

Congress and the People's Contest

Contents

Paul Finkelman

Introduction: Freedom and Democracy in
“The People’s Contest”: A Complicated Role for Congress
in a Complicated War 1

Jonathan Earle

A Martyr, a Speaker, and *Impending Crisis*: A Prologue
to the Election of 1860 20

Eric Walther

“Shatter This Accursed Union”: The Fire-Eaters
in Congress in 1860 38

Lesley J. Gordon

“These Zouaves Will Never Support Us”: Cowardice,
Congress, and the First Battle of Bull Run 59

Paul Finkelman

The Summer of ’62: Congress, Slavery, and a Revolution
in Federal Law 81

Fergus M. Bordewich

The Radicals’ War: How the Joint Committee on
the Conduct of the War Tried to Shape the Course
of the Civil War 113

Jenny Bourne

We Are Coming, Father Abraham, but How Will You
Pay for Us? 147

Mischa Honeck

Why We Fight: German American Revolutionists Confront
Slavery and Secession 163

L. Diane Barnes

Make Mine an Abolition War: George Luther Stearns,
Frederick Douglass, and the Black Soldier 185

Chandra Manning

Military Emancipation before the Emancipation
Proclamation: Overcoming Structural Obstacles 205

Nikki M. Taylor

Negotiating Black Manhood Citizenship through Civil War
Volunteerism and Patriotism: Cincinnati's Black Brigade 224

Contributors 237

Index 241

Introduction: Freedom and Democracy in “The People’s Contest”

A Complicated Role for Congress in a Complicated War

IT BEGAN LIKE no other war in American history. The forms of government, the rules of the Constitution, the role of Congress did not exactly work. The Constitution requires that Congress vote to declare war before the United States can actually fight a war. Congress had done that in 1812 against Great Britain and in 1846 against Mexico. (Congress would also do this in 1898, 1917, and 1941.) In the wars with Great Britain and Mexico, Congress had appropriated funds for soldiers, weapons, uniforms, and supplies. Congress had even created new slots for officers needed during the wars, with the understanding that these positions might be eliminated after the war. Since the creation of the government under the Constitution in 1789, Congress had also appropriated funds for excursions against Indian tribes, allowing the president, as commander in chief, to send small armies to the frontier to battle Indians, negotiate treaties, and then, starting with the Madison administration, remove them to lands west of the Mississippi River. Although often called “wars,” they were really something less than wars—short-lived military encounters, often consisting of only a few battles,¹ more like police actions. But as a result of these scattered military adventures, relatively

¹One exception was the “Seminole War,” which lasted, on and off, for almost four decades. But even this was not a “war” in the traditional sense, but rather a series of episodic and inconclusive conflicts.

small appropriations, and piecemeal laws and programs, by 1860 the vast majority of eastern Indians were no longer in the East.²

In the experience of the nation, wars—even major wars—were short, involving few men, leading to relatively few casualties, and fought against distant enemies—Great Britain, Mexico, and Indians living on the edge of American society. Only about 2,200 Americans were killed in the War of 1812 (although another 13,000 or so died of disease and other causes). The war with Mexico lasted less than two years and had similar human costs: there were about 2,000 combat-related deaths, although more than 11,000 died of disease. Historically, the involvement of Congress had been minimal: declaring war, appropriating funds, and ratifying the peace.

But the Civil War was different in so many ways. Unlike the second war with Britain and the recent war with Mexico, there was no deliberative consideration of whether or not to go to war. In 1812 and 1846 the president had sent a war message to Congress, the Congress had debated the message, and then it declared war. In April 1861 there was a crisis, but almost no one seemed to believe it would lead to war.

Congress was not even in session as the nation moved toward war. The Thirty-Seventh Congress, elected in November 1860, was not scheduled to start its first session until December 1861. The old Congress, elected in November 1858, had expired on March 4, 1861, the day Lincoln became president. By the time Lincoln entered the White House, seven states had seceded, declaring that they had left the United States to form a new nation, the Confederate States of America. Trying not to antagonize these rebellious states, in hopes that they would voluntarily return to their normal status within the Union, the president did not call Congress into special session. He believed—or at least hoped—that if he acted with patience and did nothing to initiate conflict, the crisis would evaporate. His plan was to give Southerners time to cool off and reconsider their dangerous (indeed suicidal) course. He assumed Southerners would then return to their rightful place in the Union.

²See Tim Alan Garrison, “United States Indian Policy in Sectional Crisis: Georgia’s Exploitation of the Compact of 1802” and “The Devil and Andrew Jackson: Historians and Jackson’s Role in the Indian Removal Crisis,” in Paul Finkelman and Donald R. Kennon, eds., *Congress and the Emergence of Sectionalism* (Athens, Ohio, 2008), pp. 97–124, 221–57.

