

LINCOLN MEMORIAL UNIVERSITY LAW REVIEW

VOLUME 6 SPRING 2019 ISSUE 2

PRESIDENT LINCOLN: BENDING THE IRON AND CRACKING THE CODE

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ABSTRACT

This article explores the constitutionality of President Lincoln's actions during the Civil War and poses the question of whether Lincoln taking possession of the railroads and telegraph companies during the Civil War was constitutional. The answer to this was, Lincoln's actions were, in fact, constitutional because Congress expressly authorized his actions. His taking possession of the railroads and telegraph companies provided compensation to the companies affected.

Further, the article analyzes the constitutional and congressional authority for allowing President Lincoln to take possession and provide compensation. The article also addresses the history of the Presidential "Commander-in-Chief" powers, prior to and contemporaneous to the Civil War.

The article also addresses the contemporaneous and post effects of his using the executive action and its technological, infrastructural, and practical effects upon the Civil War. Finally, the article addresses the lasting effects from President Lincoln's expansion of the scope of executive power, including both future presidents and case law.

INTRODUCTION

The Civil War was America's greatest constitutional crisis, but slavery was not the only constitutional issue to arise during the war. During the Civil War, many legal issues arose including alleged violations of *habeas corpus*, First Amendment

rights violations, and slavery's eventual prohibition. One of the lesser-known constitutional issues implicated in the Civil War was the government's taking of private property from Union citizens.

Before Lincoln, a president had to have congressional authorization to perform most actions, including taking private property. When President Lincoln took possession of the private railroads and telegraphs for military use during the Civil War, his actions were constitutional, and they subsequently provided the basis for the expansion of executive power. President Lincoln's expansion of the executive power also had contemporaneous and subsequent effects on relevant case law and executive action.

I. BOTH THE CONSTITUTION AND FEDERAL LAW AUTHORIZE GOVERNMENTAL TAKINGS.

A. CONSTITUTIONAL JUSTIFICATIONS

The U.S. Constitution expressly grants Congress the power to declare war on behalf of the country.¹ When Congress declares war, the President "shall be the Commander in Chief of the Army and Navy of the United States...when called into the actual Service of the United States."² Furthermore, the President is charged with the duty of ensuring that Congress's laws are faithfully executed.³

This constitutional grouping of duties means that the federal government contributes to war by allowing the President of the U.S. to wage war while Congress merely "shirks its constitutional responsibility" and the judiciary has a "laissez-faire" approach.⁴ After Congress has deemed that war is necessary, Congress grants the needed appropriations and vests power to the President to perform his "Commander-in-Chief" duties, to neutralize the current threat by winning the declared war, and to hand his wartime powers back to Congress.

¹ U.S. CONST. art. I, § 8, cl. 11.

² U.S. CONST. art. II, § 2, cl. 1.

³ U.S. CONST. art. II, § 3, cl. 1.

⁴ John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 171 (1996).

This process of transferring war powers between branches is supported by the Framers' conscious fear of a concentration of power in one particular branch. The Framers were worried that creating and maintaining a standing army would lead to concentrated power within the executive branch by causing "tyranny at home". This would be similar to European countries keeping standing armies "under the pretext of defending, [but instead, enslaving] the people" by allocating the country's physical power to one branch.⁵

Although the topic will be fully discussed later, when analyzing a president's actions, part of the analysis includes assessing the Executive Branch's current scope of power based on its evolution.⁶ Congress gave Presidents "wartime powers" discretion in dealing with conflicts until Lincoln's administration. However, Congress closely supervised and scrutinized the President's actions during war or conflict, even when Lincoln was acting with regard to statutorily-authorized confiscations of private property.⁷ Hence, the sitting presidents who came before Lincoln would rarely act under color of title without first obtaining express congressional approval in defining the scope in which he may act under the specified circumstances.⁸

B. LINCOLN'S ACTIONS WERE WELL INSIDE HISTORICAL CONSTITUTIONAL NORMS.

1. CONGRESS EXPRESSLY AUTHORIZED PRESIDENT LINCOLN TO CONTROL THE RAILROAD AND TELEGRAPH COMPANIES.

On January 31, 1862, Congress expressly approved President Lincoln's power to "take possession of the Railroad

⁵ James Madison, Speech Before Constitutional Convention (June 29, 1787).

⁶ This comment is in regards to the constitutional context up to this point in history, not the practical effects.

⁷ *Brown v. U.S.*, 12 U.S. 110 (1814).

⁸ David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb- A Constitutional History*, 121 HARV. L. REV. 941, 957 (2008).

and Telegraph Lines” in the interests of “public safety.”⁹ In doing so, this act authorized the President to take possession of and hold any public or private railroads. It also allowed the President to take possession of the companies’ stock, personnel or real property, for the limited purpose of transportation of troops, munitions, equipment, military property, and stores anywhere throughout the United States.¹⁰

Furthermore, this Congressional Act authorized the President to place any previously-stated personnel under military control and make them subject to the rules and articles of war.¹¹ The Act provided for the companies’ punishment if they were charged with resisting, interfering, or attempting to destroy or injure the property that was subject to the act. Any infractions “shall be” subject to a court-martial and any punishment up to and including death.¹²

Congress also had the foresight to include within this Act, the caveat, that the President shall appoint a commission to “assess and determine the damages suffered, or the compensation to which any railroad or telegraph company may be entitled by reason of the railroad or telegraph line being seized.”¹³ Then, the amounts would be submitted to Congress for payment to the companies or individuals. This procedure of appointing a commissioner to compensate the companies or individuals satisfies the constitutional requirement that the federal government shall not take private property for public use without just compensation.¹⁴

After the Act went into effect, the government bought its own locomotives and train cars¹⁵ at fair market value from private individuals, except for those locomotives and cars constructed by the Union or captured from the Confederacy.¹⁶

⁹ Act of Dec. 2, 1861, ch. 15 § 1, 1861 App. to the Congressional Globe 334 (1861).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at § 2.

¹³ *Id.* at § 3.

¹⁴ U.S. CONST. AMEND. V; *See, e.g.* *Omnia Commercial Co. v. U.S.*, 261 U.S. 502 (1923).

¹⁵ Hereafter “cars.”

