Law & Politics in Crisis:
Abraham Lincoln's War Powers and Andrew Johnson's Impeachment Trial

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Introduction

Civil War-era history has mistakenly deemphasized the role of law as an autonomous force in shaping the course of events from Abraham Lincoln's expansive assertions of executive power to Andrew Johnson's impeachment trial before the United States Senate. This is even true of the attention legal historians have paid to the period.[1] Many accounts of the era have come to view the law as a mere political tool and legal arguments as simply convenient cover for partisan advocacy. While the unique crisis of the Civil War certainly has the potential to explain such an approach to law, it is at odds with nineteenth century Americans' distinct attachment to the rule of law as a defining component "of their character as a people."[2] Such a theory is also at odds with the facts. Close examination of two moments of distinct constitutional crisis—one in the opening days of the war and another in the midst of Reconstruction—shows that while legal understandings were pushed to their limits, many Americans remained dedicated to or at least constrained by the law as an independent force. This is not to claim that the law was dispositive on every issue for every actor, but to make that claim about any period in American history would similarly ring hollow. Instead, this paper will argue that even in the darkest moments of the Civil War-era, the law mattered. The law shaped Congress' response to Lincoln's expansive claims of executive power. The law constrained Andrew Johnson and Radical Republicans in their clash over Reconstruction. The law set the terms of the debate over the constitutional status

[1] Cynthia Nicoletti, Writing the Social History of Legal Doctrine, 64 Buffalo L. Rev. 121, 124 (2016).

[2] Id. at 126, 135. Lincoln himself adopted this conception of American character in his Lyceum Address where he called for it to be the political religion of the nation that "every American, every lover of liberty, every well wisher to his posterity, swear by the blood of the Revolution, *never to violate in the least particular, the laws of the country*; and never to tolerate their violation by others." Abraham Lincoln, "Address Before the Young Men's Lyceum," January 27, 1838 in 1 Collected Works of Abraham Lincoln 108 available at https://quod.lib.umich.edu/l/lincoln/ [hereinafter CWAL] (emphasis added).

of the Confederate States both during and after the war. The law defined the scope Johnson's impeachment trial and contributed to its outcome.

To understand the force of law in Civil War America, this paper will not primarily focus on legal arguments made by lawyers and judges in traditional legal forums. Such a discussion is certainly worthy of attention and, in fact, the few cases that made it to court have already received much attention.[3] But proving that those in the legal profession continued to care about the law even in the crisis of civil war[4] is insufficient for demonstrating that law itself remained an important force for shaping the outcome of events. Instead, this paper will examine law in the hands of those most likely to convert it into a mere political tool—politicians with pressing political objectives facing unprecedented crises—to show that while it was a tool for some, the law still retained independent force in American politics and society. This paper also will not limit itself to discussing the role of law regarding the great constitutional questions like the proper separation of powers and federalism. Instead it will also analyze the less glamorous, but equally important, influence of law at all its levels – for example, debates over the proper interpretation of statutory provisions, the deployment of legal principles like estoppel, and the reliance on legal reasoning rooted in precedent.

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[3] See e.g., Brian R. Dirck, Lincoln and the Constitution (2012); Johnathan W. White, Abraham Lincoln and Treason in the Civil War: The Trials of John Merryman (2011); Stephen C. Neff, Justice in Blue and Gray: A Legal History of the Civil War (2010); Brian McGinty, Lincoln and the Court (2008); James F. Simon, Lincoln and Chief Justice Taney: Slavery, Secession and the President's War Powers (2006); Mark Neely, The Fate of Liberty: Abraham Lincoln and Civil Liberties (1991).

[4] See, Nicoletti, Writing the Social History of Legal Doctrine, 139 ("In looking at the legal history of the American Civil War, what is reflected from the sources is that American *lawyers* still cared about legal doctrine. They still believed that doctrine constrained them. Claims of exigency and necessity did not overwhelm all of the rules that had ordered life in the United States before the war. At the very least, if American lawyers abandoned doctrinal niceties, they worried mightily about the consequences of doing so.") (emphasis added).

Specifically, Part I of this paper will look to Abraham Lincoln's expansive assertion of executive power in the opening days of the Civil War and Congress' debate over whether to ratify that action, while Part II will fast forward through the remainder of the war to Reconstruction and the impeachment trial of President Andrew Johnson. Both parts will focus on the role law played in the relationship between the administration and Congress, whether the two branches were working together to win the war or at each other's throats to control Reconstruction. Exploring these two moments that bookend the Civil War in tandem provides a unique opportunity to see the importance of law, or lack thereof, to contemporary actors. The first offers an example of a politically aligned President and Congress. The other, a case of practically divided government.[5] One explores a crisis that seemingly required a strong executive claiming expansive power. Another examines an attempt to relegate the presidency to as minimal of a role as possible. One occurred during war, the other in peace. But, at the same time, these two historical moments are close enough temporally that many of the same actors appear in both stories – Andrew Johnson, Senator John Sherman, Benjamin Curtis, and Representative Thaddeus Stevens, to name a few. Both moments also focused the attention of these actors on similar legal issues within the separation of powers—for example, whether Lincoln could exercise Congress' power in their absence, whether Congress could restrict Johnson's removal power, and what was the proper function of the power of impeachment and removal—making it possible to see where their approaches changed with the circumstances and where they stayed the same.

[5] The difference in each President's relations with Congress is easily seen in C-SPAN's 2017 Survey of Presidential Leadership which asked ninety respected historians and lawyers to rank each president in ten categories. In the "Relations with Congress" category Lincoln ranked fourth. Johnson came in dead last. C-SPAN, Presidential Historians Survey 2017, available at https://www.c-span.org/presidentsurvey2017/?category=7.

The two halves of this paper will follow a parallel structure. The first section of each part will provide the historical setting. For Part I, that means a review of the challenge posed by secession and the firing on Ft. Sumter, Lincoln's response to that challenge, and Congress' ultimate ratification of those acts. Part II encompasses an explanation of Johnson and Congress' clash over Reconstruction (or as Johnson would call it, "Restoration"),[6] the strange political alignment of the executive and legislative branches, Congress' attempts to cabin the powers of the presidency, the path to impeachment, and Johnson's acquittal by a single vote. In other words, these sections will explain *what* happened. After that review, each part of this paper will turn to a section on *how* the main events in question (ratification of Lincoln's executive actions and Johnson's impeachment trial) occurred and the role the law played in that process. Specifically, both parts will focus on how the executive and Congress understood their own actions and how they justified them. This section of Part I will examine how the law influenced the Lincoln administration, and Lincoln himself, in justifying his expansive executive actions to Congress. It will then explore how Congress understood and used the law in its session-long-debate of whether to ratify those actions. In Part II, this section will analyze both how the law shaped the clash between Johnson and Congress and how it influenced the Senate's decision in Johnson's impeachment trial. Both sections conclude that law at the constitutional and statutory level played a significant role in both of those processes. In the first half, the law set the outer limits of what actions Lincoln was willing to take, defined how the administration attempted to justify those actions, and drove Congress' debate over ratification. In the second half, the law fueled the disagreement between Johnson and Congress, channeled that clash, and served as the central focus of the impeachment trial.

[6] Eric L. McKitrick, Andrew Johnson and Reconstruction 176, 188 (1960).

Part I: Abraham Lincoln, Congress, the Civil War, and War Powers

Section 1: The Crisis of Civil War – Lincoln Acts, Congress Ratifies

A. HISTORIOGRAPHY

In the opening days and months of the Civil War, President Abraham Lincoln responded to secession with expansive exercises of executive power. He authorized the suspension of habeas corpus. He declared a blockade of the Confederacy. He spent money from the treasury without an appropriation. He increased the size of the regular army and navy. He did all of this not only in the absence of congressional authorization, but in the absence of Congress itself. These acts were legally and constitutionally problematic. Moreover, Lincoln was not merely stretching the wording of a statute with a questionable interpretation, he was claiming legal authority under the Constitution to act in the absence of any congressional enactment. But Lincoln would seek, and Congress would ultimately provide, ratification of most of these actions.