Optimistic that his strategy would work, he promised Southerners that his administration would not threaten slavery, reiterating from his previous speeches, “I have no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists. I believe I have no lawful right to do so, and I have no inclination to do so.” He pledged to preserve the Union, but only in the most peaceful ways possible:

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. Where hostility to the United States in any interior locality shall be so great and universal as to prevent competent resident citizens from holding the Federal offices, there will be no attempt to force obnoxious strangers among the people for that object. While the strict legal right may exist in the Government to enforce the exercise of these offices, the attempt to do so would be so irritating and so nearly impracticable withal that I deem it better to forego for the time the uses of such offices.

With these peaceful and nonthreatening promises set out, he ended his first inaugural address on a hopeful and conciliatory note: “Though passion may have strained it must not break our bonds of affection. The mystic chords of memory, stretching from every battlefield and patriot grave to every living heart and hearthstone all over this broad land, will yet swell the chorus of the Union, when again touched, as surely they will be, by the better angels of our nature.”³

Southern leaders were far less patient than Lincoln. Perhaps they understood, as Lincoln hoped, that if “nothing” happened for a long enough time, the states would soon resume normal communication, trade, and political discussions. Moreover, as long as nothing happened, the largest and most important slave states—Tennessee, Kentucky, and most of all Virginia—were unlikely to join the Confederacy. Thus, Confederate officials pushed for some sort of military action to prove they had an independent nation.

³Abraham Lincoln, “First Inaugural Address, March 4, 1861,” in Roy P. Basler, ed., *The Collected Works of Abraham Lincoln*, 9 vols. (New Brunswick, N.J., 1953–55), 4:263, 266, 271 (hereafter *Collected Works*).

Lincoln refused to cooperate and continued to bide his time. Finally, on April 12, Confederate troops in South Carolina opened fire on the U.S. Army detachment stationed at Fort Sumter, in Charleston harbor. The fort, built to protect the harbor against an invasion from the ocean, was not well suited to withstand an attack from the mainland. On the 14th, Fort Sumter surrendered.

Four years later, Lincoln recalled in his second inaugural address, “Both parties deprecated war, but one of them would make war rather than let the nation survive, and the other would accept war rather than let it perish, and the war came.”⁴

Raising an Army without Congress

The day after the fall of Fort Sumter, the president took charge. Lincoln noted that “the laws of the United States” were being “opposed” and “obstructed” by “combinations too powerful to be suppressed by the ordinary course of judicial proceedings or by the powers vested in the Marshals by law.” He asked the states to provide 75,000 militia troops to quell the rebellion “and to cause the laws to be duly executed.”⁵

Significantly for the role of Congress in the war, Lincoln initially acted under existing federal legislation passed in 1795 to quell the Whiskey Rebellion. While Lincoln did not mention the 1795 law in his proclamation, Secretary of War Simon Cameron cited it in a letter sent to loyal governors the same day.⁶ Even as this monumental war began, the president did not

⁴Abraham Lincoln, “Second Inaugural Address, March 4, 1865,” in *Collected Works*, 8:331–33.

⁵Abraham Lincoln, “Proclamation Calling Militia and Convening Congress (Apr. 15, 1861),” *ibid.*, 4:331.

⁶“An Act to Provide for Calling Forth the Militia to Execute the Laws of the Union, Suppress Insurrections, and Repel Invasions; and to Repeal the Act Now in Force for Those Purposes,” Act of Feb. 28, 1795, ch. 36, 1 Stat. 424 (1845). Simon Cameron, Secretary of War to the Governors of 24 States, Apr. 15, 1861, in U.S. War Department, *The War of the Rebellion: The Official Records of the Union and Confederate Armies* (Washington, D.C., 1880), ser. 3, vol. 1, p. 68 (hereafter *O.R.*). This letter asked for volunteers for three months and contained a list of how many regiments each state was being asked to send. The letter was sent by telegraph to the governors of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, Pennsylvania, New Jersey, Delaware, Maryland, Virginia, North Carolina, Tennessee, Arkansas, Kentucky, Missouri, Illinois, Indiana, Ohio, Michigan, Wisconsin, Iowa, and Minnesota. The

need new legislation to act. Existing statutes provided the powers he thought he needed for the emergency.

However, Lincoln did see the need for congressional action at some point in the future, and in the April 15 proclamation the president also called for a special session of Congress:

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 day 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.⁷

Significantly, Lincoln was not in any particular hurry to bring Congress back to Washington. He was willing to wait two and a half months before turning to Congress for help in suppressing the rebellion. Equally important, he chose to convene Congress on the Fourth of July. Always aware of the importance of symbolism, Lincoln wanted Congress to begin on the eighty-fifth anniversary of the signing of the Declaration of Independence.