¹⁶ DANIEL C. MCCALLUM, REPORT OF BREVET BRIG. GENERAL D.C. MCCALLUM, 1, 10 (1866).

In 1861, P.W. & B. Railroad made a net profit increase of over \$1,000,000, an increase from 1860's net profit of \$236,000. In 1863, the same company made net revenues of \$1,042,266.¹⁷ Actually, all recorded companies, except the B&O Railroad, experienced increased business and profits during the war years. The reasons behind this are the war closed the Mississippi River's waterway travel and poor crop seasons in Europe increased overall railroad freight demands in transporting crops to New York and ultimately to Europe via boat.¹⁸ Therefore, the war actually helped the railroads withdraw from their economic depressions, ensuring that 1863 became "one of the most prosperous [years] ever known to American Railways."¹⁹ Because of this increase in profits, the railroad companies appeared to be war profiteering.²⁰

The northern railroads were not technically "seized" in the traditional constitutional meaning, but they were under direct supervision of the U.S. Military Railroad's²¹ General McCallum. Furthermore, only a handful of instances existed where the government actually seized a railroad.²²

One such example is when foreign miners in Pennsylvania, who were opposed to the draft, forced the government to operate the Philadelphia and Reading Railroads as to not disrupt coal deliveries for the U.S. Navy.²³ More specifically, the labor strike's catalyst was related to a fifty-cent-per-day raise demand, and the Reading Railroad's president, Mr. Charles E. Smith, sent Assistant Secretary of War and former Reading Railroad President to Washington, D.C. to fix the effective labor strike.²⁴ The result was that General McCallum ordered the reassignment of 142 men from the

¹⁷ THOMAS WEBER, *THE NORTHERN RAILROADS IN THE CIVIL WAR: 1861-1865* 49-50 (1952).

¹⁸ *Id.* at 59-62.

¹⁹ *Id.* at 53 (quoting AMERICAN RAILROAD JOURNAL (1864)).

²⁰ This article does not delve into the levels of governmental takings and actual amounts of compensation to a private party.

²¹ Hereafter "U.S.M.R.R."

²² Weber, *supra* note 17.

²³ *Id.* at 119 (quoting FRANK H. TAYLOR, *PHILADELPHIA IN THE CIVIL WAR* 47 (1913)). This situation is notably similar to the *Steel Seizure Case*.

²⁴ J.L. BLACKMAN, *THE SEIZURE OF THE READING RAILROAD IN 1864* 50 (1987).

captured Alexandria Railway to Philadelphia for temporary duty.²⁵ However, Mr. Smith actually requested that commanding Major General George Cadwalader take immediate military possession of the railroad during the crisis, to which the Major General agreed.²⁶

Even during the seizure of railroads near battle areas, the War Department was “very careful to give each [railroad] the ‘just compensation’ which the Constitution required,” but the railroad waived monetary compensation because the company benefited financially during the governmental seizure.²⁷ After the immediate need for coal (for both the U.S. Navy and U.S.M.R.R.) ended, the Assistant Quartermaster General returned the railroad to the private company.²⁸ The War Department was effective in ensuring they committed no constitutional violations. There were no other recorded complaints or lawsuits in regards to Fifth Amendment Takings Clause violations.

During the Civil War, President Lincoln interpreted his own wartime power to include the “right to seize citizens’ property if such seizure should become indispensable to the successful prosecution of the war.”²⁹ During Lincoln’s administration, Congress debated whether to build its own railroad system or work with private companies for military transportation. Congress also considered building its own railroad between Washington, D.C. and New York. However, after much debate between lobbyists in New York and Baltimore with Secretary of War Stanton, Congress scrapped the governmental railroad idea. Congress further expressly repealed any executive right vested in President Lincoln to complete or extend any uncompleted railroad already in construction.³⁰

²⁵ *Id.* at 52.

²⁶ *Id.* at 53.

²⁷ *Id.* at 55-56.

²⁸ *Id.* at 56 (quoting J.J. MOORE, REPORT OF J.J. MOORE, OFFICIAL RECORDS, WAR OF THE REBELLION, 67-8.).

²⁹ JAMES G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 6 (1926).

³⁰ APPENDIX TO CONGRESSIONAL GLOBE, 37TH CONG., 2ND SESS., 333, 423 (1861).

The result in abandoning any governmental railroad was that the government bought the ticket fares for its troops, munitions, cavalry, and other items of war directly from the private companies. As such, the government entered into negotiated contracts with the different railroad companies for fares. The railroads charged approximately two cents per mile per soldier, allowing each soldier up to 80 pounds of baggage, while “equipment, munitions, and troop supplies were to be carried at first-class local rates,” the charge varying for weight and distance.³¹

The North’s Reading Railroad transported the most out of any other railroad for a total of 953,397 troops during the Civil War, while the Illinois Central moved 556,421 troops during the war.³² As previously noted, almost every operating railroad at the time saw large profits during the Civil War; however, the only railroad claiming losses during the Civil War was the Michigan Central Railroad.³³ The Michigan Central Railroad claimed that the war had dislocated their business, and they did not receive enough government patronage to make up their losses, but there was never any actual recorded “seizure” or governmental “taking” of this railroad to justify compensation.³⁴

In addition to compensating railroad companies for transporting military personnel and assets, the government compensated the northern railroad companies for the traffic on their lines by the government’s own locomotives and cars.³⁵ After the Union Army confiscated southern railroads, the U.S.M.R.R. then repaired the railroads, including bridges, and after the war, returned the property to the southern companies.³⁶ Of course, this holding of personal property and its eventual outcome was dependent upon the Civil War’s outcome.

³¹ Weber, *supra* note 17, at 151-52.

³² *Id.* at 262-63.

³³ ANNUAL REPORT OF THE MICHIGAN SOUTHERN AND NORTHERN INDIANA RAILROAD, 26 (1864).

³⁴ *Id.*

³⁵ David Pfeiffer, *Working Magic with Cornstalks and Beanpoles: Records Relating to the U.S. Military Railroads During the Civil War*, 43 PROLOGUE (June 1, 2011), at 32.

