these questions. them declare whether it was of most importance to the happiness of the people of America that the Articles of Confederation should be disregarded, and an adequate government be provided, and the Union preserved; or that an adequate government should be omitted, and the Articles of Confederation preserved. Let them declare whether the preservation of these articles was the end for securing which a reform of the government was to be introduced as the means; or whether the establishment of a government adequate to the national happiness was the end at which these articles themselves originally aimed, and to which they ought, as insufficient means, to have been sacrificed.[2]

The states retained considerable power, arguably too much, leaving the central government with insufficient power to regulate commerce, to tax, to set a trade policy, or even to support a war effort should waging a war turn out to be necessary for the young nation. And the economic situation was grim: Congress had to function with a depleted treasury while paper money was flooding the country, leading to extraordinary inflation. The Continental Congress then allowed the delegates who met in Philadelphia to revise the Articles of Confederation but, aside from the theory of "unalienable rights," *i.e.* agreeing that the protection of life, liberty, and property must be kept, the delegates had little idea of how to significantly improve the Articles of Confederation. On May 25, 1787, 55 delegates from 12 states (Rhode Island was not present) did meet in Philadelphia to revise the Articles of Confederation but they soon concluded that an entirely new government would in fact have to be created for the United States of America. Four months later, on September 17, 1787, a national Constitution was to become the supreme law of the American Republic.

The U.S. Constitution has often been traced back to its English origins. Major political developments in English constitutionalism paved the way for what would become the American constitutional system, such as the appearance of English common law during the 12th century,[3] the

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[2] James Madison, *The Federalist*, 40, in Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers,* ed. Lawrence Goldman (Oxford University Press, 2008), 193-194.

[3] In 1154, Henry II created a unified system of law that would be "common" to the country. Caselaw, the body of precedent court judgments, became formalized and systematized during his reign (1154-1189), thereby institutionalizing common law. Henry II also established permanent courts at Westminster and in the counties, staffed by professional judges and judicial personnel selected largely on legal education, expertise and merit.

adoption of the Magna Carta[4] — literally "Great Charter" — in 1215, the emergence of Parliament during the 13th century,[5] the principle that Acts of Parliament are legislative statutes binding on all members of English society, and the relations between the Crown and Parliament under the Tudor monarchs.[6]

Yet, unlike England, the United States did not adopt a unitary form of government. Because the states were anxious to retain their autonomy, because fears of tyranny made centralized authority unacceptable to many, because communication and transportation were too poor and self-rule too new to experiment such a system in such a vast country, the Framers established a federal system of government based on a distribution of power between the central government and the states. Each retained separate powers, agencies, and authority, but the ultimate power of the central government, in terms of its nature and scope, remained a highly contested issue: a number of enumerated powers were specifically delegated[7] to the U.S. Congress and listed in Article I, Section 8; a number of powers were denied to the U.S Congress,[8] while others were denied to

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[4] Magna Carta was granted by King John in June 1215 in response to the threat of baronial rebellion. It was a fundamental statement of corporate and individual rights in England, and of the limitations of royal power. By the 18th century it was understood to be the foundation of English liberties.

[5] The Parliament of England evolved from the great council of bishops and peers that advised the English monarch. Great councils were first called Parliaments during the reign of Henry III (1216–1272). By this time, the king required Parliament's consent to levy taxation. It was originally a unicameral body, a bicameral Parliament only emerged when its membership was divided into the House of Lords and House of Commons, which included knights of the shire and burgesses. The Parliament of England was the legislature of the Kingdom of England from the 13th century until 1707 when it was replaced by the Parliament of Great Britain.

[6] See: T. R. S. Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Oxford University Press, 1995); Dieter Grimm, *Constitutionalism: Past, Present, and Future* (Oxford University Press, 2019).

[7] U.S. Constitution, Art. I, Sec. 8. A "Necessary and Proper Clause," also known as the elastic clause, was formally drafted in addition to Clauses 1–17 of Article I, giving Congress the ability to create structures organizing the government, and to write new legislation to support the explicit powers enumerated in Clauses 1–17. was added to ensure the government had the authority to deal with any serious issues in exercising the other enumerated powers as they arose. The Framers understood that it would be impossible to list every single power that the government would need as the world changed.

[8] *Ibid*., Sec. 9.

the states;[9] a number of powers were implicitly made concurrent,[10] *i.e.* to be shared by both the federal and state governments; some were reserved to the states: by affirming that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," Amendment X helped define the very concept of federalism, the relationship between the federal and the state governments.[11] The distribution of power was designed to be maintained by judicial enforcement of the Constitution.