In the meantime, Lincoln would prosecute the war for the Union on his own. Lincoln's call for troops went to the governors of twenty-four states, with a follow-up letter from Secretary of War Cameron specifying how many regiments each state should provide.⁸ Most governors responded quickly,

administration asked for a total of seventeen regiments (13,260 men) from the slave states still in the Union, but these soldiers would not be mustered by the slave state governors. However, other states sent more soldiers than were requested. Cameron could not send a telegram to California and Oregon, so any troops from those states would have to wait. It is not clear why Cameron did not send the telegram to the governor of Kansas, which had become a state on January 29, 1861. Perhaps it was an oversight, or perhaps based on the belief that this new state could not yet muster a militia regiment. By this time Kansas had been connected to the rest of the nation by telegraph for a few years. See John E. Sunder, "Telegraph Beginnings in Kansas," *Kansas Historical Quarterly* 25 (1959):32. This failure to include Kansas is particularly odd, because on April 14 Senator James Lane of Kansas had organized 120 men from his state (who were in Washington at the time) to form a "Frontier Guard," which was billeted at the White House to serve as security for the new president (<http://www.kshs.org/kansapedia/frontier-guard/16898>). Eventually about 20,000 men from Kansas, approximately two-thirds of the military-age men in the state, served the Union cause (<http://www.kshs.org/kansapedia/civil-war/14565>).

⁷Lincoln, "Proclamation Calling Militia and Convening Congress," in *Collected Works*, 4:332.

⁸Simon Cameron, Secretary of War to the Governors of 24 States, cited in n. 6.

often the same day they received the telegram. Some responded with enormous enthusiasm. Governor Alexander Ramsey of Minnesota actually telegraphed Secretary Cameron on April 14, the day *before* Lincoln asked for troops, offering 1,000 men to protect the nation.⁹ Within days of issuing his proclamation, Lincoln knew that troops were on their way to protect the Nation's capital.

Cameron's telegram went out on the 15th, and Governor Israel Washburn of Maine replied that day, saying that, in his state, the people "of all parties will rally with alacrity to the maintenance of the Government and of the Union." In Massachusetts, Governor John A. Andrew did not bother with flowery language or patriotic blather. The hard-nosed abolitionist governor of the Bay State cut right to the point, simply asking, "By what route shall we send?" Two days later, he told Secretary Cameron that two regiments had left the state, one headed to Washington and another to Fortress Monroe, in Virginia, and that a third regiment was leaving the next day. Governor William Denison of Ohio, who would later serve in Lincoln's cabinet as postmaster general, said there was "great rejoicing" in the Buckeye State over the proclamation and that Ohio would "furnish the largest number" of troops the government would "receive." Governor Oliver P. Morton of Indiana promised six regiments in three days. Iowa's governor wanted to know if he could send more than the one regiment the secretary of war had requested. Senator Zachariah Chandler of Michigan wrote that his state would provide 50,000 troops if requested.¹⁰ This might have seemed like braggadocio on Chandler's part, but by the end of the war about 90,000 men from Michigan—nearly 25 percent of the adult male population—would serve in the army, with nearly 15,000 dying.

Lincoln hoped to contain secession and avoid a military conflict that would lead to a full-blown civil war. He initially believed, incorrectly as it turned out, that Southerners would quickly come to their senses and return to the Union. He now assumed (again incorrectly) that the conflict would be short, and thus 75,000 militia troops would be able to finish the job

⁹Letters from various Northern governors (Apr. 1861), in *O.R.*, ser. 3, vol. 1, pp. 70–90; Alex Ramsey, governor of Minnesota to Simon Cameron, secretary of war (Apr. 14, 1861), in *O.R.*, ser. 3, vol. 1, p. 67.

¹⁰This correspondence is found in *O.R.*, ser. 3, vol. 1, pp. 71, 73, 75, 78, 79, 87. For a fuller account of the war governors and mobilization, see Stephen D. Engle, *Gathering to Save a Nation: Lincoln and the Union's War Governors* (Chapel Hill, N.C., 2016).

quickly, and that the huge size of this army would intimidate the South. While 75,000 militia troops seems small compared to the more than 2.2 million men who would eventually serve in the U.S. Army and Navy in the Civil War, this was the largest military call-up in the history of the nation, and, combined with the 15,000 or so troops in the regular army, created the largest military force in the history of the nation. It was more than the total number of troops used in the Mexican War of 1846–48. Similarly, when the War of 1812 began the U.S. Army had only about 12,000 troops, and there was never any mass mobilization of the state militias, although many militia units fought in the war at various times. When George Washington took command of the Patriot Army in July 1775, he was expecting 20,000 troops, but in fact only had 14,000.¹¹ Thus, by historic American standards, 75,000 troops constituted a very large army. Lincoln assumed that the unprecedented size of this army would be sufficient to show the Confederates that they should avoid war, or if necessary, this large force could quickly crush the insurrection.

Lincoln was, of course, wrong about the impact of mobilization, and the war quickly evolved. Events moved faster than Lincoln could have imagined, and without Congress in session the president governed the nation alone. This had always been done in an era when Congress was not continuously in session, but this was the first time a war had started when it was not in session. In addition to mobilizing the army, Lincoln, acting without the help of Congress, faced two major issues that set the tone for the war and would later lead to shared responsibility during the war. The first involved internal security and domestic terrorism; the second involved slavery and emancipation.