³⁶ *Id.*

In regards to confiscated Confederate property, case law at the time provided that it was “usually held as a mere military occupation until the fate of the nation from which it is conquered is determined; but if the [Confederacy] is entirely subdued, or ... be destroyed and ceases to exist, the right of occupation becomes permanent, and the title [in the Confederacy’s private property] vests absolutely in the conqueror.”³⁷

However, the modern rules of engagement and the U.S. Military codes required that the U.S. government should not destroy or permanently deprive the owners of their railways and telegraphs within the South, but instead, the publically-held property should be restored to its original owners at the conclusion of the war.³⁸

Even though the case law provided that the government had a right to keep any confiscated property, the U.S. Military chose to vest its ownership interests in its previous Confederate owners. Similarly in the North, the railroad companies were fully reinvested in their possession and control of their property, and the U.S. government compensated the companies for the “transportation furnished by them.”³⁹

Although the analysis has been primarily about railroads, President Lincoln also revolutionized wartime communications by taking possession of the telegraph companies. His taking of the telegraph companies created the first military telegraph office in the country, and it was located next door to Secretary of War Stanton’s office. These actions soon led to the creation of the Military Telegraph Corps Bureau.⁴⁰

The telegraph companies performed similarly to the railroad companies in that they made enormous wartime profits. The telegraph companies made approximately \$2,655,000 (about 41 cents per message) from the government’s communications during the Civil War.⁴¹ The government also negotiated with the telegraph companies for special rates for

³⁷ U.S. v. Huckabee, 83 U.S. 414, 434 (1872).

³⁸ WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 809 (1920).

³⁹ *Id.* at fn. 39.

⁴⁰ *Id.* at 44. The Military Telegraph Corps bureau will be later expanded upon.

⁴¹ DAVID HOCHFELDER, THE TELEGRAPH IN AMERICA: 1832-1920 (2012).

messages sent and received, but other times, the government paid the regular amount charged to any other party.

However, the telegraph companies gave the U.S. military communications priority over all other telegraph communications. This priority status could potentially cause an unconstitutional “takings” situation. Furthermore, the telegraph companies also received enormous wartime profits from 1) the additional commercial traffic as well as from 2) the large increase in the amount of telegraph coverage.⁴² This increased commercial traffic included interpersonal communications between soldiers and their families, newspaper correspondence, and other war-related communications. Neither the railroad nor telegraph industries were harmed by the U.S. Military or the government’s actions. No other violation of the Fifth Amendment’s Takings Clause is present from Lincoln’s use of executive power in taking possession of the railroad or telegraph companies.

Finally, the Congressional Act appointed the immediate control of the new appropriations of the railroads and telegraph companies to be placed under the direct supervision of the Secretary of War.⁴³ The Secretary of War at this point in history was still included within the President’s cabinet. Therefore, ultimate delegation and responsibility was on the President. The Act finally concluded that it expressly preempted any other regulations, rules, or laws that may be in conflict with the “order.”⁴⁴

2. PRESIDENT LINCOLN ISSUES EXECUTIVE ORDERS IN ACCORDANCE WITH CONGRESSIONAL AUTHORIZATION.

Although the preceding section discussed the Act’s components, subsequent legal consequences, Fifth Amendment implications, and actual possession of the railroad and telegraph companies, the analysis is constitutional if President Lincoln issued appropriate executive orders in accordance with the Congressional Act.

⁴² *Id.*

⁴³ Act of Dec. 2, 1861, ch. 15§ 4, 1861 App. to the Congressional Globe 334, 335 (1861).

⁴⁴ *Id.*

On February 25, 1862, Secretary of War Stanton, by order of the President, issued an executive order to take “military possession of all the telegraph lines in the United States.”⁴⁵ In the same executive order, the telegraph companies were expressly prohibited from sending any unauthorized information regarding military operations, and the government’s possession and control of the telegraph lines was not intended to “interfere in any respect with the ordinary affairs of the companies or with private business.”⁴⁶ Later in the year, on May 25, 1862, President Lincoln issued another executive order allowing him to take “military possession of all the railroads” until further orders, directing the companies and officers to “hold themselves in readiness for the transportation of such troops and munitions of war as may be ordered by the military authorities, to the exclusion of all other business.”⁴⁷

The major difference between these two orders is that within the latter order, President Lincoln’s intent was that the government’s transportation needs outweigh the needs of any private or commercial business the railroads performed. This situation is in contrast to the former where the governmental use of the telegraph companies’ property was not to interfere with “business as usual.” Furthermore, the latter’s order was executed by M.C. Meigs, Quartermaster-General, on behalf of Secretary of War Stanton, which in turn, was on behalf of President Lincoln.⁴⁸

C. HISTORICALLY, THE EXECUTIVE’S COMMANDER-IN-CHIEF POWER HAD TO BE BASED UPON A SPECIFIC PROVISION OF THE U.S. CONSTITUTION OR EXPRESSLY AUTHORIZED BY CONGRESS.

Prior to the Civil War, the President’s use of executive power was based upon a specific provision of the U.S.

⁴⁵ Executive Order – Taking into Military Possession all Telegraph Lines in the U.S., The American Presidency Project (Feb. 25, 1862), <http://www.presidency.ucsb.edu/ws/index.php?pid=69797>.

⁴⁶ *Id.*

⁴⁷ Executive Order – Taking Military Possession of Railroads, The American Presidency Project (May 25, 1862), <http://www.presidency.ucsb.edu/ws/index.php?pid=69807>.

⁴⁸ *Id.*

Constitution or expressly authorized by Congress. President Lincoln received expressed congressional authorization for taking control of the railroad and telegraph companies during the Civil War. This section analyzes different presidents' use of the Commander-in-Chief powers from George Washington up to Abraham Lincoln's presidency.

During George Washington's presidency, the "most prominent war powers questions of the time concerned whether Congress had in fact approved specific" war actions.⁴⁹ This quotation is an echo of the last section's constitutional analysis, following the dichotomy that if a president's action is not specifically enumerated within the U.S. Constitution, then Congress must authorize the current president's action. The original congressional intent did not leave the President free of any "statutory encumbrances in exercising his powers in command in battle," which suggests a strict, originalist view of Congress's authority to declare and ultimately supervise the President.⁵⁰ Although this view appears obsolete in the present day, it appears to vest ultimate war power authority within the two houses of Congress. In history, it seems most successful armies have a centralized leader at the pinnacle of the hierarchy, such as George Washington during the Revolutionary War, to vest responsibility of the war's ultimate defeat or victory.⁵¹

While John Adams was the President, Congress expressly authorized him to "raise an army of up to 10,000 men to serve for three years" and later authorized him to "raise an additional 12 infantry regiments and 6 troops of light dragoons" in response to the looming French war.⁵² At that time, Congress expressly determined the scope of the war by determining the quantity of men and their time commitments that would be allowed. In America's young history, this

⁴⁹ David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb- A Constitutional History*, 121 HARV. L. REV. 941, 955 (2008).