The Constitution also centered on a concept elaborated by such political thinkers as Montesquieu[12] and known as "separation of powers." As stated by James Madison in *The Federalist*, 40:

> From these facts, by which Montesquieu was guided, it may clearly be inferred that in saying "There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates," or, "if the power of judging be not separated from the legislative and executive powers," he did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted.[13]

The idea was to vest the powers of government — the legislative, the executive, and the judiciary — in three branches that were meant to be separate and independent from one another to prevent any one of the three branches from becoming omnipotent or tyrannical. Besides, the Framers incorporated a system of checks and balances into the U.S. Constitution to protect each branch against possible violation of its authority by the other branches. As explained by James Madison in the *Federalist*, 51:

> But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others. The provision for defence must in this, as in all other cases, be made commensurate to the danger of attack.

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[9] *Ibid*., Sec. 10.
[10] The Constitution does not explicitly list them but implies that they should exist.
[11] U.S. Constitution, Amendment X (1791).
[12] Charles de Montesquieu, *The Spirit of the Laws*, ed. Anne M. Cohler, *et. al* (Cambridge University Press, 1989).
[13] James Madison, *The Federalist*, 40, 241.

> Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to controul the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controuls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place, oblige it to controul itself. A dependence on the people is no doubt the primary controul on the government; but experience has taught mankind the necessity of auxiliary precautions.[14]

Each department was given a share of the powers of the others in order to preserve its jurisdiction. The president's veto and senatorial approval of treatises and of executive, as well as judicial appointments, are examples of checks and balances. Although they are basic tenets of the U.S. Constitution, federalism and the notion of separated powers remained in the field of political theory, and the passage from theory to practice would prove to be extremely controversial.

* * *

Written in 1787, the U.S. Constitution provides with little more than a general framework inside of which numerous interpretations were possible, and still are today. This was the result of a series of compromises between large and small states, between free and slave states, between states favoring or opposing strong federal authority, between many different and often conflicting interests. Therefore, the U.S. Constitution is very adaptable but often — if not predictably — unable to settle disputes, even disputes as to its own enforcement. Hence the longstanding debate in American politics about different methods of interpreting the Constitution, over the living Constitution, over strict constructionism, originalism, textualism, etc.[15]

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[14] *Id*., *The Federalist*, 51, 257.

[15] See: Walter Murphy, *et. al. American Constitutional Interpretation*. 6th ed. (Foundation Press, 2019). While textualism is the practice of adhering to the actual text of the Constitution, originalism aims to follow how the Constitution would have been understood or was intended to be understood at the time it was written.

There are several theories of the nature of the Union. The dual sovereignty theory[16] holds that the national government and the state governments are each supreme in their separated spheres. The states' rights theory[17] holds that the Constitution is a compact between the states, which remain supreme and can decide the distribution of power and withdraw from the Union if they wish to do so. The national supremacy theory holds that the Constitution and the national government were established by the people of the nation, not the states, and that the

[16] Amendment V of the U.S. Constitution (1791) has it that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." Yet, in a federal system, different units of government may have different interests to serve in the definition of crimes and in the enforcement of their laws. When the different units have overlapping jurisdictions, a person may engage in conduct that will violate the laws of more than one single unit. Although the Supreme Court had long accepted the principle that prosecution of the same defendant by two governments for the same conduct would not constitute double jeopardy, it was not until *United States v. Lanza* (356 F. Supp. 27, 1973) that the conviction in federal court of a person previously convicted in a state court for performing the same acts was sustained. See: Cornell Law School, Legal Information Institute, "Amdt5.2.1.2.2 Dual Sovereignty Doctrine," https://www.law.cornell.edu/constitution-conan/amendment-5/dual-sovereignty-doctrine.