¹¹As of June 30, 1860, the regular army had just over 16,000 men: “1,080 officers and 14,926 enlisted men” consisting of “10 regiments of infantry, 4 of artillery, 2 of cavalry, 2 of dragoons, and 1 of mounted riflemen.” Richard W. Stewart ed., *American Military History*, vol. 1: *The United States Army and the Forging of a Nation, 1775–1917* (Washington, D.C., 2009), p. 204 (<http://www.history.army.mil/books/AMH-V1/ch09.htm>). By April 1861 the army was smaller because of the defection of some Southern soldiers and most Southern officers. When the War of 1812 began, there were fewer than 12,000 soldiers in the regular army. There were about 450,000 militiamen in the country, but most never saw action in the war. *Ibid.*, p. 133 (<http://www.history.army.mil/books/AMH-V1/PDF/Chapter06.pdf>). The United States had used only 78,700 soldiers in the entire Mexican War, which lasted nearly two years. Susan B. Carter et al., eds., *Historical Statistics of the United States: Earliest Times to the Present*, 5 vols. (New York, 2006), 5:350–51. On Washington’s troops, see Henry Wiencek, *An Imperfect God: George Washington, His Slaves, and the Creation of America* (New York, 2003), p. 196.

National Security, Terrorism, and the Suspension of Habeas Corpus

While Northern militiamen poured into Washington, D.C., to protect the city from Confederate attack, Lincoln faced a series of other decisions, over and above mobilizing his (in retrospect) small volunteer army. Three inter-related issues were (1) national security and the problem of domestic terrorism and sabotage; (2) the status of U.S. Army officers who were defecting to the Confederacy, taking up arms against their former comrades, and making war on the nation they had sworn to serve; and (3) the political status of Maryland.

All three of these issues were tied to the suspension of habeas corpus. The writ of habeas corpus—the “great writ”—is the legal process used to bring an incarcerated individual before a judge to determine if the incarceration is legal. The writ is a key component of the rule of law, because it protects people from arbitrary arrest and incarceration. Without the writ, police officials can arrest and hold people indefinitely without charges.

The Constitution provides that “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”¹² This Suspension Clause is located in Article I, Section 9 of the Constitution, which delineates limitations on the power of Congress. The language of the clause makes it clear that it can only be implemented if two things simultaneously occur: there is a “Rebellion” or an “Invasion,” and “the public Safety” requires the suspension.

The location of the clause in Article I has led some scholars (and anti-Lincoln politicians) to argue that *only* Congress can suspend habeas corpus. However, this argument raises a number of problems. Unlike some other provisions of Article I, Section 9, this clause does not explicitly or implicitly contain any specific delegation of power to Congress or state which branch of the government can actually suspend the writ. Furthermore, there are other provisions in Section 9 that lack a specific delegation of power to Congress, precisely because the limitation could also apply to the executive branch. For example, Article I, Section 9 also prohibits the granting of any title of nobility by “the United States,” which would prevent the president from granting such a title on his own. Similarly, the ban on giving any

¹²U.S. Constitution, Art. I, Sec. 9, cl. 2.

“preference” by “any Regulation of Commerce” to the “Ports of one State over those of another” limits the actions of the executive branch as well as the Congress. Moreover, the requirement of the publication of “a regular Statement and Account” of “Expenditures of all public Money” seems to imply an expectation that the executive branch will give the accounting and possibly do the publishing. Similarly, in the years between the adoption of the Constitution and the Civil War, the courts had found that Congress had legislative powers that were not in Article I and that were not explicitly granted to Congress. For example, in 1842 the Supreme Court ruled that Congress had sole power to regulate the return of fugitive slaves, even though the Fugitive Slave Clause is in Article IV, which deals with interstate relations, and the provision does not even mention Congress.¹³ Thus, placement of a clause may not fully determine where the power lies.

The very nature of the Suspension Clause plausibly implies that a suspension could be imposed by the executive branch. There are two reasons for this. First, the clause allows suspension *only* during an emergency, an invasion, or a rebellion when the “public Safety” is endangered. In the eighteenth and nineteenth centuries, Congress was often not in session, and even today Congress is often in recess. In a real emergency, where lives are at stake and the future of the nation might be in the balance, there might not be time to wait for Congress to gather. Second, an invading army or a rebellious force could prevent Congress from even meeting and might thus prevent the suspension, even though the existing conditions might “require it.” The War of 1812 offers an example of this. During the war the British had invaded Washington and burned part of the capital. President Madison did not have time to suspend habeas corpus in the city, because he was too busy trying to escape. But had he remained and defended the city, he might very well have wanted to declare martial law. There was, of course, no Congress in town to suspend habeas corpus, but it seems likely that the Father of the Constitution would have made the call—and the suspension—on his own if he thought it was necessary.

Though not witnessing an invasion of the national capital, Lincoln faced an enormously complicated situation in the weeks after he became president. Congress was not in session, and calling Congress back into session would have been cumbersome. Furthermore, it might have been impossible

¹³*Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842).

for members of Congress to reach Washington, because of pro-Confederate terrorists and mobs in Baltimore and other parts of Maryland who threatened the public safety, particularly at the train stations that members of Congress had to use to get to Washington. Even more ominous, Confederate sympathizers in Maryland were blowing up bridges and destroying railroad tracks, as well as raising military forces, in order to isolate Washington, D.C., from the rest of the nation. This situation, along with the Confederate attack on Fort Sumter, constituted a “rebellion” as set out in the Suspension Clause. This was also a situation that deeply threatened “the public Safety.”