Many scholars have treated that as the full story. They highlight the problem, almost as briefly as the paragraph above, provide a cursory discussion of Lincoln's defense, and then move on.[7] Commonly, this discussion is a mere introduction to a larger debate over whether Lincoln was a dictator[8] or to a discussion of the proper scope of executive power that reaches far beyond

[7] See e.g. Arthur M. Schlesinger, War and the Constitution: Abraham Lincoln and Franklin D. Roosevelt in Gabor S. Boritt, Lincoln the War President 156 (1992).
[8] See e.g. Sidney M. Milkis & Michael Nelson, The American Presidency: Origins & Development, 1776–2011 166–73 (6th ed. 2012); James G. Randall, Lincoln in the Role of Dictator, 28 S. Atlantic Q. 236 (1929); Michael Les Benedict, Lincoln, The Powers of the Commander in Chief, and the Constitution 29 Cardozo L. Rev. 927 (2008); Herman Belz, Lincoln and the Constitution: The Dictatorship Question Reconsidered in Kenneth L. Deutsch & Joseph R. Fornieri, Lincoln's American Dream: Clashing Political Perspectives 289–303 (2005).

the opening days of the war and actions taken in Congress' absence.[9] When there is extended discussion of Lincoln's early actions, instead of a focus on the Emancipation Proclamation,[10] it usually focuses on *habeas corpus*, as that action engendered the longest-lasting opposition.[11] There is little discussion of Congress' reaction to Lincoln's other measures, like his unilateral expansion of the Army and Navy and the spending of money without an appropriation. For example, James Randall's *Constitutional Problems Under Lincoln* relegates the appropriations issue to a mere footnote.[12] James McPherson's *Tried by War* dedicates only three pages to the expansion of the army and Lincoln's spending in Congress' absence.[13] And when these issues are discussed in depth, analysis of Lincoln's approach tends to dominate with a few exceptions.[14] Much of the existing historiography also downplays the importance of law and legal thinking in favor of facts and necessity determining the course of conduct.[15] Overall, while much ink has been spilt on the Civil War and Lincoln, insufficient attention has been paid to the relationship between Congress and the executive in the opening days of war. That relationship, and specifically Lincoln's justification of his actions and Congress' debate over whether to ratify

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[9] See e.g., Benjamin A. Kleinerman, The Discretionary President: The Promise and Peril of Executive Power (2009); Joseph M. Bessette & Jeffrey K. Tulis, On the Constitution, Politics and the Presidency in The Constitutional Presidency 17–27 (Bessette & Tulis eds. 2009).
[10] See e.g., Allen C. Guelzo, Lincoln's Emancipation Proclamation: The End of Slavery in America (2006).
[11] See e.g., Johnathan W. White, Abraham Lincoln and Treason in the Civil War: The Trials of John Merryman (2011); Brian McGinty, The Body of John Merryman: Abraham Lincoln and the Suspension of Habeas Corpus (2011); Mark Neely, The Fate of Liberty: Abraham Lincoln and Civil Liberties (1991).
[12] James G. Randall, Constitutional Problems Under Lincoln 36 n. 15 (1926).
[13] James McPherson, Tried by War: Abraham Lincoln as Commander in Chief 23–25 (2008).
[14] Louis Fisher, Presidential War Power 47–51 (3rd ed. 2013) (focusing on Lincoln); but see David P. Currie, The Civil War Congress 73 U. Chi. L. Rev. 1131 (focusing on Congress).
[15] See e.g., William Dunning, Essays on the Civil War and Reconstruction 18–19 1931 ("The general concurrence in the avowed ignoring of the organic law emphasizes the completeness of the revolution which was in progress. The idea of a government limited by the written instructions of a past generation had already begun to grow dim in the smoke of battle.")

those actions, should not be overlooked. It provides an important window into the Civil War era and demonstrates that even in a moment of crisis, the law still mattered. Prior to exploring how Lincoln justified these acts and the details of Congress' response, it is necessary to understand the general outline and magnitude of what Lincoln did and the basic constitutional problems it presented beyond the brief paragraph above.

B. LINCOLN'S EXECUTIVE ACTIONS IN THE OPENING DAYS OF THE WAR

On April 14, 1861, official word reached Washington, D.C. and President Abraham Lincoln that the garrison at Fort Sumter had surrendered.[16] With the first shots of the Civil War fired, the administration sprang into action. On April 15, Lincoln nationalized 75,000 state militia members.[17] In the same proclamation, he called for an emergency session of Congress to assemble on the symbolic, but distant, date of July 4, 1861.[18] Lincoln, however, would not wait for Congress to prosecute the war. As he would later explain to Congress,

> There was no adequate and effective organization for the public defense. Congress had indefinitely adjourned. There was no time to convene them. It became necessary for me to choose whether, using only the existing means, agencies and processes, which Congress provided, I should let the Government fall into ruin, or whether, availing myself of the broader powers conferred by the Constitution in cases of insurrection, I would make an effort to save it.[19]

Lincoln chose the latter. In describing his options in this way, however, Lincoln conceded that there was no statutory basis for what he had done. He was relying entirely on the Constitution.

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[16] James McPherson, Tried by War, 22.
[17] Philip Shaw Paludan, The Presidency of Abraham Lincoln 70 (1994).
[18] Abraham Lincoln, "Proclamation Calling Militia and Convening Congress," April 15, 1861, in Lincoln on War, (ed. Harold Holzer 2011), 85-86.
[19] Abraham Lincoln, "A Message to Congress from President Lincoln," May 27, 1862, in 5 CWAL 241 (emphasis added).

On April 19, Lincoln declared a blockade of the seven seceded states.[20] On May 3, Lincoln called for 43,034 three-year volunteers and grew the regular Army and Navy by 22,714 and 18,000 men, respectively. As part of his expansion of the Navy Lincoln direct the commandants of the Boston, Philadelphia and New York Navy yards "to purchase or charter, and arm as quickly as possible, five steamships, for purposes of public defense."[21] Lincoln also

> authorized and directed the Secretary of the Treasury to advance, without requiring security, two millions of dollars of public money to John A. Dix, George Opdyke and Richard M. Blatchford, of New York to be used by them in meeting such requisitions as should be directly consequent upon the military and naval measures for the defense and support of the Government, requiring them only to act without compensation, and to report their transactions when duly called upon.[22]

On April 27, Lincoln suspended the writ of *habeas corpus* between Philadelphia and Washington. By September 24, 1862, that suspension had expanded to encompass the entire country.[23]

These actions raised serious legal and constitutional problems, particularly regarding the separation of powers. When Lincoln declared a blockade he was engaging in an act of war absent a congressional declaration of war or congressional recognition of a civil war.[24] When he suspended *habeas corpus*, he was arguably exercising a congressional power found in Article I.[25] There was, however, room for legal argument regarding these actions—and such argument

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[20] Paludan, The Presidency of Abraham Lincoln, 70.
[21] Lincoln, "A Message to Congress from President Lincoln," May 27, 1862, in 5 CWAL 240, 241.
[22] Id. at 242–43; Randall, Constitutional Problems Under Lincoln, 36 n. 15.
[23] McPherson, Tried by War, 27.
[24] U.S. Const. art. I., § 8.
[25] U.S. Const. art. I., § 9.

occurred. As Lincoln himself noted, the *habeas corpus* clause was in the passive voice and intended for an emergency, while the blockade could have been justified as either a closing of the nation's ports or as a response to an existing state of war.[26] Lincoln's other actions were more obviously problematic. When he increased the size of the regular Army and Navy, Lincoln was exercising Congress' constitutional power "to raise and support Armies" and "to provide and maintain a Navy."[27] When Lincoln spent money on his own authority he ran afoul of the constitutional prohibition that "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[28] No such appropriation had been made. Instead, Congress had explicitly barred any "contract or purchase . . . unless [it was] authorized by law or [] under an appropriation adequate to its fulfilment.[29] In short, from the firing on Fort Sumter to the assembling of Congress on July 4, Lincoln conducted an executive war in the absence of Congress. Lincoln himself admitted that some of his actions "were without any authority of law," but justified them on the grounds that he had not done anything "beyond the constitutional