[17] The Supremacy Clause in the U.S. Constitution states: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding" (Art. 6, Sec. 2). In *McCulloch v. Maryland* (17 U.S. 316, 1819), the Supreme Court asserted that the laws adopted by the federal government, when exercising its constitutional powers, are generally paramount over any conflicting laws adopted by state governments. One major constitutional strain on the Union until the Civil War was to be related to the issue of trade and tariffs, which led to the nullification crisis after South Carolina's Nullification Ordinance declared that the tariff of 1828 and of 1832 were null and void within the state borders of South Carolina (see p. 14). Thomas Jefferson was one of the staunchest advocates of states' right, as in his letter to William B. Giles on December 26, 1825: "I see, as you do, and with the deepest affliction, the rapid strides with which the federal branch of our government is advancing towards the usurpation of all the rights reserved to the States, and the consolidation in itself of all powers, foreign and domestic, and that, too, by constructions which, if legitimate, leave no limits to their power." Quoted in: *The Essential Jefferson*, ed. Jean Yarbrough (Hackett, 2006), 269.

Constitution should make it possible for the national government to achieve the great ends of its Preamble:[18]

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

In other words, the national supremacy theory guarantees the U.S. Constitution's authority over laws created by the states that may be at odds with the goals originally held by the Framers.

The constitutional text then proceeds with a series of Articles outlining the organization and powers of government:

> All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.[19]

> The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and together with the Vice President, chosen for the same Term […].[20]

> The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish.[21]

As Arthur M. Schlesinger Jr. argued, the separation of powers "institutionalized conflict at the very heart of the American polity,"[22] or, in the words of Richard Neustadt, who claimed that the expression "separation of powers" was misleading since what the Framers actually created was only a set of three separate institutions. the U.S. Constitution did not create a government of separated powers: "It did nothing of the sort. Rather, it created a government of separate institutions *sharing* powers."[23] As a matter of fact, the relations between the presidency and

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[18] See: Forrest McDonald, *States' Rights and the Union: Imperium in Imperio, 1776-1876* (University Press of Kansas, 2000).
[19] U.S. Constitution, Art. I, Sec. 1.
[20] *Ibid*. Art II, Sec. 1.
[21] *Ibid*. Art. III, Sec. 1
[22] Arthur M. Schlesinger Jr., *The Imperial Presidency* (Houghton Mifflin, 1973), vii.
[23] Richard E. Neustadt, *Presidential Power: The Politics of Leadership* (Wiley, 1960), 33.

Congress are seldom easy; conflict was built into the system from the outset, and each institution consequently sought to preserve or to expand its power. Again, as the Constitution largely fails to settle such disputes, they have become a central feature of American political history as well as a factor of evolution.

* * *

As early as 1798, the Federalists, who dominated the 5th Congress (March 4, 1797-March 4, 1799) during the presidency of John Adams (1797-1801), and who favored a strong central government, aimed at silencing their Republican[24] opponents and critics by passing a series of laws known as the *Alien and Sedition Acts*. Since a number of prominent Republicans were born in foreign countries, the *Naturalization Act*[25] made it more difficult to acquire American citizenship by raising the residency status to fourteen years and by denying eligibility to those from countries at war with the United States. The *Alien Act*[26] and the *Alien Enemies Act* provided for the deportation or confinement of aliens considered as dangerous. In addition, the *Sedition Act*[27] made it a crime to criticize the government and its officers, or to incite people to resist the law:

> And be it farther enacted, That if any person shall write, print, utter or publish, or shall cause or procure to be written, printed, uttered or published, or shall knowingly and willingly assist or aid in writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute; […] then such person, being thereof convicted before any court of the United States having jurisdiction thereof, shall be

[24] Republican is not to be understood here as a reference to Abraham Lincoln's party, founded in 1854 in Ripon, Wisconsin. The reference here is to the Jeffersonian Republicans, sometimes called Democratic-Republicans, whose party was founded in the 1790s and who believed that the greatest threat to liberty was posed by a tyrannical central government and that power in the hands of the common people was preferred. Arthur T. Downey, "The Conflict between the Chief Justice and the Chief Executive: *Ex parte Merryman*," *Journal of Supreme Court History*, vol. 31, n°3 (2006), 264.
[25] *Naturalization Act* (1798), 1. Stat. 566.
[26] *Alien Act* (1798), 1 Stat. 570; *Alien Enemy Act* (1798), 1. Stat. 577.
[27] *Sedition Act* (1798), 1. Stat. 596.

> punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years.[28]

The Republican leaders, Thomas Jefferson and James Madison, considered that the *Alien and Sedition Acts* were unconstitutional since the First Amendment guaranteed freedom of speech and of the press:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. [29]

Yet they had no reason to look to the Supreme Court at the time, since the Supreme Court had never declared an act of Congress unconstitutional (the principle of judicial review would only be established in 1803 in the landmark *Marbury v. Madison.* There was in fact no agency of government to decide the question of constitutionality; Jefferson and Madison concluded that it was up to the state legislatures to do so. They expressed their views in two sets of resolutions that were adopted by the legislatures of Kentucky and Virginia in 1798 and 1799. The Kentucky[30] and Virginia[31] Resolutions, which were Democratic-Republican responses to the *Alien and Sedition Acts*,[32] asserted that the federal government had been formed by a compact between the states, *i.e.* by the Constitution; it was therefore a limited government with limited powers:

> That the General Assembly doth particularly protest against the palpable and alarming infractions of the Constitution, in the two late cases of the "Alien and Sedition Acts" passed at the last session of Congress; the first of which exercises a power no where delegated to the federal government, and which by uniting legislative and judicial powers to

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[28] In Stephen A. Smith, *Freedom of Expression: Foundational Documents and Historical Arguments* (Oxbridge Research Associates, 2018), 201.
[29] U.S. Constitution, Amendment I (1791).
[30] The Kentucky Resolutions were introduced in the Kentucky House of Representatives by John Breckinridge and adopted in November of 1798. *The Papers of Thomas Jefferson*, vol. 30: 1 January 1798 to 31 January 1799, ed. J. Jefferson Looney (Princeton University Press, 2003), 529-56.
[31] The Virginia Resolutions were sponsored in the Virginia House of Delegates by John Taylor and adopted in December of 1798. *The Papers of James Madison*, ed. David B. Mattern, J. C. A. Stagg, Jeanne K. Cross, and Susan Holbrook Perdue (University Press of Virginia, 1991), 185-91.
[32] See: William J. Watkins, *Reclaiming the American Revolution: The Kentucky and Virginia Resolutions and their Legacy* (Palgrave Macmillan, 2004).

> those of executive, subverts the general principles of free government; as well as the particular organization, and positive provisions of the federal constitution; and the other of which acts, exercises in like manner, a power not delegated by the constitution, but on the contrary, expressly and positively forbidden by one of the amendments thereto; a power, which more than any other, ought to produce universal alarm, because it is levelled against that right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed, the only effectual guardian of every other right.[33]

The parties to the compact, the states, must decide for themselves if its terms were being violated; and if they were, nullification — the refusal of a state to recognize or enforce any act of Congress held to be an infringement on its sovereignty — was rightful. The Kentucky and Virginia Resolutions urged all the states to join in declaring the *Alien and Sedition Acts* null and void and in requesting their repeal by Congress:

> That the several states who formed that instrument, being sovereign and independent, have the unquestionable right to judge of its infraction; and that a nullification, by those sovereignties, of all unauthorized acts done under colour of that instrument, is the rightful remedy […].[34]

Although no other state followed them, the nullification issue remained a central problem in U.S. history and was to bring about talk of secession some fifteen years later.

The War of 1812 (18 June 1812–17 February 1815)[35] broke out during the presidency of James Madison (1809-1817), at a time when the Republicans were in power. Although the U.S. armies succeeded rather well, it was a fact that the government was largely unprepared for the conflict; and as the war dragged on, the government had to face increasing popular opposition. The opposition was centered in New England where some Federalists did not hesitate to go to extremes to oppose the war as well as the levy of men and money to fight it. Some of them went as far as

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[33] "The Virginia Resolution" (December 24, 1798), Bill of Rights Institute, https://billofrightsinstitute.org/primary-sources/virginia-and-kentucky-resolutions.
[34] "The Kentucky Resolution" (December 3, 1798), *ibid*.
[35] See: J. C. A. Stagg, *The War of 1812: Conflict for a Continent*, Cambridge University Press, 2012. In the War of 1812, the United States fought the world's greatest naval power, Great Britain, over British attempts to restrict U.S. trade, the Royal Navy's impressment of U.S. seamen, and as the United States desired to expand its territory. The United States suffered many costly defeats, including the capture and burning of the nation's capital, Washington, D.C., in August 1814.

to celebrate British victories, to trade with the enemy and to refuse to fight or to purchase war bonds. There was even talk of secession when delegates of the New England states met on December 15, 1814, in Hartford, Connecticut,[36] to react against the Madison administration:

> Finally, if the Union be destined to dissolution, by reason of the multiplied abuses of bad administrations, it should, if possible, be the work of peaceable times, and deliberate consent. – Some new form of confederacy should be substituted among those States, which shall intend to maintain a federal relation to each other. – Events may prove that the causes of our calamities are deep and permanent. They may be found to proceed, not merely from the blindness of prejudice, pride of opinion, violence of party spirit, or the confusion of the times; but they may be traced to implacable combinations of individuals, or of States, to monopolize power and office, and to trample without remorse upon the rights and interests of commercial sections of the Union. Whenever it shall appear that these causes are radical and permanent, a separation by equitable arrangement, will be preferable to an alliance by constraint, among nominal friends, but real enemies, inflamed by mutual hatred and jealousy, and inviting by intestine divisions, contempt, and aggression from abroad. But a severance of the Union by one or more States, against the will of the rest, and especially in a time of war, can be justified only by absolute necessity. These are among the principal objections against precipitate measures tending to disunite the States, and when examined in connection with the farewell address of the Father of his country, they must, it is believed, be deemed conclusive.[37]

Those who advocated secession, however, were outnumbered by a majority of comparatively moderate men. The Hartford Convention Report asserted the states' right of nullification[38] and proposed seven amendments to the Constitution as the condition of New England's remaining in the Union.[39] Yet the demands were soon forgotten with the news of a treaty of peace signed in Ghent (United Netherlands, now Belgium) on Christmas

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[36] James M. Banner, *To the Hartford Convention: The Federalists and the Origins of Party Politics in Massachusetts, 1789-1815* (Knopf, 1970).

[37] In Kurt T. Lash, *The Reconstruction Amendments: The Essential Documents*, vol. 1 (University of Chicago Press, 2021), 82.

[38] See: Richard Ellis, *The Union at Risk: Jacksonian Democracy, States' Rights, and Nullification Crisis* (Oxford University Press, 1989).

[39] Connecticut, and Rhode Island were the three New England states that dominated the Hartford Convention. The counties of Grafton and Cheshire in the state of New-Hampshire and the county of Windham in the state of Vermont also had delegates to the Convention.

Eve and of General Jackson's victory in New Orleans about two weeks later.

When the Republicans were facing Federalist opposition during the War of 1812, the man who devoted himself to justifying the war was John C. Calhoun (Democratic-Republican, South Carolina), the Chairman of the House Committee on Foreign Affairs. At the time, Calhoun was a strong advocate of a protective tariff to shelter U.S. manufacturers from foreign competition. Yet he was from South Carolina and the interests of the cotton trade in his state eventually made him change his positions, and he finally opposed a tariff bill. The bill, however, passed the House of Representatives 105 to 94 on April 23 and the Senate 26 to 21 on May 13, 1828.[40] The Tariff of 1828 was also known as the "Tariff of Abominations" among its Southern detractors because of its effects on the Southern economy. Since the South had virtually no manufacturing industry, it had to either import finished goods from Europe or buy them from the North. South Carolina planters resented it so much that they began to consider secession. While adamantly defending slavery and protecting the interests of the white South, Calhoun initially wanted to find a way for his state to resist the new tariff without going to the extreme of secession, although his beliefs and warnings were to heavily influence the South's eventual secession from the Union in 1861. Calhoun found support for his cause in the Kentucky and Virginia Resolutions and wrote a pamphlet entitled *The South Carolina Exposition and Protest* in 1828,[41] which defined his view of nullification:

> The committee [of the South Carolina Legislature] have bestowed on the subjects referred to them the deliberate attention which their importance demands; and the result, on full investigation, is a unanimous opinion that the act of Congress of the last session, with the whole system of legislation imposing duties on imports, not for revenue, but the protection of one branch of industry at the expense of others, is unconstitutional, unequal, and oppressive, and calculated to corrupt the public virtue and destroy the liberty of the country; which propositions they propose to consider in the order stated, and then to conclude their report with the consideration of the important question of the remedy.[42]

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[40] See: F. W. Taussig, "The Early Protective Movement and the Tariff of 1828," *Political Science Quarterly*, vol. 3, n°1 (March 1888), 17-45.

[41] John Caldwell Calhoun, "Exposition and Protest," in *Union and Liberty: The Political Philosophy of John C. Calhoun*, ed. Ross M. Lence (Liberty Fund, 1992), 311-265. In 1828, John C. Calhoun was Vice President of the United States under John Quincy Adams.

[42] *Ibid*., 313.