At the time there were no federal laws to prevent some of these activities and no national police forces to stop them. It was a state crime to destroy a railroad bridge or railroad tracks, but not a federal crime. Public safety, in 1861, was almost entirely in the hands of state and local officials. In Maryland many officials, including the governor, sympathized with the Confederacy and were unwilling to prevent sabotage, terrorism, or the organizing of troops to fight against the United States. At the same time, the Maryland legislature was meeting in special session to debate secession. In addition to activities in Maryland, there were former U.S. military officers (some who had just resigned their commissions) who were trying to reach the Confederacy to make war on the United States, and in parts of the Confederacy (such as Florida and Virginia) there was a U.S. presence that was threatened by Confederate civilians and military forces.

The only tool Lincoln had at hand to protect railroad tracks, bridges, telegraph lines, and the nation itself, was the army. Under federal law, the military had no power to arrest civilians or in any other way keep the peace. However, by suspending habeas corpus, Lincoln could use the military as a police force to arrest and incarcerate people who were actively in rebellion. These would be preventive arrests, since the army could not try them for any crimes. But such arrests would thwart terrorists and saboteurs.

In a series of orders from April to June, Lincoln, acting unilaterally (since Congress was still not in session), ordered the army to arrest Confederate activists and terrorists and to secure the railroad lines from Washington to Philadelphia, and later all the way to New York. In October he would extend this order to the entire East Coast.¹⁴ At the same time, respectful of

¹⁴Lincoln to Winfield Scott, Apr. 27, 1861, in *Collected Works*, 4:347 (suspending habeas corpus from Washington, D.C., to Philadelphia); Lincoln to Winfield Scott, July 2, 1861,

the political process in the loyal slave states (and working very hard not to push them into the arms of the Confederacy), Lincoln specifically ordered the military *not* to interfere with the Maryland legislature's scheduled meeting to vote on secession.¹⁵ During this period Lincoln also suspended habeas corpus in Florida and specifically directed General Winfield Scott to arrest a former U.S. Army officer who was trying to reach the Confederacy.¹⁶

The suspension was controversial. Confederate sympathizers and some Northern Democrats considered it an act of tyranny. None of these critics ever suggested an alternative—which modern constitutional law scholars might call a “least restrictive means”—to protect the nation from sabotage and terrorism. Illustrative of the need for the suspension was the arrest of John Merryman, a wealthy Marylander and militia lieutenant, who was trying to recruit Confederate soldiers in Maryland and was also destroying railroad bridges, railroad tracks, and telegraph wires with the avowed purpose of preventing Northern militia troops from reaching Washington to protect the nation's capital.¹⁷ At the end of May the army arrested Merryman and locked him up in Fort McHenry. Oddly, even though Merryman was arrested under the suspension of habeas corpus, military authorities allowed him access to an attorney, who immediately applied to Chief Justice Roger B. Taney for a writ of habeas corpus. It is not clear whether Taney acted as chief justice or in his role as circuit justice for Maryland, but the distinction is not really important. Taney ordered that Merryman be brought to his court under a writ of habeas corpus. Major General George Cadwalader refused to comply with the writ, explaining to Taney that the president had suspended the writ. Cadwalader was a lawyer in civilian life and fully understood the legal issues. Taney's long and angry response, published

ibid., 4:419 (extending the suspension to New York City); Lincoln to Lieutenant General Winfield Scott, Oct. 14, 1861, ibid., 4:554 (extending the suspension to Bangor, Maine).

¹⁵Lincoln to Lieutenant General Scott, Apr. 25, 1861, ibid., 4:344.

¹⁶Abraham Lincoln, “Proclamation Suspending Writ of Habeas Corpus in Florida,” May 10, 1861, ibid., 3:364–65; Lincoln to Winfield Scott, Lieutenant-General, June 20, 1861, ibid., 4:414 (ordering the arrest of “Major Chase, lately of the Engineer Corps of the Army of the United States, now alleged to be guilty of treasonable practices against this government”).

¹⁷Brian McGinty, *The Body of John Merryman: Abraham Lincoln and the Suspension of Habeas Corpus* (Cambridge, Mass., 2011), pp. 154–55. Jonathan W. White, *Abraham Lincoln and Treason in the Civil War: The Trials of John Merryman* (Baton Rouge, 2011), pp. 19–21.

as *Ex parte Merryman*,¹⁸ excoriated Cadwalader, and by implication President Lincoln, for suspending the writ and arresting Merryman. But the military and the administration ignored Taney, who by this time was correctly seen as a Confederate sympathizer who would do anything in his power to impede the war effort and aid the cause of the slaveholders' rebellion. Merryman remained in custody until July, when the emergency was over, and he was allowed to post bail while awaiting trial for treason, which would never take place.