[26] Abraham Lincoln, "Message to Congress in Special Session," July 4, 1861 in 4 CWAL 421; Randall, Constitutional Problems Under Lincoln, 123; John Fabian Witt, Lincoln's Code: The Laws of War in American History 144-151 (2012). This argument regarding habeas corpus continues to this day. See e.g., Michael S. Paulsen, The Constitution of Necessity, 79 Notre Dame L. Rev. 1257, 1269–70 ("Like many of the Constitution's empowerments and limitations, it is written somewhat awkwardly, in passive voice . . . The clause does not specify who may exercise the power to suspend. Chief Justice Taney offered good arguments, perhaps even persuasive ones, for believing the power to be a congressional one . . . But Lincoln had some convincing counterarguments."); Saikrishna Bangalore Prakash, Imperial from the Beginning: The Constitution of the Original Executive 216–218 (2015) (noting continued debate but concluding "the Constitution does not authorize the president to suspend.").
[27] U.S. Const. art. I., § 8.
[28] U.S. Const. art I., § 9.
[29] An Act of March 2, 1861, ch LXXXIV 12 Stat. 214, 220 §10. This act did contain an exception for the "War and Navy Departments," but that exception was limited to "clothing, subsistence, forage, fuel, quarters, or transportation" and that exception could "not exceed the necessities of the current year." Id.

competency" of Congress.[30] Thus, he appealed to Congress to recognize the "public necessity" and "popular demand" behind his actions and hoped that body would ratify them after the fact.[31]

At first glance, Lincoln's appeals to necessity and public opinion would appear to confirm the view that when the war came, the law ceased to matter in a meaningful way. Lincoln was going to do what was needed to preserve the Union regardless of the statutory or constitutional basis for it. The Union Army needed men and weapons, and Lincoln would ensure that they had them. One might even find the shunting of the law aside to be a reasonable, or perhaps even an appropriate, response to the crisis at hand: eleven states, covering 800,000 square miles, eventually seceded. Much of the nation's military establishment went with them, and the remainder was poorly equipped and scattered along the frontier or sailing across the globe. While the North did have an advantage in manpower, manufacturing, shipping, and railroad mileage, among other factors, the strategic situation necessitated an offensive war.[32] The Union could not merely defend their borders as the Confederacy could; they needed to conquer, subdue, and control a vast territory defended by hostile armies.[33] But the law did still matter. The close examination of Lincoln's justification for and Congress' debate over those actions provided by section two of this paper reveals that law had not disappeared from the equation.

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[30] Lincoln, "To the Senate and House of Representatives," May 26, 1862 in 5 CWAL 240, 242; Lincoln, "Message to Congress in Special Session," July 4, 1861 in 4 CWAL 421, 429.
[31] Lincoln, "Message to Congress in Special Session," July 4, 1861 in 4 CWAL 421, 429. Lincoln had some reason to hope that they would ratify his actions given that even before the surrender of Fort Sumter, Republican Senator Lyman Trumbull had proposed a resolution that "it is the duty of the President to use all the means in his power to hold and protect the public property of the United States." Cong Globe, 37th Cong, 4th Sess 1519 (March 28, 1861) (Enforcement of the Laws).
[32] Daniel Farber, Lincoln's Constitution 115-18 (2003); Allen C. Guelzo, Fateful Lightning: A New History of the Civil War and Reconstruction 152 (2012).
[33] Guelzo, Fateful Lightning, 153.

C. CONGRESS RATIFIES LINCOLN'S ACTIONS

Congress' reaction to Lincoln's expansive use of executive power shows that many of its members took the legal implications of what Lincoln had done seriously. Congress was not a mere rubber stamp. While Congress' nearly immediate move to ratify Lincoln's questionable actions might at first glance be taken as a sign that Congress had ceased to care about strict legality in the face of civil war, the congressional debate over executive power that came to dominate its special session reveals that interpretation to be far from the truth. Part I Section 2 of this paper will explain that debate in depth, but before doing so it is first necessary to understand the basic elements of what Congress did regarding Lincoln's actions.

Congress assembled for the first time during the war on July 4, 1861 after being called into special session by Lincoln.[34] That date was itself controversial, with some arguing that Lincoln should have brought Congress back to Washington earlier. During the special session, Democratic Congressman Clement Vallandigham of Ohio pointedly argued that except for calling forth the militia, every other one of Lincoln's acts should "have been postponed . . . until the meeting of Congress."[35] Had the circumstances demanded immediate action, he thought "Congress should forthwith have been assembled."[36] There was, however, one main flaw with this critique – not all of the House had yet been elected. At the time, seven states held their elections in May and June as Congress usually did not meet until December.[37] Congressman Vallandigham partially acknowledged this and admitted that calling Congress earlier would have

[34] U.S. Const. art. II, §3 ("[the President] may, on extraordinary Occasions, convene both Houses, or either of them").
[35] Cong Globe, 37th Cong, 1st Sess 58 (July 10, 1861).
[36] Id.
[37] McPherson, Tried by War, 23.

meant that "two or three states should not have been represented."[38] He simply thought it was "better, a thousand times" to have unrepresented states than to allow "the Constitution [to] be repeatedly and flagrantly violated."[39] This was a fair criticism, but given the source it should be taken with a grain of salt.[40] Lincoln's decision to wait for a complete Congress was also quite justifiable. Yes, Lincoln gained the opportunity to exercise expansive executive power in the absence of Congress, but a fair reading of events indicates that to be an incidental benefit to the executive and not the prime motive behind Lincoln's decision.[41]

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[38] Cong Globe, 37th Cong, 1st Sess 58 (July 10, 1861).
[39] Id.
[40] Vallandigham became a leading Peace Democrat and was famously convicted by a military tribunal of violating General Burnside's General Order No. 38 which forbid "express or implied treason" and "declaring sympathies for the enemy." Lincoln commuted Vallandigham's sentence and exiled him to the Confederacy, but Vallandigham escaped from there to Canada where he ran a campaign for Governor of Ohio as the Democratic nominee. James McPherson, Battle Cry of Freedom: The Civil War Era 591–98 (1988).
[41] Lincoln's failure to assemble Congress earlier is still debated by historians today. Philip Shaw Paludan questions why Lincoln did not call Congress together as the crisis at Fort Sumter grew. He points out that the Senate was in special session until March 28 confirming Lincoln's nominations, and that while the House had adjourned on March 3 all of its members except those living on the West Coast could have reached Washington within 10 days. Paludan, The Presidency of Abraham Lincoln, 58. The dissent in the *Prize Cases* offered a slightly longer time line, but made the same general point: "Congress can be assembled within any thirty days, if the safety of the country requires that the war power shall be brought into operation." The Prize Cases, 67 U.S. 635, 693 (1863) (Nelson, J., Dissenting). James G. Randall and Arthur M. Schlesinger, Jr. both take the position that the delay was a "deliberate" move by Lincoln to avoid congressional interference. Randall, Constitutional Problems Under Lincoln, 52; Arthur M. Schlesinger, Jr., The Imperial Presidency 58 (2004). Challenging that critique other historians have argued that the electoral calendar at the time made assembling Congress earlier impossible because not all representatives had yet been elected. James McPherson explains, under "the electoral calendar at that time. Most states held congressional elections in the fall of even-numbered years . . . But Congress itself did not meet in its first regular session until December of the following year, thirteen months later." Consequently, "several states held their congressional elections in the spring of odd-numbered years. In 1861, seven states remaining in the Union held their congressional elections from March to June." Thus, assembling Congress at an earlier date would mean assembling an incomplete Congress. McPherson, Tried by War, 23–24. Allen C. Guelzo agrees: "Nor could Congress be assembled at the drop of a hat for the emergency. Unlike the Senate, the representatives in the House were still elected in 1860 on a staggered schedule that varied from state to state . . . there was little hope of getting the new Congress together