⁵⁰ *Id.*

⁵¹ Although this is a mere speculation in regards to historical figures such as Genghis Khan, Alexander the Great, and Emperor Napoleon Bonaparte, the underlying theme is that history usually vests the triumphs or defeats with one main actor regardless of the war cabinet, armies, and other exigent circumstances.

⁵² *Id.* at 965.

allocation of power was a marked increase by allowing the President to have direct command over a standing army that was only being raised in preparation, not actual current use, for a war with France.

Following the French conflict, President Thomas Jefferson recognized that the country should rely on the state militia rather than having a standing army. In response, Congress reduced half the regular army, down to about 3,300 standing troops.⁵³ Around this time in 1807, the concept of the executive branch's "temporary necessity" doctrine arose, but President Thomas Jefferson's actions did not "appear to have been a constitutional trump."⁵⁴ Even during this era, there was constant, almost fluid shifting of the executive's scope of power in relation to the legislature. However, many constitutional scholars point this war out as being the only constitutional war in history.

President Jefferson appropriated timber for gunboats and chemicals for gunpowder. In doing so, he acknowledged that he was acting outside his scope of power, but he believed that Congress would ultimately approve his actions.⁵⁵ Not only did Congress ratify President Jefferson's actions, it "stressed that disregard of appropriations limitations would be" permissible when Congress was not available to address a national emergency.⁵⁶ This is the same argument that President Lincoln would later use when defending his actions in appropriating funds and raising the Union Army.

During the War of 1812, a legal case arose where the U.S. attorney general in Massachusetts filed to condemn over 500 tons of lumber within the U.S. that belonged to British subjects.⁵⁷ However, the United States Supreme Court held that "the [governmental] seizure [requires] statutory authorization" which Congress had not provided, rendering the action covered within the legislature's jurisdiction, rather than the President's

⁵³ *Id.* at 973.

⁵⁴ *Id.* at 974.

⁵⁵ *Id.* at 975 (quoting Informal Memorandum from President Thomas Jefferson (July 18, 1807) (on file with Online Library of Liberty), <http://oll.libertyfund.org/titles/jefferson-the-works-vol-1-autobiography-anas-1760-1770>).

⁵⁶ *Id.*

⁵⁷ *Brown v. U.S.*, 12 U.S. 110, 121 (1814).

authority under his Article II wartime powers.⁵⁸ During the rest of the era leading up to the Civil War, the sitting president, at any given time, consistently accepted Congress's war power limitations.⁵⁹ Just as the United States Supreme Court "carves out" certain rights or doctrinal principles, the executive branch's remedy to the constant congressional restraint was to creatively interpret the statutes to circumvent those limitations, such as President Jefferson going through a dichotomy of using the government's "credit" to appropriate naval vessels and not actually having approved unauthorized "expenditures."

One of the major pre-Civil War issues between the legislative and the executive branches was the disagreement between President James Buchanan and U.S. Army Corps of Engineers' Captain Meigs. This disagreement between the two arose during the building of the Washington, D.C. aqueduct.⁶⁰ After Secretary of War John Floyd fired Captain Meigs from the aqueduct project over a disagreement, Meigs lobbied Congress and received funding and direct supervision over the project.⁶¹ Understandably, President Buchanan found this situation to usurp his presidential Commander in Chief powers because such a relationship would cause Captain Meigs to fall outside of the military hierarchy and no longer answerable to the President. Attorney General Jeremiah Black affirmed President Buchanan's view that Congress could not allow Captain Meigs to become independent of the President. However, the statutory act allowing Meigs appropriations for and control over the aqueduct project did not make him independent because President Buchanan was still in a position to order him as Commander in Chief.⁶²

At this point prior to the Civil War, the executive branch's powers were fairly concrete with presidents carving out exceptions when they were in times of "temporary necessity." The "temporary necessity" doctrine is a prelude to the current day's "ongoing emergency" doctrine. Even before President Lincoln, Congress followed two major courses of action. First, Congress expressly authorized the scope that the

⁵⁸ *Id.*

⁵⁹ Barron & Lederman, *supra* note 8, at 981.

⁶⁰ *Id.* at 984.

⁶¹ *Id.*

⁶² *Id.*

President was allowed to act within. The second course of action was to allow the sitting President to appropriate troops and property to meet a “temporary necessity” and later ratify the President’s actions.

D. PRESIDENT LINCOLN’S USE OF EXECUTIVE POWERS
COMPELLED THE CREATION OF ENTIRE BUREAUS TO ASSIST
IN THE TECHNOLOGICAL, INFRASTRUCTURAL, AND
PRACTICAL ASPECTS OF THE CIVIL WAR.

Thus far, the discussion has centered on the constitutionality, procedure, and context of the President exerting executive powers. This section addresses the contemporaneous and subsequent effects of both Congress’s and President Lincoln’s actions in regards to the taking of personal property during the Civil War. This analysis is specific to northern citizens only, and not a dichotomy of the constitutionality or aspects of the Emancipation Proclamation.

President Lincoln’s aggressive use of executive war powers compelled the creation of entire bureaus to assist in the technological, infrastructural, and practical aspects of the Civil War. Congress’s authorizations and President Lincoln’s executive orders resulted in Secretary of War Edwin Stanton creating two different bureaus to support mass transportation of troops and mass communication: the U.S. Military Railroad and the U.S. Military Telegraph Service. These bureaus assisted in the technological, infrastructural, and practical aspects of the Civil War, which ultimately allowed the Union to claim victory. Both bureaus and their effects are addressed in turn.