In July, when Congress met, Lincoln explained why he had suspended habeas corpus. At this point Congress might have acted, either to support the president or to express its opposition to the suspension. Instead, Congress did nothing. Two years later Congress passed the "Habeas Corpus Suspension Act," which ratified Lincoln's actions.¹⁹

Facing the Real Cause of the War

Slavery and racism were the root causes of secession and the war. Those slave states that published an explanation for their secession put bondage and the suppression of black people front and center.

In its Declaration of the Causes of Secession, South Carolina noted that eight years earlier the state had asserted its right to secede, but, "in deference to the opinions and wishes of the other slaveholding States, she forbore at that time to exercise this right." Significantly, this forbearance was not connected to the wishes of the free states or the national government. For South Carolina the decision to remain in the Union or leave it was based entirely on the needs of the slave states and the protection of slavery. Among the state's grievances was the failure of Northern states to vigorously assist in the recapture of fugitive slaves, the "increasing hostility on the part of the non-slaveholding States to the institution of slavery," the refusal of free states to allow Southerners to bring their slaves into those states, and "the election of a man to the high office of President of the United States, whose opinions and purposes are hostile to slavery. He is to be entrusted

¹⁸17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487).

¹⁹An Act Relating to Habeas Corpus and Regulating Judicial Proceedings in Certain Cases, Act of March 3, 1863, 12 Stat. 755 (1863).

with the administration of the common Government, because he has declared that that ‘Government cannot endure permanently half slave, half free,’ and that the public mind must rest in the belief that slavery is in the course of ultimate extinction.”²⁰

The second sentence of the Georgia declaration addressed the same concerns: “For the last ten years we have had numerous and serious causes of complaint against our nonslaveholding confederate States with reference to the subject of African slavery.” The Georgia secessionists went on to note that:

The party of Lincoln, called the Republican party, under its present name and organization, is of recent origin. It is admitted to be an anti-slavery party. While it attracts to itself by its creed the scattered advocates of exploded political heresies, of condemned theories in political economy, the advocates of commercial restrictions, of protection, of special privileges, of waste and corruption in the administration of Government, anti-slavery is its mission and its purpose. By anti-slavery it is made a power in the state.²¹

Mississippi noted that “Our position is thoroughly identified with the institution of slavery—the greatest material interest of the world. Its labor supplies the product which constitutes by far the largest and most important portions of commerce of the earth.” The state tied its economic well-being to both slavery and racism, noting that the products it produced “are peculiar to the climate verging on the tropical regions, and by an imperious law of nature, none but the black race can bear exposure to the tropical sun. These products have become necessities of the world, and a blow at slavery is a blow at commerce and civilization.”²² Texas recounted that it had joined the Union “holding, maintaining and protecting the institution known as negro slavery—the servitude of the African to the white race within her limits—a relation that had existed from the first settlement of her wilderness by the white race, and which her people intended should exist in all future

²⁰*Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union*, adopted Dec. 24, 1860 (<http://www.civilwar.org/education/history/primarysources/declarationofcauses.html>).

²¹Georgia explanation for secession, “Approved, Tuesday, January 29, 1861” (<http://www.civilwar.org/education/history/primarysources/declarationofcauses.html>).

²²*A Declaration of the Immediate Causes Which Induce and Justify the Secession of the State of Mississippi from the Federal Union* (<http://www.civilwar.org/education/history/primarysources/declarationofcauses.html>).

time.” Texas was committed to slavery and white supremacy, and this justified secession:

That in this free government *all white men are and of right ought to be entitled to equal civil and political rights*; that the servitude of the African race, as existing in these States, is mutually beneficial to both bond and free, and is abundantly authorized and justified by the experience of mankind, and the revealed will of the Almighty Creator, as recognized by all Christian nations; while the destruction of the existing relations between the two races, as advocated by our sectional enemies, would bring inevitable calamities upon both and desolation upon the fifteen slave-holding states.²³

Shortly after Lincoln’s inauguration, the vice president of the Confederacy, Alexander Stephens, summed up the relationship between slavery and secession. He began with a weird and historically inaccurate claim that when the United States had been created, “the prevailing ideas entertained by [Thomas Jefferson] and most of the leading statesmen at the time” was “that the enslavement of the African was in violation of the laws of nature; that it was wrong in principle, socially, morally, and politically. It was an evil they knew not well how to deal with, but the general opinion of the men of that day was that, somehow or other in the order of Providence, the institution would be evanescent and pass away.”²⁴

There is no evidence that Jefferson believed this, and support for any of these principles among the Founders was surely mixed. But Stephens was not concerned with historical accuracy. He was interested in asserting that the purpose of the Confederacy was to establish white supremacy and to protect slavery. Thus he continued: “Those ideas, however, were fundamentally wrong. They rested upon the assumption of the equality of races. This was an error. It was a sandy foundation, and the government built upon it fell when the ‘storm came and the wind blew.’” He then asserted the racist and proslavery basis of the Confederacy:

²³*A Declaration of the Causes Which Impel the State of Texas to Secede from the Federal Union*, “Adopted in Convention on the 2nd day of Feb’y, in the year of our Lord one thousand eight hundred and sixty-one and of the independence of Texas the twenty-fifth” (<http://www.civilwar.org/education/history/primarysources/declarationofcauses.html>).