The very day that Congress assembled, as one of the very first matters, Republican Senator Henry Wilson of Massachusetts informed the Senate that the next day he would introduce "A bill to ratify and confirm certain acts of the President for suppression of insurrection and rebellion."[42] One month later on August 6, Congress passed the following act:

> all the acts, proclamations and orders of the President [made after March 4, 1861] respecting the army and navy of the United States, and calling out or relating to the militia or volunteers from the States, are hereby approved and in all respects legalized and made valid, to the same intent and with the same effect as if they had been issued and done under the previous express authority and direction of the Congress of the United States.[43]

In the Senate, on the direct question of whether to add this section to the bill in question the vote was 37 – 5. Only Senators John C. Breckinridge of Kentucky,[44] Jesse David Bright of Indiana,[45] Anthony Kennedy of Maryland, James Pearce of Maryland, and Lazarus W. Powell of Kentucky voted against the language.[46] No Republican senator voted against the measure. In the House, on the direct question of whether to remove this language from the bill, only 19 Congressmen voted

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before July, when a number of crucial border-state elections would finally be complete." Guelzo, Fateful Lightning, 141–42. Factually, McPherson and Guelzo appear to have the better of this argument with Paludan seeming to miss the difference in the Senate and House's electoral calendars. Randall and Schlesinger, however, are correct to point out that the result of all of this was that Lincoln was able to operate without congressional interference for four months.

[42] Cong Globe, 37th Cong, 1st Sess 2 (July 4, 1861) (Notice of Bills).

[43] An Act to Increase the Pay of the Privates in the Regular Army and I the Volunteers in the Service of the United States, and for other Purposes, ch. LXIII 12 Stat. 326 §3 (1861).

[44] Senator Breckinridge was unanimously expelled from the Senate on December 4, 1861 for becoming a Brigadier General in the Confederate Army. He had, however, submitted a letter of resignation to the Senate. U.S. Senate Historical Office, United States Senate Election, Expulsion and Censure Cases: 1793-1990 102–03 (1995).

[45] Senator Bright was expelled from the Senate on February 5, 1862 for disloyalty to the Union based on a letter he wrote to Jefferson Davis. Id. at 106–08.

[46] Cong Globe, 37th Cong, 1st Sess 443 (Aug. 5, 1861) (Increase Army Pay). Not all Senators voted.

to do so while 74 voted to retain the language.[47] Once again, no Republican voted against the language.

It would be easy, but incorrect, to interpret these lopsided votes to quickly ratify Lincoln's actions as a decision divorced from the law and rooted entirely in politics. David P. Currie, in describing the history of the special session, put it thus: "There was less debate than one might have expected, and it consisted largely of objections. Confident that they would ultimately prevail, supporters of the resolution hardly bothered to defend it."[48] Currie is certainly correct that attacks on ratification occupied more floor time than defenses, but that ignores the fact that the administration had already provided a defense. The two branches did not operate in a vacuum. Rather, they were in conversation with one another. Representatives who supported Lincoln and his request for ratification could let the President speak for himself. Taking that into account, there was in fact extensive discussion that stretched over the entire special session of Congress regarding the legality of Lincoln's actions and the legal implications of ratifying his conduct.[49] That discussion is worth exploring in detail.

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[47] Cong Globe, 37th Cong, 1st Sess 448 (Aug. 5, 1861) (Increase Army Pay). The following representatives voted to remove the language: William Allen of Ohio, Sydenham E. Ancona of Pennsylvania, George H. Browne of Rhode Island, Charles B. Calvert of Maryland, Samuel S. Cox of Ohio, John W. Crisfield of Maryland, James S. Jackson of Kentucky, Philip Johnson of Pennsylvania, Henry May of Maryland, Warren P. Noble of Ohio, George H. Pendleton of Ohio, James S. Rollins of Missouri, George K. Shiel of Oregon, Edward H. Smith of New York, Clement Vallandigham of Ohio, Daniel W. Voorhees of Indiana, William H. Wadsworth of Kentucky, Elijah Ward of New York, and Edwin H. Webster of Maryland. Id.

[48] David P. Currie, The Civil War Congress 73 U. Chi. L. Rev. 1131, 1136.

[49] Given the limited attention historians and legal scholars have paid to the details of congressional ratification in favor of other topics, discussed *supra* Part I, Section 1, A it is unsurprising that Currie reached this conclusion.

Section 2: Ratification – A Legal Debate

A. ABRAHAM LINCOLN'S JUSTIFICATION[50]

President Lincoln and his administration recognized the legal problems inherent in the executive actions taken during the opening days of the war. The administration did not, however, simply cry "necessity" and claim that illegal conduct was justified by unprecedented crisis. Yes, Lincoln did make an argument rooted in necessity and that argument certainly served a political role as part of Lincoln's defense of expansive executive power. But his necessity argument also sounded in both natural law and constitutional law. A close examination of the Lincoln administration's communication with Congress demonstrates that Lincoln was addressing the problem presented by his early actions as a legal one. He was looking to natural law and the text, structure, and history of the Constitution to justify what he had done.

From the outset, Lincoln acknowledged that his actions in the opening days of the war would be subject to review by Congress. For example, Lincoln's Proclamation of Blockade explained that he was acting under his own authority, but only "until Congress shall have assembled and deliberated on the said unlawful proceedings."[51] Similarly, in his Proclamation Calling for Volunteers, Lincoln fully conceded that his decision "will be submitted to Congress as soon as assembled."[52] Lincoln saw the legal problems in his actions that only Congress could

[50] This section of the paper, with some modification to the argument, is substantially taken from Thomas J. Sanford, Abraham Lincoln and Presidential War Powers, in Center for the Study of the Presidency & Congress Fellows Review 3–23 (Andrew Steele ed., 2013) (exploring Lincoln's understanding of executive war powers based upon his writings, speeches and actions throughout the war); Thomas J. Sanford, Abraham Lincoln and Presidential War Powers (2013) (unpublished) (on file with Washington & Lee University) (same, but also applying Lincoln's theory to his approach to the Emancipation Proclamation).

[51] Abraham Lincoln, "Proclamation of a Blockade," April 19, 1861 in 4 CWAL 338 (blockading the then existing Confederate States).

[52] Abraham Lincoln, "Proclamation Calling for 42,034 Volunteers," May 3, 1861 in 4 CWAL 354 (calling volunteers into service).

rectify. He was not arguing that the crisis had suspended the Constitution and laws and thus nullified those legal problems. Nor did Lincoln claim the authority to act outside of the Constitution.

Once Congress assembled, Lincoln immediately justified his actions to that co-equal branch based on his reading of the Constitution's separation of powers.[53] This justification primarily came from Lincoln's July 4 Message to Congress, which argued in both political and legal terms with the line between the two blurring at times, and the Opinion of Attorney General Bates.[54] In the July 4 Message, Lincoln quickly reminded Congress of the crisis he faced and argued that the actions he took were "indispensable" to fulfilling his constitutional "duty" of preserving the "Federal Union."[55] Secession had made it so that "no choice was left but to call out the war power of the Government and so to resist force employed for its destruction by force for its preservation."[56] This first part of the message in emphasizing the crisis faced can be misinterpreted as Lincoln looking outside the letter of the law to the demands of the crisis to defend his war measures. But Lincoln was actually making a legal argument about the constitutional powers of the president – specifically, he had a constitutional duty to preserve the Union and the Constitution implied the power to fulfill that duty. In the case of the Civil War, that meant a "war power."