According to his theory, the ultimate source of power lay in the separate states which had created the federal government by ratifying the Constitution. Therefore, the Supreme Court could not judge whether acts of Congress were constitutional or not since the Supreme Court was only a branch of an agency created by the states. If a state considered that a law of Congress was unconstitutional, it could declare it null and void between its boundaries. The law would remain unenforced until the ratification by three-fourths of all the states of an amendment giving Congress the power in question. The nullifying state would then submit it or it could secede. In 1828 as in the early years of the Union, the debate over the Constitution and sectional interests was a central feature of American political history.

* * *

This volume focuses on the Civil War period (1861-1865), a period characterized by a culmination of passions over the nature of the Union and over the respective jurisdictions of the different branches of power. President Lincoln's capture and expansion of the power to make war will be analyzed so as to bring out the ultimate political implications of his Reconstruction plan. Another purpose of this reflection will be to deal with the concept of nationalization in the context of political democracy. As Ralph Henry Gabriel once wrote, "[t]he roar of the batteries beside Charleston Harbor announced the defeat of American political democracy."[43] Behind the thunder and the smoke lay very disturbing trends indeed.

There had never been more than talk of secession in the United States when eleven states adopted ordinances of secession in 1860 and 1861, thus creating an unprecedented crisis in U.S. history. The Constitution which had been established a century earlier "in order to form a more perfect Union" and to "insure domestic Tranquility"[44] did not provide that the individual states could secede from the Union. Therefore, what British Chancellor of the Exchequer and future Prime Minister William Gladstone later regarded as "the most wonderful work ever struck off at any given time by the brain and purpose of man"[45] still failed to say anything relevant about a situation that was reaching a deadlock. Under the states' rights theory, the Southern secessionists claimed that the states were older

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[43] Ralph Henry Gabriel, *The Course of American Democratic Thought: An Intellectual History since 1815* (The Ronald Press Company, 1940), 111.
[44] U.S. Constitution, Preamble.
[45] William Gladstone (1873). Quoted in: Forrest McDonald, Ellen Shapiro McDonald, *A Constitutional History of the United States* (R. E. Krieger Publishing Company, 1982), 3.

than the Union they had established through the Constitution and that they remained supreme and could withdraw from the Union at will:

> Thus was established, by compact between the States, a Government with definite objects and powers, limited to the express words of the grant. This limitation left the whole remaining mass of power subject to the clause reserving it to the States or to the people, and rendered unnecessary any specification of reserved rights. We hold that the Government thus established is subject to the two great principles asserted in the Declaration of Independence; and we hold further, that the mode of its formation subjects it to a third fundamental principle, namely: the law of compact. We maintain that in every compact between two or more parties, the obligation is mutual; that the failure of one of the contracting parties to perform a material part of the agreement, entirely releases the obligation of the other; and that where no arbiter is provided, each party is remitted to his own judgment to determine the fact of failure, with all its consequences.[46]

On the other hand, as stated in the first inaugural address of President Abraham Lincoln, whose election in November 1860 had been the backdrop behind the ordinances of secession, the unionists held that the Union was older than the Constitution and that no state could secede from the Union since each state had surrendered part of its sovereignty to the federal government which, therefore, exercised its power directly on the people, not through the states:

> It follows from these views that no State upon its own mere motion can lawfully get out of the Union; that 'resolves' and 'ordinances' to that effect are legally void, and that acts of violence within any State or States against the authority of the United States are insurrectionary or revolutionary, according to circumstances.[47]

Not only did the Constitution fail to solve the secession issue, but it also failed to determine what the three branches of national power were to do in such a situation. Only in the case of an insurrection could the

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[46] The State of South Carolina, "Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union," in Peter Charles Hoffer, *Uncivil Warriors: The Lawyers' Civil* War (Oxford University Press, 2018), 30.

[47] Abraham Lincoln, "First Inaugural Address" (March 4, 1861), *The Collected Works of Abraham Lincoln, 1809-1865*, vol. 4 (Rutgers University Press, 1953), 265. See Appendix B. *The Collected Works of Abraham Lincoln* are also made available online by The Abraham Lincoln Association at https://quod.lib.umich.edu/l/lincoln/.

Constitution delegate powers to intervene. But there was officially no insurrection yet.

Under the principle of civil supremacy over the military, the Constitution appointed a civil officer, the president, as the head of the armed forces. But despite his status of commander in chief of the armed forces, Abraham Lincoln could legally do nothing since only Congress had the power to declare war, to raise and support armies,[48] and to appropriate funds[49] for the defense of the nation under the Constitution. The president was only to direct what armed forces were provided by Congress. Lincoln was bound hand and foot. But not for long.