²⁴Alexander Stephens, “The Cornerstone Speech,” Mar. 21, 1861, in Henry Cleveland, *Alexander H. Stephens, in Public and Private: With Letters and Speeches, before, during, and since the War* (Philadelphia, 1886), pp. 717–29 (<http://www.TeachingAmericanHistory.org/library/index.asp?documentprint=76>).

Our new government is founded upon exactly the opposite idea; its foundations are laid, its corner-stone rests, upon the great truth that the negro is not equal to the white man; that slavery—subordination to the superior race—is his natural and normal condition. This, our new government, is the first, in the history of the world, based upon this great physical, philosophical, and moral truth.

This led Stephens to denounce Northerners who he claimed almost universally believed in racial equality. Their arguments, he concluded, were:

a species of insanity. One of the most striking characteristics of insanity, in many instances, is forming correct conclusions from fancied or erroneous premises; so with the anti-slavery fanatics. Their conclusions are right if their premises were. They assume that the negro is equal, and hence conclude that he is entitled to equal privileges and rights with the white man. If their premises were correct, their conclusions would be logical and just but their premises being wrong, their whole argument fails.

For Stephens, the Confederacy answered all these questions:

With us, all of the white race, however high or low, rich or poor, are equal in the eye of the law. Not so with the negro. Subordination is his place. He, by nature, or by the curse against Canaan, is fitted for that condition which he occupies in our system. The architect, in the construction of buildings, lays the foundation with the proper material—the granite; then comes the brick or the marble. The substratum of our society is made of the material fitted by nature for it, and by experience we know that it is best, not only for the superior, but for the inferior race, that it should be so. It is, indeed, in conformity with the ordinance of the Creator.²⁵

Despite the clear connection to slavery and secession, Lincoln promised in his first inaugural address not to touch slavery in the states where it existed. Furthermore, when the war began, he refused to make it about slavery and similarly resisted demands to allow blacks to serve in the army.²⁶ While Lincoln personally hated slavery—he would later say, “If slavery is not wrong, nothing is wrong”²⁷—he had neither the constitutional authority

²⁵Ibid.

²⁶See Paul Finkelman, “Lincoln’s Long Road to Freedom: How a Railroad Lawyer Became the Great Emancipator,” in Paul Finkelman and Donald R. Kennon, eds., *Lincoln, Congress, and Emancipation* (Athens, Ohio, 2016), pp. 162–210.

²⁷Lincoln to Albert G. Hodges, Apr. 4, 1864, in *Collected Works*, 7:281.

to touch it nor the political flexibility to do so. Any overt move against slavery would likely drive Maryland, Missouri, and most importantly Kentucky, into the Confederacy. With more than 225,000 slaves in the state, Kentucky was vulnerable to Confederate entreaties. Lincoln believed that losing Kentucky to the Confederacy would be a disaster for the Union cause. Due to both its geography and its size, Kentucky was the most crucial of the loyal slave states. A Confederate army on the southern bank of the Ohio River would interrupt east–west commerce and troop movements; threaten the vast agricultural heartland of Ohio, Indiana, and Illinois; and endanger key manufacturing, commercial, and politically significant cities, such as Cincinnati, Columbus, Indianapolis, and Pittsburgh. As Lincoln told Senator Orville Browning: “[T]o lose Kentucky is nearly . . . to lose the whole game.” Early in the war, a group of ministers urged Lincoln to free the slaves because, they said, God would be on his side. He allegedly responded, “I hope to have God on my side, but I must have Kentucky.”²⁸

But while Lincoln did not move against slavery, the slaves themselves recognized that the war was about *them*, and that this was their moment to seek freedom. Most slaves had no opportunity to do this, since they were trapped in the Confederacy or the loyal slave states where slavery was protected by all social, political, and legal institutions. But where the war created chaos, social dislocation, and legal and political uncertainties, slaves moved away from their masters, running to U.S. Army lines. In Virginia, General Benjamin F. Butler famously declared that slaves who escaped to Fortress Monroe, where he was encamped, were “contrabands” of war, and could not be returned to their owners. By the end of July there were about 850 slaves in the fort, working as civilian employees of the army and being paid for their labor. The end of slavery had begun, whether the president had a policy or not. By August the president had endorsed Butler’s solution and humorously called it “Butler’s Fugitive Slave Law.” The endorsement went from Lincoln to the secretary of war to Butler and then to all U.S. Army generals and other commanding officers. Secretary of War Cameron told General Butler that President Lincoln understood that “in States wholly or partially under insurrectionary control,” the laws could not be enforced, and it was “equally obvious that rights dependent on the laws of the States within which military operations are conducted must be necessarily

²⁸Lincoln to Orville H. Browning, Sept. 22, 1861, *ibid.*, 4:531–32.