Lincoln argued for a constitutional "war power" to do that which was indispensably necessary to meet the obligations imposed on the executive by the Constitution. There were three main elements to Lincoln's understanding of the war power. First, the action had to be necessary

[53] Abraham Lincoln, Message to Congress in Special Session, July 4, 1861 in 4 CWAL 421–41.
[54] Id.; 10 Op. Att'y Gen. 74 (July 5, 1861) (Attorney General Edward Bates).
[55] Lincoln, Message to Congress in Special Session, July 4, 1861 in 4 CWAL 421–41.
[56] Id.

or indispensable to the preservation of the Constitution.[57] Second, the president alone had discretion to determine what action was necessary and when that action became necessary. Third, presidential war powers could only be exercised in a time of war.[58]

Lincoln, with the help of Attorney General Bates, provided a seven-part constitutional justification for the existence of this power that at times blended into a natural law argument. They relied on the president's place in the constitutional order established by the Article II vesting clause,[59] the presidential oath,[60] the Take Care Clause,[61] the Commander-in-Chief

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[57] Lincoln's conception of necessity does not track the interpreted meaning of necessary in the Necessary and Proper Clause. Rather for Lincoln necessity meant something was indispensable. It meant a goal could not be accomplished without that measure. See Sanford, Abraham Lincoln and Presidential War Powers in Center for the Study of the Presidency and Congress, 5–10.

[58] See id. for a further discussion of these elements.

[59] 10 Op. Att'y Gen. 74, 81–82 (July 5, 1861) (Attorney General Edward Bates) ("The duties of the office comprehend all the executive power of the nation, which is expressly vested in the President by the Constitution, (article 2, sec. 1,) and, also, all the powers which are specially delegated to the President, and yet are not, in their nature, executive powers . . . The executive powers are granted generally.").

[60] Lincoln, "Message to Congress in Special Session," July 4, 1861 in 4 CWAL 430 ("*would not the official oath be broken*, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it?") (emphasis added). For Lincoln's fullest explanation of this position see Abraham Lincoln, "Letter to Albert G. Hodges," April 4, 1864 in 7 CWAL 281 ("It was in the oath I took that I would, to the best of my ability, preserve, protect, and defend the Constitution of the United States. I could not take the office without taking the oath. Nor was it my view that I might take an oath to get power, and break the oath in using the power . . . I did understand however, that my oath to preserve the constitution to the best of my ability, imposed upon me the duty of preserving, by every indispensable means, that government – that nation – of which that constitution was the organic law.").

[61] Attorney General Bates combined the uniqueness of the president's oath to "preserve, protect, and defend" the Constitution as opposed to merely having to "support it" and the fact that the president was the only officer subject to the Take Care Clause to argue that the executive is "above all other officers, the guardian of the Constitution – its preserver, protector, and defender." 10 Op. Att'y Gen. 74, 82 (July 5, 1861) (Attorney General Edward Bates); Lincoln, "Message to Congress in Special Session," July 4, 1861 in 4 CWAL 430 ("The whole of the laws which were required to be faithfully executed, were being resisted, and failing of execution, in nearly one-third of the States. Must they be allowed to finally fail of execution, even had it been perfectly clear, that by the use of the means necessary to their execution, some single law, made in such extreme tenderness of the citizen's liberty, that practically, it relieves more of the guilty, than of the innocent, should, to a very limited extent, be violated? To state the question more

Clause,[62] the guarantee of republican government,[63] the Constitution's ability to preserve itself (an argument which resembles John Locke and Thomas Jefferson's natural law arguments for executive prerogative),[64] and in a government of enumerated powers the missing grant of power the executive to destroy the country by not doing all that he can to prevent secession.[65]

For Lincoln, this was not an empty legal argument. There was substantive content to the idea that an action could be indispensably necessary to fulfilling a constitutional duty. Some acts would not qualify. For example, late in 1861 Lincoln desired to appoint chaplains to military hospitals. But Lincoln recognized there was "no law conferring the power upon me to appoint

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directly, are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?").

[62] 10 Op. Att'y Gen. 74, 92 (July 5, 1861) (Attorney General Edward Bates) ("He is the chief civil magistrate of the nation, and being such, and because he is such, he is the constitutional commander-in-chief of the army and navy, and thus, within the limits of the Constitution, he rules in peace and commands in war, and at this moment he is in the full exercise of all the functions belonging to both those characters.").

[63] Lincoln makes this point explicitly in his July 4 Message. Lincoln, "Message to Congress in Special Session," July 4, 1861 in 4 CWAL 440 ("The Constitution provides, and all the States have accepted the provision, that 'The United States shall guarantee to every State in this Union a republican form of government.' But, if a State may lawfully go out of the Union, having done so, it may also discard the republican form of government; so that to prevent it going out, is an indispensable means, to the end, of maintaining the guaranty mentioned; and when an end is lawful and obligatory, the indispensable means to it, are also lawful and obligatory.").

[64] Lincoln, "Message to Congress in Special Session," July 4, 1861 in 4 CWAL 426 ("It presents *to the whole family of man*, the question, whether a constitutional republic, or a democracy—a government of the people, by the same people—can, or cannot, maintain its territorial integrity, against its own domestic foes. It presents the question, whether discontented individuals . . . [can] practically put an end to free government upon the earth. It forces us to ask: 'Is there, in all republics, this inherent, and fatal weakness?' '*Must a government, of necessity, be too strong for the liberties of its own people, or too weak to maintain its own existence*?' So viewing the issue, no choice was left but to call out the war power of the Government; and so to resist force, employed for its destruction, by force, for its preservation.") (emphasis added).

[65] Lincoln made this argument in his First Inaugural prior to exercising expansive executive power. Abraham Lincoln, "First Inaugural," March 4, 1861 in 4 CWAL 270 ("The Chief Magistrate derives all his authority from the people and they have conferred none upon him to fix terms for the separation of the States. The people themselves can do this also if they choose; but the executive, as such, has nothing to do with it. His duty is to administer the present government, as it came to his hands, and to transmit it, unimpaired by him, to his successor.").

them."[66] While Lincoln felt an "intrinsic propriety" to making such an appointment, doing so was not indispensably necessary to fulfilling his constitutional duty to save the Union and preserve the Constitution.[67] Thus, Lincoln could not act. He could only encourage volunteering and "recommend that Congress" take action itself.[68] Lincoln's position was also not the most pro-executive that he could have adopted, which indicates the law was doing some work to constrain the administration.[69]

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[66] Abraham Lincoln, "Letter to F. M. Magrath," Oct. 30, 1861 in 5 CWAL 8–9; Abraham Lincoln, "Form Letter to Chaplains," Dec. 3, 1861 in 5 CWAL 53–54.
[67] Id.
[68] Id.
[69] Somewhat surprisingly President Thomas Jefferson had advocated for an even more expansive understanding of executive power. Like Lincoln, Jefferson spent money from the treasury without a congressional appropriation. In 1807, the HMS Leopard fired on the USS Chesapeake after the American ship refused a British demand to search for deserters. President Jefferson responded by banning armed British ships from U.S. waters, calling on governors to ready their militia quotas, and, most importantly, he spent money without a congressional appropriation to ready the country for war. He explained, "The moment our peace was threatened, I deemed it indispensable to secure greater provision of those articles of military stores with which our magazines were not sufficiently furnished." Jefferson thought his actions were necessary to defend the country. As such, he reached the conclusion that "the legislature, feeling the same anxiety for the safety of our country so materially advanced by this precaution, will approve, when done, what they would have seen so important to be done, if then assembled." Jon Meacham, Thomas Jefferson: The Art of Power 425–26 (2012); Jeremy David Bailey, Executive Prerogative and the Good Officer in Thomas Jefferson's Letter to John B. Colvin, 34:4 Presidential Studies Quarterly 743 (December 2004). Jefferson acted and expected ratification based on the sound policy behind his decision, but Congress was under no obligation to provide it. Jefferson was not claiming to have had the legal authority to take this action from the start.