From December 1860 to February 1861, the Confederacy kept seizing U.S. military installations with President James Buchanan doing very little to defend them. But the Confederate omission of Fort Sumter in Charleston Harbor, South Carolina, made it possible for Lincoln to intervene. As he could not declare war, Lincoln arguably prompted the South into firing the first shot in Charleston by sending out a ship filled with provisions — not with troops or military equipment — to Fort Sumter, which did lack supplies. In spite of a notice addressed by Lincoln to the governor of South Carolina explaining that the purpose of the expedition was strictly nonmilitary, Fort Sumter was bombarded and seized: the war was on, without a declaration by Congress.

The presidential war could begin.

[48] U.S. Constitution, Art. I, Sec. 8.
[49] *Ibid*., Sec. 9.

PART I

LINCOLN AND THE POWER TO MAKE WAR

CHAPTER 1

CAPTURING THE POWER TO MAKE WAR

Abraham Lincoln was inaugurated on March 4, 1861, when seven Southern states had already seceded from the Union in the wake of his election in November, starting with South Carolina on December 20, 1860, and only days after Jefferson Davis was elected president of the Confederacy that had been just formed in February 1861. Fort Sumter was bombarded on April 12, 1861, only a month into his presidency. Article II of the U.S. Constitution delineates and organizes presidential power by granting certain prerogatives and placing a number of constraints on those prerogatives. One such prerogative gives the president, as chief executive, the discretion, "on extraordinary occasions," to convene the legislative branch, "both Houses or either of them."[50] By all means, the bombardment of Fort Sumter by the South Carolina militia on April 12, 1861, which ended with the surrender of the U.S. army, certainly could be regarded as one such occasion, one of "extraordinary" magnitude, since it represented no less than a lethal threat against the Union itself. Now that the Confederacy had started an actual war against the United States, against the government of the United States, Lincoln could legitimately convene Congress into a special session. And he was certainly expected to do so.

1.1. Postponing Congress

Lincoln had made his intentions clear in his first inaugural address, affirming that he would use the power confided to him, arguing that "no State upon its own mere motion [could] lawfully get out of the Union," and that "resolves and ordinances to that effect [were] legally void":

> I therefore consider that in view of the Constitution and the laws the Union is unbroken, and to the extent of my ability, I shall take care, as the Constitution itself expressly enjoins upon me, that the laws of the Union be faithfully executed in all the States. Doing this I deem to be only a simple duty on my part, and I shall perform it so far as practicable unless

[50] U.S. Constitution, Art. II, Sec. 3.

> my rightful masters, the American people, shall withhold the requisite means or in some authoritative manner direct the contrary. I trust this will not be regarded as a menace, but only as the declared purpose of the Union that it will constitutionally defend and maintain itself.
>
> In doing this there needs to be no bloodshed or violence, and there shall be none unless it be forced upon the national authority. The power confided to me will be used to hold, occupy, and possess the property and places belonging to the Government and to collect the duties and imposts; but beyond what may be necessary for these objects, there will be no invasion, no using of force against or among the people anywhere.[51]

While in Lincoln's view everything that was likely to help save the Union had to be done, and arguably for that very particular reason, he was not in the least disposed to call Congress into a special session too soon. His intention was not so much "to prosecute the war without congressional interference"[52] as a matter of principle, as James McPherson remarked, yet he certainly expected that strict legalists would be prompt to oppose his forthcoming decisions on constitutional grounds. Therefore, instead of calling Congress in a special session when he was expected to do so, *i.e.* immediately, Lincoln waited and postponed that decision for as long as he could, and until the moment when it would seem to be almost forced upon him. James McPherson, however, claims that Lincoln's decision to postpone Congress was in reality simply the logical consequence of the electoral calendar that year:

> Most states held congressional elections in the fall of even-numbered years, as today. But Congress itself did not meet in its first regular session until December of the following year, thirteen months later. Hence several states held their congressional elections in the spring of odd-numbered years. In 1861 seven states remaining in the Union held their congressional elections from March to June. Thus the special session could not meet until all representatives had been elected.[53]

Lincoln's call was included in the Proclamation of April 15, 1861, only three days after Fort Sumter was bombarded, but Lincoln — arguably because of the electoral calendar, in part, but most certainly also out of