subordinated to the military exigencies created by the insurrection if not wholly forfeited by the treasonable conduct of the parties claiming them.” Most importantly, “rights to services” could “form no exception” to “this general rule.” Two days before Cameron sent this letter, Congress passed the First Confiscation Act, which allowed for the emancipation of some slaves owned by Confederates.²⁹

This law, and other acts passed that summer, signaled the emergence of Congress as a full partner in the war effort. In the next year and a half—from July 4, 1861, when Congress first came into session during the war, until January 1, 1863, when Lincoln issued the final Emancipation Proclamation—Congress would reshape the nation’s legal and political landscape. During this period Congress would end slavery in Washington D.C., prohibit slavery in all federal territories, reverse seven decades of public policy by allowing blacks to serve in the state militias and the U.S. Army, approve the appointment of black commissioned and noncommissioned officers, and create public schools for the now free black population of Washington. Meanwhile, the Homestead Act, the Land-Grant College Act, and the Pacific Railroad Act (all enacted in 1862) would point the way to a newly activist government that would promote western settlement, higher education, and transcontinental communication and transportation.

As the essays in this book show, congressional involvement was essential to the war. The articles on Congress in 1860 and 1861 by Jonathan Earle and Eric Walther show how Congress was involved in the events that led to session and the war. The fight over the speakership in the House and the maneuverings of the fire-eaters for decades leading up to 1860 can be seen as political “prewar” battles. These battles are important for understanding the tense politics *before* Lincoln’s election. Thus, before secession Congress was already rehearsing for the Civil War. But, as noted in this introduction, when the war began Lincoln was on his own, relying on the 1795 militia statute and his own powers as commander in chief.

After July 4, 1861, and until the end of the conflict Congress actively supported the war effort while considering how to deal with its consequences. The interaction took a variety of forms. Recruiting troops and getting them

²⁹Simon Cameron to Benjamin F. Butler, Aug. 8, 1861, *O.R.*, ser. 2, vol. 1, pp. 761–62. An Act to Confiscate Property Used for Insurrectionary Purposes (First Confiscation Act), Act of Aug. 6, 1861, ch. 60, 12 Stat. 319 (1863).

ready for battle was complicated and not always successful, as the chapters by Lesley Gordon and Mischa Honeck demonstrate. The role of black troops was even more complicated, requiring executive initiative and congressional action. Diane Barnes, Chandra Manning, and Nikki Taylor explore this issue in their chapters. All of this cost money, as the economic historian Jenny Bourne demonstrates in her chapter on how Congress paid for the war. Allowing black troops was part of a larger congressional expansion of black rights that I explore in my own chapter. That chapter also notes that secession and the war allowed for other significant statutory changes. For Congress, the war became part of a giant reform and modernization movement in the nation.

In the end, what was the war about? Freedom and ending slavery were often at the center of congressional debates over military and domestic policy and the remaking of the nation when the war would finally be over. Fergus Bordewich explores how the key congressional committee overseeing the war effort grappled with demands to make this “an Abolition War,” as Diane Barnes notes in the title of her chapter. Beyond these issues, as my chapter demonstrates, Congress moved to create equality and took large steps toward remaking and modernizing the nation. Emancipation, racial equality on Washington’s street railroads, and building a railroad that connected the West Coast to the East Coast all merged in the war, especially in the dramatic and far-reaching legislation of the spring and summer of 1862, which culminated with Lincoln issuing the Preliminary Emancipation Proclamation.

Freedom and an end to slavery were connected to the larger problem of democracy. All of the chapters in this book connect to this. Mischa Honeck’s newly arrived German immigrants were fighting to preserve a nation they had just moved to, but they were also fighting for the right to be part of the nation, just as were the black soldiers discussed in the chapters by Nikki Taylor, Diane Barnes, and Chandra Manning. The white, native-born American kids from Connecticut in Lesley Gordon’s chapter were similarly fighting for their place in the new nation that the Congress and the president were shaping. Congress, which had to pay for all this, had to think of new and creative ways to fund this mammoth enterprise, and Jenny Bourne teaches us how they did it. The losers in all this would be the slave owners, the Southern fire-eaters, and, to some extent, many of the political players

of the previous decade, whose relevance disappeared in the smoke of battle and the fog of war.

In his message to Congress on July 4, 1861, Lincoln described the war in the context of democratic theory:

This is essentially a People's contest. On the side of the Union, it is a struggle for maintaining in the world, that form, and substance of government, whose leading object is, to elevate the condition of men—to lift artificial weights from all shoulders—to clear the paths of laudable pursuit for all—to afford all, an unfettered start, and a fair chance, in the race of life. Yielding to partial, and temporary departures, from necessity, this is the leading object of the government for whose existence we contend.³⁰

The “People’s contest” could be fought only with the support of the people and their representatives in Congress. In the end, all the chapters in this volume circle back to the problem of democracy and the meaning of “the People” during the Civil War era.

³⁰Abraham Lincoln, “Message to Congress in Special Session,” July 4, 1861, in *Collected Works*, 4:438.