Jefferson's theory of executive power and the separation of powers supported his practice. In his 1810 letter to John B. Colvin, Jefferson explained "Ought the Executive, in that case, and with the foreknowledge, to have secured the good to his country, and to have trusted to their justice for the transgression of the law? I think he ought, and that the act would have been approved." Thomas Jefferson, Letter to John B. Colvin, September 20, 1810. Jefferson made this point again in a letter to Senator John C. Breckinridge Sr. regarding the Louisiana Purchase. Jefferson admitted that in purchasing Louisiana he had "done an act beyond the Constitution," but maintained the act truly "advance[d] the good of their country." He called on "the Legislature" to follow his lead and "risk[] themselves like faithful servants . . . and throw themselves on their country for doing for them unauthorized what we know they would have done themselves had they been in a situation to do it." He thought the executive and Congress in this situation should act like "a guardian . . . of his ward," but acknowledged that their ward

The legal basis of Lincoln's defense of his actions is also seen in how he presented them to Congress in his July 4 Message. Lincoln recited what he had done and then broke those actions into three legal categories. First, he pointed to his calling of the militia and his declaration of blockade. These acts Lincoln thought were "strictly legal." Second, Lincoln explained that he had called for three-year volunteers and increased the size of the regular Army and Navy. Here, Lincoln did not maintain absolutely that his acts were strictly legal. Instead he argued that "[t]hese measures, whether strictly legal or not, were ventured upon under what appeared to be a popular demand and a public necessity." Lincoln justified taking these

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could "disavow them." Jefferson concluded, "I thought it my duty to risk myself for you," but he maintained "we shall not be disavowed by the nation and their act of indemnity will confirm & not weaken the Constitution." Thomas Jefferson, Letter to John C. Breckinridge Sr., August 12, 1803. Political scientists have frequently linked Jefferson and Lincoln's theories. See e.g., Benjamin A. Kleinerman, The Discretionary President: The Promise and Peril of Executive Power 148–187 (2009); Arthur M. Schlesinger, Jr., The Imperial Presidency, 60 (1973). While they are certainly in the same vein, there are critical distinctions that show Lincoln's approach had substantive limits which in turn indicates it was not a legal theory invented for the sole purpose of justifying anything Lincoln may want to do in prosecuting the war.

Jefferson's theory went much further than Lincoln's. First, Jefferson would allow indispensable executive action in violation of the law to achieve "the good to his country." Lincoln instead required that action to be indispensable to the executive fulfilling his constitutional duties. A mere policy benefit was not enough. Second, Jefferson's theory was not rooted in the text of the Constitution, while Lincoln always maintained that his actions were within the Constitution even if not strictly legal. Third, Lincoln only claimed the authority to do that which Congress could do itself. He did not claim the authority to go beyond Congress' constitutional power. Jefferson on the other hand would allow "an act beyond the Constitution." Thus, Lincoln's theory only allowed for a violation of the horizontal separation of powers between the different branches of the federal government, it did not countenance a violation of the vertical separation between the federal government and the states. Fourth, Lincoln limited his theory to the executive who could seek ratification from and be held accountable by Congress, while Jefferson would also allow Congress to act beyond its enumerated power to then seek affirmation from the people themselves.

Jefferson's precedent shows that Lincoln could have made an even more expansive claim to power, particularly given how much greater of a crisis he faced. But, he did not. Lincoln instead limited his argument to one that could operate within the Constitution. While his legal and constitutional argument may not be compelling, his effort to make such an argument instead of just asserting as much power as possible shows that the law did have a constraining effect on his administration.

potentially illegal actions on the grounds that "nothing has been done beyond the constitutional competency of Congress" and that he trusted "Congress would readily ratify them."[70] That was an important limitation to Lincoln's legal theory – he was not claiming authority to act beyond the scope of the federal government's power. Third, Lincoln turned to the suspension of habeas corpus. He admitted that the "legality" of the suspension had been questioned and acknowledged attacks on him for violating the law when it was his duty to "take care that the laws be faithfully executed." Lincoln, however, reframed the question by weighing competing duties and illegalities. He asked, "Are all the laws but one to go unexecuted, and the Government itself go to pieces lest that one be violated? Even in such a case, would not the official oath be broken if the Government should be overthrown when it was believed that disregarding the single law would tend to preserve it?" These rhetorical questions led him to conclude that regarding habeas, "It was not believed that any law was violated."[71] This division of his actions into "strictly legal," "whether strictly legal or not," and questionable legality reveals the continuing importance of law even in civil war. Lincoln's approach to the problem was a legal one. He did not group his actions by how necessary they were or by the magnitude of their effect. He grouped them by their legal status. Tellingly, the intensity of congressional debate over these actions also tended to align with the legal categories Lincoln placed them in – those that were strictly legal received less debate than those that were questionable.

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[70] Lincoln, "Message to Congress in Special Session," July 4, 1861 in 4 CWAL 421–41. This view is somewhat ironic given that in his Lyceum Address Lincoln had called for it to be the political religion of the nation that "every American, every lover of liberty, every well wisher to his posterity, swear by the blood of the Revolution, *never to violate in the least particular, the laws of the country*; and never to tolerate their violation by others." Abraham Lincoln, "Address Before the Young Men's Lyceum," January 27, 1838 in 1 CWAL 108.

[71] Lincoln, "Message to Congress in Special Session," July 4, 1861 in 4 CWAL 421–41.

Even in the category of questionable legality, Lincoln did not concede that his actions were illegal. Instead he presented an argument based on the text and structure of the Constitution that the executive had the power to suspend habeas corpus. He maintained that the clause was an emergency one and thus was not limited to Congress, especially because the emergency requiring its use might also prevent Congress from assembling. In the "whether strictly legal or not" category, Lincoln made a legal argument drawing a distinction between statutory and constitutional authority. He conceded that no statute had authorized what he had done. But he argued that he had a constitutional duty from his oath of office, the Republican Government Clause, and the Take Care Clause to preserve the Constitution and the Union. For Lincoln, that constitutional duty came with the power to take those actions that were indispensably necessary to fulfill it. Lincoln, however, recognized that this constitutional authority to act was not the equivalent of a "legal sanction." Only Congress could provide strict legal sanction by statutorily authorizing his actions. Thus, Lincoln called upon Congress to ratify his measures in order to provide that sanction.

B. CONGRESS DEBATES LINCOLN'S ACTIONS

Despite overwhelming political support for the President, Congress was not willing to ratify Lincoln's acts without first debating the legal basis and legal consequences of doing so. At the start of the July 4 Special Session, Republican Senator Henry Wilson of Massachusetts introduced a joint resolution to ratify Lincoln's conduct.[72] Debate over Wilson's resolution would come to define the special session of Congress with the measure only being approved on the session's final day after pieces of it were added to a bill increasing the pay of privates. That bill was titled "An Act to increase the pay of the Privates in the Regular Army, and the

[72] Cong Globe, 37th Cong, 1st Sess 2 (July 4, 1861) (Notice of Bills).

Volunteers in the service of the United States, and for other purposes."[73] Ratification of one of the most expansive uses of executive war power to that point in American history was classified as "and for other purposes." That title, however, instead of reflecting a lack of concern for the legality of Lincoln's actions or the separation of powers, shows just how seriously Congress took the matter. They debated it for the entire session, and opponents prevented passage of the original joint resolution. Ratification instead had to be slipped into a must pass bill to increase pay for the Army. Usually historians focus on the special session for its implications regarding a longer running debate over the suspension of habeas corpus. The debate over the entirety of the resolution and the pieces that did eventually pass, however, provides a much larger view of the force of the law at the time of the Civil War.

As an initial matter, it is important to note that 1. Congress was aware of its constitutional powers and jealously guarded them[74] and 2. Congress recognized the legal problems with Lincoln's actions. For example, on July 8, Republican Congressman Thaddeus Stevens of Pennsylvania addressed the legal questions surrounding the blockade by introducing a bill to "repeal the laws creating ports of entry in the rebellious states."[75] Republican Senator James W.

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[73] Cong Globe, 37th Cong, 1st Sess Appendix 44 (July 10, 1861).