1. THE PRESIDENT CREATES THE U.S. MILITARY RAILROAD
BUREAU

President Lincoln’s administration created the U.S.M.R.R. for the purpose of transporting troops, munitions, and other necessities of war.⁶³ Even one of President Lincoln’s most staunch critics, General George B. McClellan, admitted that the introduction of “railroads has introduced a new and

⁶³ Act of Dec. 2, 1861, ch. 15§ 1, 1861 App. to the Congressional Globe 334 (1861).

very important element into the war.”⁶⁴ The U.S.M.R.R.’s lasting effects would later become a precursor for President Franklin D. Roosevelt’s creating the U.S. Army’s Transportation Corps.⁶⁵ The same day that President Lincoln issued his railroad executive order, Secretary of War Stanton ordered D.C. McCallum’s appointment as military director and superintendent of “the railroads in the U.S., with authority to enter upon, take possession of, hold and use” all property in relation to the President’s purpose of transportation.⁶⁶

After these preceding acts, the U.S.M.R.R. bureau became extinct, and the government only had one railroad in its possession for wartime use, which was a seven-mile-long route from Washington, D.C. to Alexandria, Virginia.⁶⁷ Brigadier General McCallum was already an experienced railroad man who built railway and railway bridges during the war. Regarding the Potomac Bridge, the only available supply line between Fredericksburg and Richmond, 51,000 cars traversed the bridge throughout the war.⁶⁸ The U.S.M.R.R. acted under the direct orders of both Secretary of War Stanton as well as other superior U.S. Army officers.⁶⁹

After his appointment to this newly-formed bureau in 1862, McCallum ordered the purchase of five locomotives and eighty cars for military use. The major infrastructural and practical problem McCallum faced was that all private companies used different gauged tracks in order to compete in their respective geographical markets.⁷⁰ This meant that the locomotives used on one railway could not be transferred onto another company’s railway because the width and length of the track were different between each company.

Over the entire course of the Civil War, McCallum reported a total appropriations amount as follows: he spent \$4.9 million in labor with a total net war expenditure of

⁶⁴ CARL R. FISH, *THE AMERICAN CIVIL WAR* 778 (1937).

⁶⁵ Executive Order 9082: Reorganizing the Army and the War Department, The American Presidency Project (Feb. 28, 1942), <http://www.presidency.ucsb.edu/ws/index.php?pid=16227>.

⁶⁶ DANIEL C. MCCALLUM, *REPORT OF BREVET BRIG. GENERAL D.C. MCCALLUM*, 1, 3 (1866).

⁶⁷ *Id.*

⁶⁸ *Id.* at 4.

⁶⁹ *Id.* at 41.

⁷⁰ *Id.*

\$29,838,176.⁷¹ he appropriated over 70 locomotives and 1,733 cars during the war, by purchase, capture, or being built⁷², and he built approximately 137,418 feet of the track, and he re-laid about 185,440 feet.⁷³

After the war's end, the government reverted the Southern owners' property back via executive action on August 8, 1865.⁷⁴ In regards to the immediate practical and logistical impact on the Civil War, the U.S.M.R.R.'s first transportation of troops was the transportation of 2,000 troops of the 6th Massachusetts regiment, the 1st and 4th Pennsylvania regiments, and the Washington Brigade of Philadelphia who arrived in 35 cars into Baltimore. After arriving, they had to walk a mile to switch railroads onto the B&O Railroad to continue the trip to reinforce Washington.⁷⁵ This expedition carried with it the infamous Baltimore rioting attacks, in which the troops were attacked while transitioning between rail lines. This resulted in four soldiers' and 12 civilians' deaths, with 36 civilian injuries.⁷⁶ Also, the U.S.M.R.R.'s largest reported transportation was with the 4th Army Corps from Carter's Station, TN to Nashville, TN, totaling 33 miles with 1,498 cars.⁷⁷ The most strategic use of the U.S.M.R.R. was Lincoln's authorization of a plan to reinforce General William Rosecrans after being defeated in the battle of Chickamauga (Sept. of 1863) and while there was a siege in Chattanooga, TN (as of Nov. of 1863).⁷⁸

Because of Secretary Stanton's and the U.S.M.R.R.'s actions, the War Department transported Major General Joseph Hooker and about 20,000 men and 3,000 horses and mules from Virginia to eastern Tennessee, traveling 1,159 miles in seven to nine days, preventing the Confederate Army from taking Tennessee.⁷⁹ This bureau's achievements resulted in scientific innovations, thereby assisting the Lincoln administration's war

⁷¹ *Id.* at 10-47.

⁷² *Id.*

⁷³ *Id.* (most tracks being about forty feet long multiplied by 4,636).

⁷⁴ *Id.* at 47.

⁷⁵ THOMAS WEBER, *THE NORTHERN RAILROADS IN THE CIVIL WAR: 1861-1865* 37-40 (1952).

⁷⁶ *Id.* at 39.

⁷⁷ McCallum, *supra* note 66, at 47.

⁷⁸ DAVID H. DONALD, *LINCOLN* 457-58 (1995).

⁷⁹ *Id.*

prosecution. The use of the U.S.M.R.R. achieved a mass transportation and supply chain that would transport many troops and allowed them to be deployed in a distant location where they were needed to supply existing troops, refresh more troops, or remove wounded troops.⁸⁰

Another contribution was the increased development in efficient construction and destruction of both tracks and bridges. These new construction techniques were completed accurately and efficiently by using “ready-made bridges and trestles constructed on an assembly-like technique.”⁸¹ The final and most interesting practical aspect of the U.S.M.R.R.’s war contributions was its humanitarian impact.

The government developed special equipment, including hospital cars that assisted in decreasing gangrene rates among the wounded; hospital trains quickly evacuated and treated the wounded; and armored cars with on-car munitions or artillery readily assisted in the battlefield.⁸²

2. THE PRESIDENT CREATES THE TELEGRAPH SERVICE BUREAU.

After Secretary of War Stanton released the February 25, 1862 executive order that took military possession of all telegraph lines, President Lincoln’s administration created the U.S. Military Telegraph Service⁸³. The executive order authorized the “possession of, prevention of certain print or letting news out, and it was not intended to interfere with ordinary affairs of the companies or private businesses.”⁸⁴

Before 1861, the Signal Corps was small and more concentrated on large flag signals between ships on the sea or regiments on the battlefield.⁸⁵ Assistant Secretary of War Thomas A. Scott became the general manager of all telegraph

⁸⁰ Weber, *supra* note 75, at 264-67.