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[51] Lincoln, "First Inaugural Address" (March 4, 1861), *op. cit.*, 266. See Appendix B.
[52] James McPherson, *Tried by War: Abraham Lincoln as Commander in Chief* (The Penguin Press, 2008), 36.
[53] *Ibid*.

sheer strategy — announced that the special session of Congress would be delayed until July 4:

> Deeming that the present condition of public affairs presents an extraordinary occasion, I do hereby, in virtue of the power in me vested by the Constitution, convene both Houses of Congress. Senators and Representatives are therefore summoned to assemble at their respective chambers, at 12 o'clock, noon, on Thursday, the fourth of July, next, then and there to consider and determine, such measures, as, in their wisdom, the public safety, and interest may seem to demand.[54]

The decision temporarily paralyzed the normal functioning of government and gave the president twelve weeks during which he would have greater leeway to enforce what measures he deemed necessary to preserve the Union. On May 3, 1861, Lincoln issued a call for 43,034 three-year volunteers and also increased the size of the regular army by 22,714 men and of the navy by 18,000:

> Now, therefore, I, Abraham Lincoln President of the United States, and Commander-in-Chief of the Army and Navy thereof, and of the Militia of the several States, when called into actual service, do hereby call into the service of the United States, forty two thousand and thirty four volunteers, to serve for the period of three years, unless sooner discharged, and to be mustered into service as Infantry and cavalry.[55]

James McPherson notes that the president enacted the measures by executive order, "in apparent violation of the Constitution, which grants Congress exclusive authority to 'raise and support armies' and to 'provide and maintain a navy' (Article I, Section 7)."[56] Yet the postponement of Congress provided the perfect context to defend executive actions under such extraordinary circumstances. And Lincoln did just that, defending his emergency measures before Congress in special session on July 4, 1861:

> These measures, whether strictly legal or not, were ventured upon, under what appeared to be a popular demand, and a public necessity; trusting, then as now, that Congress would readily ratify

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[54] Lincoln, "Proclamation Calling Militia and Convening Congress" (April 15, 1861), *Collected Works*, vol. 4, 332.
[55] *Id*., "Proclamation Calling for 42,034 Volunteers" (May 3, 1861), *Collected Works*, vol. 4, 353-354.
[56] *Id*., "Message to Congress in Special Session" (July 4, 1861), *Collected Works*, vol. 4, 429. See Appendix C.

> them. It is believed that nothing has been done beyond the constitutional competency of Congress.[57]

The date chosen for the special session was late enough for the president to do what he deemed necessary, but also early enough for Congress to ratify the presidential measures.

It was the beginning of a policy of *faits accomplis*.

1.2. Calling the militia

Lincoln's policy of *faits accomplish* began with the "Proclamation Calling Militia and Convening Congress" of April 15, 1861, in which he called out 75,000 militia in order to suppress insurrectionary combinations in South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana and Texas:

> Now therefore, I, Abraham Lincoln, President of the United States, in virtue of the power in me vested by the Constitution, and the laws, have thought fit to call forth, and hereby do call forth, the militia of the several States of the Union, to the aggregate number of seventy-five thousand, in order to suppress said combinations, and to cause the laws to be duly executed.[58]

For the time being, Lincoln was not really treading on constitutionally forbidden ground, except for the fact that his call of state militias for such a purpose amounted to no less than a declaration of war. That was certainly a bold step in that the U.S. Constitution reserves Congress, not the president, the power "to provide for organizing, arming, and disciplining the Militia."[59] Other steps, bolder still, were to follow.

The militia call was based on the *Militia Acts* enacted by the 2nd U.S. Congress on May 2, 1792[60] ("providing for the authority of the President to call out the Militia") and May 8, 1792[61] ("providing federal standards

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[57] *Ibid*.

[58] *Id*., "Proclamation Calling Militia and Convening Congress" (April 15, 1861), *ibid*., 319.

[59] U.S. Constitution, Art. I, Sec. 8.

[60] *Militia Act* (May 2, 1792), 1. Stat. 28. See: https://constitution.org/1-Activism/mil/mil_act_1792.htm.

[61] *Militia Act* (May 8, 1792), 1. Stat. 33. See: https://constitution.org/1-Activism/mil/mil_act_1792.htm. The second *Militia Act* also provided that each state should be assigned a quota of militia by the War Department. Congress then passed the *Militia Act* of 1795, which allowed the president to retain the militia until the expiration of thirty days after the beginning of the next session in Congress.