[74] While not implicated by Lincoln's actions one such constitutional power was the right of each House to "be the Judge of the Elections, Returns and Qualifications of its own Members." U.S. Const. art. I., § 5. At the start of the special session, Democratic Representative John McClernand of Illinois, who would later resign from Congress to serve as a general in the Union Army, decried what he saw as the "usurpation" of that prerogative by the Governor of Nebraska. McClernand declared "there could be no greater usurpation" and rhetorically asked "what more dangerous usurpation could there be?" Cong Globe, 37th Cong, 1st Sess 15 (July 5, 1861).This is a somewhat remarkable question given all that Lincoln had done, but as Part II will show this power was critical to Congress' battle with Andrew Johnson over Reconstruction so perhaps the Illinois Congressman was correct. Modern audiences should also take note of how quick speakers of the day were to jump to the language of usurpation.

[75] Cong Globe, 37th Cong, 1st Sess 23 (July 8, 1861).

Grimes of Iowa similarly refused to call "the closing of the ports" a "blockade."[76] They both saw the legal problem under the law of nations arising from a nation blockading its own ports. In short, Congress was a sophisticated actor when it came to understanding its own constitutional power and the implications of what Lincoln had done.

Congress' understanding of the legal implications of what Lincoln had done and what ratification would do led them to adopt a substantially more limited ratification measure than the one initially proposed. Senator Wilson's initial joint resolution recognized that Lincoln had acted "under [] extraordinary exigencies . . . for the preservation of this Government."[77] It then listed six distinct items that the resolution would "approve[] and declare[] to be in all respects legal and valid, to the same intent, and with the same effect, as if they been issued and done under the previous express authority and direction of the Congress of the United States."[78] The first item would ratify Lincoln's nationalization of the militia through his "proclamation calling upon the several States for seventy-five thousand men," the second and third would approve Lincoln's "proclamation setting on foot a blockade of the ports" of the seceded states, the fourth and sixth would affirm his "order . . . addressed to the Commanding General of the Army of the United States, [that] authorize[d] that officer to suspend the writ of habeas corpus," and the fifth would legalize the expansion of the regular Army and Navy through his "proclamation calling into the service of the United States forty-two thousand men and thirty-four thousand volunteers, increasing the regular Army by the addition of twenty-two thousand seven hundred and fourteen men, and the Navy by an addition of eighteen thousand seamen."[79] This resolution, however, did

[76] Id. at 17. Grimes was one of the seven Republican senators who voted to acquit Andrew Johnson.
[77] Id. at 40.
[78] Id.
[79] Id.

not pass. After a month's debate the only language that could make it out of Congress was a ratification of all of Lincoln's actions "respecting the army and navy of the United States, and calling out or relating to the militia or volunteers from the States."[80] Why the difference? The debate on the floor of the House and Senate reveals that while politics was certainly at play, congressmen and senators' understanding of the law also influenced what they were willing to ratify.

Ratification of Lincoln's actions at first had clear sailing. On July 6, Senator Wilson introduced the ratification joint resolution along with five bills that would reassert congressional control over the military. Those five bills would authorize the employment of volunteers to enforce the law, increase the size of the military establishment, reorganize the military, promote the efficiency of the army and organize a volunteer militia force called the National Guard.[81] All of Wilson's proposals were referred to the Committee on Military Affairs and Militia.[82] Only two days later, on July 8, the committee recommended passage of the joint resolution without amendment. Senator Wilson sought present consideration and that is when the true debate began. Democratic Senator Trusten Polk of Missouri, who was expelled from the Senate on January 10, 1862 for supporting Missouri secessionists, objected requiring the resolution to lie over until the next day.[83]

In proposing ratification, Senator Wilson was not advocating that Congress serve as a rubber stamp for the president. That is why he paired the joint resolution with bills to regulate "the President in increasing the Army, and calling out the volunteer force." Wilson wanted quick

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[80] An Act to Increase the Pay of the Privates in the Regular Army and I the Volunteers in the Service of the United States, and for other Purposes, ch. LXIII 12 Stat. 326 §3 (1861).
[81] Cong Globe, 37th Cong, 1st Sess 16 (July 6, 1861).
[82] Id. at 17.
[83] U.S. Senate Historical Office, United States Senate Election, Expulsion and Censure Cases: 1793-1990 104–05 (1995).

ratification of Lincoln's actions, but he was not asserting that Lincoln would maintain control over these areas of congressional concern.[84] The House shared that sentiment and on July 8 passed a resolution instructing the Committee on Naval Affairs to "inquire into the expediency of providing by law for a temporary increase of the Navy."[85] Congress would not merely rely on Lincoln's unilateral expansion of the Navy. Wilson's bills and the House's resolution show that from the very start of the session Congress would not have been receptive in the least to Lincoln repeating his actions from the first months of the war. Nor would Congress have tolerated those actions had it been in session.

On July 10, the Senate returned to the question of approving Lincoln's actions as its first order of business.[86] Once again Democratic Senator Trusten Polk of Missouri requested that the joint resolution "should go over until another day." Given his subsequent expulsion from the Senate, Polk's request was at least in part a politically motivated maneuver to delay ratification. In justifying this political maneuver, however, Polk revealed that the opposition's primary arguments would be legal ones. Polk explained that he expected a deep debate on the topic and wanted to wait for the "opinion from the Attorney General that will bear on the subject-matter of this resolution."[87] His motion to postpone, however, was defeated and the Senate began its session-long debate over ratification. That debate would continuously return to the same themes – the separation of powers, impeachment, and necessity.

[84] Cong Globe, 37th Cong, 1st Sess 21 (July 8, 1861).
[85] Id. at 23.
[86] Id. at 40.
[87] Id. at 41. It is unclear what opinion Polk is referring to.

1. Critics of Lincoln and Ratification

Democratic Senator James A. Bayard Jr. of Delaware in his remarks titled "Executive Usurpation" made the most extensive legal case against Lincoln's actions. It is key to note Bayard's politics at the outset – he was a Peace Democrat who opposed coercing the seceded states to remain in the Union and compared the present crisis to the American Revolution. Bayard saw the separation of powers as the core principle of republican government:

> Power always tends to corruption, and especially when concentrated in a single person; and it is that tendency which requires, in all free governments, the division of power among separate and independent departments for the prevention of its abuse—legislative, executive, and judicial; and it is only by maintaining the balance between these depositories of power that a government of laws can be perpetuated.[88]

In opposition to the Lincoln administration, Bayard invoked this political philosophy regarding the Constitution's separation of powers and argued that by affirming Lincoln's actions Congress would be destroying that fundamental "balance."

From the outset, Bayard drew the line between law and politics. He acknowledged that his position was that of a distinct minority in Congress and recognized that "resistance" to the majority would "be futile and hopeless." Thus, he would not object to Congress' "practical measures" to fight the war, but he would oppose those "palpably violating the Constitution." He would fight only on legal grounds, not policy. To that end, he would oppose passage of the joint resolution on legal grounds, but knew that for overall success he would likely have to "await that change in public sentiment."[89]

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[88] Cong Globe, 37th Cong, 1st Sess Appendix 18 (July 19, 1861).
[89] Id.