⁸¹ *Id.* at 267.

⁸² *Id.* at 268.

⁸³ Hereafter “U.S.M.T.S.”

⁸⁴ Executive Order – Taking into Military Possession all Telegraph Lines in the U.S., The American Presidency Project (Feb. 25, 1862), <http://www.presidency.ucsb.edu/ws/index.php?pid=69797>.

⁸⁵ JOSEPH W. BROWN, THE SIGNAL CORPS, U.S.A. IN THE WAR OF THE REBELLION 140 (1896).

lines so he could create the War Department's telegraph office, headed by Major Albert James Myer.⁸⁶ The telegraph bureau was created separate from the transportation corps and partly separate from the Signal Corps because the government's needs required a completely different skill set and type of resources than ever before.⁸⁷ Telegraph workers were not considered military personnel; however, unlike the railroad workers, they were so skilled that they were "indispensable in their jobs" and were not subject to the draft.⁸⁸ Even though the U.S.M.T.S. bureau was born and used in military operations, those men who served in this bureau were not given military status. The reason for which was to prevent them from being under generals' and other military officers' control, rather than immediately answerable to President Lincoln and Secretary of War Stanton.⁸⁹ Because of the bureau's lack of skilled "linesmen," Congress finally passed a law that allowed military men to join the Signal Corps and more specifically, the U.S.M.T.S., while retaining their current military ranks and pay.⁹⁰

By 1863, the total amount of men in the U.S.M.T.S. was 1,012 strong, but by the end of the war, it increased to approximately 2,500 men strong.⁹¹ At the beginning of the war, approximately \$10,000 was appropriated to the Signal Corps for the construction expenditures of telegraph infrastructure.⁹² The U.S.M.T.S. worked with the U.S.M.R. by inventing telegraph trains that were allowed to be near the occurring battles, so generals could efficiently coordinate troop movements and live battle reports could be sent to Washington, D.C.⁹³ The telegraph operations not only kept President Lincoln supplied with a constant update on battle situations, but this bureau assisted Union generals in concerting their

⁸⁶ MAJOR GENERAL A.W. GREELY, *THE MILITARY-TELEGRAPH SERVICE* PAR. 7 (1912), <http://www.civilwarsignals.org/pages/tele/telegreely/telegreely.html>.

⁸⁷ Brown, *supra* note 85, at 123.

⁸⁸ *Id.* at 155.

⁸⁹ Greely, *supra* note 86, at par. 17.

⁹⁰ Brown, *supra* note 85, at 145.

⁹¹ *Id.* at 160.

⁹² *Id.* at 171.

⁹³ *Id.* at 172.

attacks over long distance and in mass transit of soldiers.⁹⁴ The Confederate Army also attempted to wiretap the telegraph lines but could not cipher the important encrypted messages to Washington, D.C. In the same way, the Union would also disseminate misleading military information to the Confederate eavesdroppers of the U.S.M.T.S.⁹⁵ This was similar to the British during the Revolutionary War.

By the end of the Civil War, the U.S.M.T.S. had spent a total appropriations allotment of about \$16.9 million, including total pay, clothing, transportation, forage, arms, and signal apparatuses and stores.⁹⁶ In total, the U.S.M.T.S. laid over 15,000 miles of telegraph line and had sent over 6.5 million messages. While the telegraph companies gave the military use priority in communications, the companies still made large wartime profits.⁹⁷ The creation of both the U.S.M.R.R. and U.S.M.T.S. clearly had positive impacts on the war's technological, infrastructural, and practical aspects.

E. PRESIDENT LINCOLN'S EXPANSION OF THE EXECUTIVE BRANCH HAD LEGAL IMPLICATION FOR FUTURE PRESIDENTS AS WELL AS GOVERNMENTAL TAKINGS' CASE LAW IN DEFINING THE SCOPE OF EXECUTIVE POWER.

As with any war, litigation arose in relation to Fifth Amendment Takings. Also, the President's use of executive power broadened the scope of the executive branch's position. President Lincoln's taking military possession of the rail and telegraph companies' property under the doctrine of temporary necessity affected all three branches of government. This was done by evolving governmental takings' case law and ultimately defining the scope of executive power. First, this section addresses the subsequent effects on case law in regards to the Civil War. Second, this section will address the

⁹⁴ Greely, *supra* note 86, at par. 21.

⁹⁵ *Id.* (The Union was also plagued by its own soldiers' sabotage via ignorance of the lines laid with railway, believing they were some instrument of the enemy; they would often cut the lines open to view what lie inside.).

⁹⁶ Brown, *supra* note 85, at 122.

⁹⁷ DAVID HOCHFELDER, THE TELEGRAPH IN AMERICA: 1832-1920 6-31 (2012).

chronology of effects on future presidents, including Theodore Roosevelt, Woodrow Wilson, and Harry Truman in relation to the same subject matter. Finally, this section will address Justice Jackson's concurrence from the *Steel Seizure Case* becoming the U.S. Supreme Court's majority opinion.

In *U.S. v. Pacific Railroad*, the Union Army destroyed thirteen railroad bridges surrounding St. Louis, Missouri when the Confederate Army, led by Sterling Price in October of 1864, was closing in to capture the city.⁹⁸ The U.S. government rebuilt four of the 13 destroyed bridges after the incident for military necessity; however, they charged the Pacific Railroad the total amount of \$181,548.89 for the rebuilding.⁹⁹ The government ultimately sued the company when it refused to pay. The U.S. Supreme Court held that the U.S. is not responsible for "the destruction of private property by its military operation during the [Civil War], nor are private parties chargeable for works constructed on their property by the U.S. to facilitate such operations [of war]" without the request of, or contract with the railroad.¹⁰⁰ This holding has two outcomes.

First, the government spent its resources rebuilding private property; however, the government used rebuilt property for its own necessity and use. Therefore, the owner should not bear the financial burden. The Supreme Court's second holding is that private property destroyed during wartime does not require the government to carry the liability for compensating the owner. This is an important difference in theory and thought in relation to the Fifth Amendment's Takings' Clause.

Two ways of analyzing the Supreme Court's rationale exist. First, although the government took the private property for its use without compensation, there was no property since the bridge was destroyed. The government used its own resources to rebuild and use the bridge. This situation would result in the railroad company not having to pay for the new bridge because it was not a party to any transaction until after the military was finished using the newly-constructed bridge. The second way of analyzing the constitutional implication is that although the government destroyed the bridges so that

⁹⁸ 120 U.S. 227, 228 (1887).

⁹⁹ *Id.* at 232.

¹⁰⁰ *Id.* at 240.

they would not fall into Confederate enemy hands, it did not bear the loss of the property because the military was merely destroying the enemy's future property.¹⁰¹ However, the owners were compensated in the way that the government rebuilt the bridges for them, ultimately at no charge to the owners because of the Supreme Court's holding.

Along with this previous case, *The Prize Cases* assisted in creating the doctrine of "enemy property."¹⁰² This doctrine states that a private party cannot bring a takings claim if one's property is enemy property or will inevitably fall into enemy hands, and if it is destroyed during wartime, the result is that no one is liable for its loss because of the circumstances.¹⁰³ The courts later stated that as to the justiciability of the "enemy property doctrine," federal courts have no role in supervising presidential designations of such in regards to war powers.¹⁰⁴

The Prize Cases are relevant, but not specifically to this subject matter because they address executive power in the context of the power to declare wars, order blockades, and seize enemy property.¹⁰⁵ Later and in World War Two, oil companies with property in Manila brought suit against the U.S. government for destroying terminal facilities while engaging the Empire of Japan.¹⁰⁶ The Supreme Court held that destroying property for the purpose of preventing strategically-valued property from falling into enemy hands was considered "waging war" and did not violate the Takings Clause of the Fifth Amendment.¹⁰⁷

The Supreme Court did not expressly restate the existence of the "enemy property" doctrine, but it did state that the U.S. makes no promise to compensate "all who suffer from every ravage and burden of war, ... and in wartime[,] many losses must be attributed solely to the fortunes of war and not

¹⁰¹ See Vladeck, *infra* note 102.

¹⁰² Stephen I. Vladeck, *Re-Rethinking the Prize Cases: Some Remarks in Response to Professor Lee*, 53 ST. LOUIS U. L.J. 85, 59 (2008).

¹⁰³ *Id.*

¹⁰⁴ *El-Shifa Pharm. Indus. Co. v. U.S.*, 378 F.3d 1346, 1369 (Fed. Cir. 2004) (addressing President Bill Clinton's use of executive power to destroy a Sudanese pharmaceutical plant in 1998).

¹⁰⁵ *The Prize Cases*, 67 U.S. 635 (1863). It does not specifically address property rights of lawful citizens.

¹⁰⁶ *U.S. v. Caltex, Inc.*, 344 U.S. 149, 155 (1952).

¹⁰⁷ *Id.*

to the sovereign, and no rigid rules will be laid down to distinguish compensable losses from non-compensable losses, but each case will be judged on its own facts.”¹⁰⁸ Therefore, on a case-by-case analysis, the court should decide which government is at fault and apply the enemy property doctrine. This is still good law.

In regards to the Executive Branch, the old adage that “power corrupts” is accurate. In any Introduction to Constitutional Law course, the professor will almost always orate Lord Acton’s quote that “power corrupts and absolute power corrupts absolutely” in regards to the executive branch. Although President Lincoln has been accused of serious constitutional violations, he is not the only president who has attempted to unilaterally assert unconstitutional powers. For instance, during Theodore Roosevelt’s presidency, he wielded unauthorized executive power on the basis of “public policy” by building the Panama Canal.¹⁰⁹

President Theodore Roosevelt often claimed rights to action via his Commander in Chief powers. These powers were becoming more recognized and accepted by legal scholars as there was now an omnipresent army and navy.¹¹⁰ The “Great White Fleet” naval tour occurred during his presidency, and he later released a controversial executive order restricting the Marine Corps to on-shore bases only, causing intense friction between the Legislative and Executive Branches.¹¹¹ President Roosevelt finally acquiesced to Congress’s limitation, thwarting a “battle of the branches” scenario. Later, President Woodrow Wilson unilaterally set a fixed price for procuring the navy’s coal throughout the Navy Department from private parties, and the Supreme Court found that the “owner of coal taken by the government under [the Lever Act], was entitled to the full money equivalent of the property taken, and to be put in as

¹⁰⁸ *Id.*

¹⁰⁹ THEODORE ROOSEVELT, AN AUTOBIOGRAPHY 647 (1913).

¹¹⁰ David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb- A Constitutional History*, 121 HARV. L. REV. 941, 1035 (2008).

¹¹¹ *Id.*

good position pecuniarily as it would have occupied, had its property had not been taken.”¹¹²

A few decades later, *Youngstown Sheet & Tube Co. v. Sawyer* proved to be one of the most influential and still current examples of the Executive’s power in regards to governmental Takings Clause.¹¹³ Although the facts have been scattered across many other cases and law reviews, they will be briefly described here. President Truman directed the seizure and operation of the nation’s steel mills in response to labor union disputes under the rationale that his actions were necessary to “avert a national catastrophe” in the Korean War.¹¹⁴ The Supreme Court found that the President’s preventing labor disputes was under Congress’s jurisdiction and not within the President’s jurisdiction. The President could not use military authorities through executive action to “expand the theater of war” powers as Commander-in-Chief, seizing the steel plants by military force.¹¹⁵ The President’s use of military force could not be “sustained as [an] exercise of [the] President’s military power” and was unconstitutional.¹¹⁶

The outcome may have been very different had the Korean War been ongoing instead of concluded. However, more interesting and resounding was Justice Jackson’s classification concurrence that describes the President’s powers as not being “fixed but [fluctuating], depending upon their disjunction or conjunction with those of Congress.”¹¹⁷ In his concurrence, Justice Jackson proposed an “over-simplified grouping” of the tests to determine the strength of the President’s powers. Within the first classification, the President “acts pursuant to an express or implied authorization of Congress,” and his power is at its height because he “possesses in his own right plus all that Congress [has delegated].”¹¹⁸ Justice Jackson further added that a “seizure [of property] executed by the President pursuant to an Act of Congress

¹¹² *U.S. v. New River Collieries Co.*, 262 U.S. 341, 343 (1923) (quoting *Seaboard Air Line Railway Co. v. U.S.*, 261 U.S. 299 (1923)).

¹¹³ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

¹¹⁴ *Id.* at 582.

¹¹⁵ *Id.* at 587.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 635.

¹¹⁸ *Id.*

would be supported by the strongest presumptions and widest latitude of judicial interpretation," causing almost limitless executive power.¹¹⁹ This first classification is commonly referred to as the President's "high-watermark of power."

This is also the classification to which President Lincoln's taking possession of the railroad and telegraph companies' property lies. Within the second classification, Congress has remained neutral in neither granting nor denying the President authority, but in this classification, the President may "rely upon his own independent powers" during this "twilight" of power where either he or Congress may possess the power to act, but he nonetheless acts first and his actions may be later condemned or allowed by Congress.¹²⁰ As previously discussed, President Thomas Jefferson's actions with procuring boats for war would fall into this category.¹²¹

The third and final classification is the lowest ebb of the executive power for the President. When he wields his power in a way that is "incompatible with the [express] or implied will of Congress," he can only act upon matters that remain after Congress has acted.¹²² In theory, this explanation of power would best be illustrated by the seminal case of *Marbury v. Madison* where the Supreme Court states that the Court may exercise judicial review over the executive branch.¹²³

Justice Jackson's concurrence later became the Supreme Court's majority opinion in *Dames & Moore v. Regan*, 453 U.S. 654 (1981).¹²⁴ In 1979, the Iranian hostage crisis began and President Jimmy Carter acted pursuant to the International Emergency Economic Powers Act (IEEPA) and seized all Iranian assets.¹²⁵ After an agreement ending all litigation between Iran and the U.S., the plaintiff challenged the Executive Branch's powers in making the agreement, claiming the agreement was unconstitutional.¹²⁶ The Supreme Court's

¹¹⁹ *Id.* at 637.

¹²⁰ *Id.* In theory, this approach is similar to the "first in time" domestic relations doctrine where whoever files a parenting plan first "wins," but the plan may be granted or denied by the court.

¹²¹ Barron & Lederman, *supra* note 110.

¹²² *Youngstown Sheet*, 343 U.S. at 637-40.

¹²³ *Marbury v. Madison*, 5 U.S. 137, 162 (1803).

¹²⁴ DANIEL FARBER, *LINCOLN'S CONSTITUTION* 131 (2003).

¹²⁵ *Dames & Moore v. Regan*, 453 U.S. 654, 662 (1981).

¹²⁶ *Id.* at 655.

majority opinion entered into Justice Jackson's previous concurrence.¹²⁷ The Court restated the three classifications of Executive's power, even though the taxonomy would never be completely "black and white."¹²⁸ The Court found that President Carter's actions fell within the first classification and they were "taken pursuant to specific congressional authorization [and were] supported by the strongest presumptions and widest latitude of judicial determination." President Carter acted just as President Lincoln did, through Congress's express authorization.

F. THE CURRENT STATE OF TEMPORARY NECESSITY HAS TRANSFORMED INTO "NATIONAL EMERGENCY."

As a final point, relevant but not separate from the article's dialogue, is the modern executive branch's use of declaring a "national emergency" to justify its actions that may violate the U.S. Constitution. Since Franklin D. Roosevelt's presidency, there has been almost a constant state of "national emergency" that has been renewed by other presidents, including President Truman in 1950, President Nixon in 1970, and even Presidents George W. Bush and Barack Obama.¹²⁹ This "national emergency" is an echo of previous presidents' "temporary necessity" argument. However, Congress has allowed the current day's "national emergency" expansion of power by codifying it in the U.S. Code through the National Emergency Act and International Emergency Economic Powers Act.¹³⁰ These executive proclamations give force to about 470 different provisions of Federal law.¹³¹

Some of these powers include seizing property, organizing and controlling the means of production, seizing commodities, assigning military forces abroad, instituting martial law, seizing and controlling all transportation and

¹²⁷ *Id.* at 668.

¹²⁸ *Id.*

¹²⁹ MICHAEL BADNARIK, *GOOD TO BE KING: THE FOUNDATION OF OUR CONSTITUTIONAL FREEDOM* 72-3 (2004).

¹³⁰ Jason Luong, *Forcing Constraint: The Case for Amending the International Emergency Economic Powers Act* 78 TEX. L. REV. 1181 (2000).

¹³¹ Badnarik, *supra* note 129.

communication, regulating the operation of private enterprise, restricting travel, and ultimately controlling the particularity of American citizens' lives.¹³² Even in the 1970s, members of Congress recognized the executive branch's encroachment upon the U.S. Constitution. Congressman Beck noted that the President's range of powers did and still allows him or Congress to proclaim a national emergency.¹³³

This state of constitutional affairs is the same as with President Lincoln. He was able to seize property, suspend habeas corpus, and control the press; however, in regards to the railroads and telegraph companies, his military possession was both necessary and constitutional. The continued tolerance of allowing the executive branch to usurp its constitutional bounds is the result of congressional inaction and judicial tolerance that must be remedied.¹³⁴ In Lincoln's national emergency of Civil War and even now during the ongoing war on terror, "adherence to constitutional principles is even more warranted during such times 'so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.'"¹³⁵

CONCLUSION

President Lincoln was a man faced with a presidency of epic proportions. His country was on the brink of Civil War, and he was required to act quickly in hopes of the Union's preservation. Congress expressly and constitutionally authorized his taking military possession of the railroad and telegraph companies' property. President Lincoln acted within the historical contextual scope of his powers in regards to this situation. His use of his authorized executive powers created the U.S.M.R.R., a precursor to the U.S. Army's Transportation Corps and the U.S.M.T.S., a division of the Signal Corps. He utilized these bureaus both assisted in bringing an end to the U.S. Civil War as well as progressing war's use of mass transportation and communication. Ultimately, his actions, as

¹³² *Id.* at 73.

¹³³ S. REP. NO. 93-549 (1973).

¹³⁴ Luong, *supra* note 130, at 1200.

¹³⁵ *Id.* at 1213 (quoting *New York v. United States*, 505 U.S. 144, 187 (1992)).

well as the results of the Civil War, impacted case law and future presidents' use of the executive power to the point that now, perhaps the time has come for the legislative and judicial branches to reign in the executive branch's powers to bring the balance and separation of powers back into the constitutional realm.