Bayard first pointed to Lincoln's unilateral expansion of the army as unconstitutional and argued against ratifying it. He argued that under the Constitution "No man could pretend to affirm that the President had authority to increase the Army of the United States without a precedent law." Specifically, he highlighted this as a violation of the separation of powers because it was undeniable "that the power to raise and increase the Army is . . . vested in Congress." He conceded, however, that Congress could in fact "legitimately sanction" such an act after the fact. But, he thought the proper mode to do that was with an independent bill organizing the army, not a mere ratification of Lincoln's actions. Both paths would result in an expanded military, but the former would reaffirm that this was a congressional power that could only be exercised legally by Congress, while the latter would sanction executive usurpation as acceptable.[90]

Bayard primarily objected to ratification of Lincoln's suspension of habeas corpus as a violation of the separation of powers. First, he pointed back to English history to argue suspension was a distinctly legislative power—"It has been done by act of Parliament always, and no king of England in two hundred years past has every ventured to suspend the writ of habeas corpus."[91] He also reminded Congress that they had already given up one of their primary checks on the executive—the "power of the purse"—when they "voted $500,000,000 and five hundred thousand men."[92]

Bayard then specifically made an argument about the separation of powers. This time, however, that argument was not about the distinction between legislative and executive power, but about the realm of judicial power. He cautioned that if Congress acted to ratify Lincoln's

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[90] Id. at 15.
[91] Id. Bayard's history was correct. Saikrishna Bangalore Prakash, Imperial from the Beginning: The Constitution of the Original Executive 217 (2015)
[92] Cong Globe, 37th Cong, 1st Sess Appendix 15 (July 19, 1861).

actions they would in fact be usurping the judicial power in their approval of Lincoln usurping the legislative power. He reminded Congress that "You are not vested with judicial power; the judicial power is, by the Constitution, given to the Supreme Court and the subordinate courts . . . if you arrogate to yourselves judicial powers, you are departing plainly from the mandate of the Constitution." In Bayard's view, that was precisely what Congress would be doing if it ratified suspension—it would be taking the question from the courts in effect by mooting the challenge to suspension's legality. He warned them that it was the "division of the powers of government between separate and coordinate" branches that made "a free Government." Thus, by violating the separation of powers, Congress would "destroy[] the Government."[93]

Despite considering the judiciary to be "by far the weakest" branch, Bayard turned to it in part recognizing that as a minority in the legislative branch he had little hope of success in Congress.[94] For example, he was "willing to leave [the case of the blockade] to the courts." This was partly for practical reasons. He argued that Congress could not ratify an executive act resulting in forfeiture after the fact. To do so would be an ex post facto law. Thus, if the president did in fact lack the authority to implement a blockade, the courts would be able to order the return of the seized property regardless of whatever Congress purported to declare.[95] He saw greater danger in leaving the suspension of habeas corpus to the courts despite that branch's apparent agreement with his position. He believed the Supreme Court precedents of "*Bollman*" and "*Swartwout*" had settled that suspension was a "legislative and not an executive" power. He also found Taney's decision in *Ex Parte Merryman* to be "utterly unanswerable."[96] Nevertheless, he thought congressional affirmation of Lincoln's actions regarding habeas corpus would mean,

[93] Id.
[94] Id.
[95] Id.
[96] Id.

"A single man becomes a despot" because "he [would have] the power of the purse and the sword, and you give him the absolute control over the liberty of every citizen in the United States."[97] Apparently, Bayard believed legislative ratification would be more legally effective for habeas than for the blockade. Otherwise his choice to trust the courts with one but not the other would make little sense.

Bayard put the danger of ratifying suspension specifically in terms of the separation of powers. He argued that by affirming Lincoln's acts Congress would be "virtually assenting, *on the part of the Legislature* to the claim of power on the part of the President."[98] It is important to note the distinct role Bayard assigned to the legislature. He recognized that their affirmation meant the affirmation of a coequal branch of government. To him, that meant "the constitutional division of powers, which is the security of our Government as a free Government, is to be abandoned."[99] In raising this concern, Bayard seemed to be accepting a framework similar to what Justice Jackson would set out in the *Steele Seizure Cases* many years later.[100] Bayard appeared to believe an executive act if consented to by the legislature gained greater constitutional validity. He also seemed to recognize the danger in creating what modern lawyers would call a "gloss" on the Constitution to be invoked by later actors. Making that concession to

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[97] Id.
[98] Id. at 16 (emphasis added).
[99] Id.
[100] Justice Jackson argued, "Presidential powers are not fixed, but fluctuate, depending upon their disjunction or conjunction with those of Congress." He explained that there were three scenarios in which presidential power could operate and that within each one the president's power changed: first, the president's authority was at "its maximum" when he acted "pursuant to an express or implied authorization of Congress." Second, in the absence of Congress granting or denying authority the president had to rely on "his own independent powers." In this second zone, Justice Jackson theorized, "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law." Third, a president's power was at its "lowest ebb" when he acted in a manner that was "incompatible with the expressed or implied will of Congress." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-38 (1952) (Jackson, J., Concurring).

the executive, however, was unacceptable because the separation of powers gave Congress a duty to the people to "judg[e] … the exigency for [themselves]" and "avow[] to the people, by direct legislation that you have parted with that right."[101] Congress could not just follow in the president's path.

It is important to remember Bayard's politics and staunch opposition to the administration. While he made arguments rooted in the separation of powers and attacked Attorney General Bates' habeas corpus opinion on legal grounds, he also appealed to passion by comparing Lincoln to a despised absolute monarch: "there is no other distinction between the condition of France under Louis XIV and the present condition of these United States if this resolution be passed [than that] the Bastille had its dungeons; the forts have none."[102]

For Bayard, the political situation was clear. He lacked the votes and popular support to immediately rein in a president that he thought had acted unconstitutionally. But Bayard believed a changed political climate could create accountability in the future through the constitutional mechanism of impeachment. First, he argued that regardless of what Congress declared about the legality or constitutionality of Lincoln's executive acts, they "cannot make it so." They could only "legalize for the future" what Lincoln had done; they could not legalize past acts. Under Bayard's theory the government's power had been separated "under the Constitution" and Congress could not alter that constitutional vesting with a mere resolution. Bayard thought Congress was "powerless … to censure the President," but he saw one clear constitutional power Congress could fall back on: impeachment. Because Congress could not legalize Lincoln's past constitutional violations (it could only join him in undermining the liberty of the people), that also meant a future Congress would not be barred from enforcing the Constitution. In other

[101] Cong Globe, 37th Cong, 1st Sess Appendix 18 (July 19, 1861).
[102] Id. at 17.

words, a future Congress could impeach Lincoln for his unconstitutional acts even if a previous Congress had purported to ratify them. Bayard expected that once "the people of this country pass from the state of excitement which now exists," causing the political landscape to change, "*a subsequent Congress can deal legally with this question, by the action of the House of Representatives as an impeaching body, and the action of the Senate in deciding on that impeachment*."[103] Bayard refused "to predict what the action of a subsequent Congress may be on those extraordinary acts of the President," but he strongly hinted that impeachment might be in the cards.[104] In hoping for a future impeachment, Bayard appears to have conceded that his legal arguments were unlikely to carry the current debate. Instead he was anticipating that in a calmer political environment, legal argument would carry more force.[105]

Senator Bayard was not the only representative to invoke the possibility of impeachment. Democratic Senator Lazarus Powell of Kentucky[106] raised the possibility even more directly. He argued that

> in the earlier and better days of the Republic, instead of being engaged in an effort to pass through the Senate a resolution approving these violations of the Constitution by the Chief Executive, we should have been engaged in a far different scene. With such wanton, such palpable violations of the Constitution, the usurping of the war making power, the power to raise armies, the power to provide a navy . . . we should be

[103] Id. at 19 (emphasis added).
[104] Id.
[105] Arguably, this is precisely what did occur in Andrew Johnson's impeachment, but in reverse. There Johnson was impeached on a partisan vote during a heated political moment, but then acquitted in a legalistic trial once political tempers had cooled. See *infra* Part II.
[106] On March 14, 1862, the resolution to expel Senator Powell from the Senate failed by a vote of 11 to 28 with Republican Senator Lyman Trumbull vigorously defending Powell. U.S. Senate Historical Office, United States Senate Election, Expulsion and Censure Cases: 1793-1990 112–14 (1995).

witnessing a far different scene than this . . . *the officer who committed these usurpations would be arraigned at the bar of the Senate, and be upon trial under impeachment*.[107]

Senator Powell disappointedly recognized the current political reality and concluded that "that does not seem to be the temper of these times."[108] He thought, however, that in the face of an executive taking unconstitutional actions, Congress did have the power to impeach that executive. Powell clearly believed Lincoln's actions were unconstitutional as direct violations of the separation of powers. He addressed many of the same constitutional concerns already raised, but he also pointed to a measure not included in the joint resolution – Lincoln's spending of money without an appropriation. Powell correctly noted that raising an army, expanding the navy, and enforcing a blockade would require funding. But, "there was certainly no money appropriated by law for [those purposes]—none in the Treasury to be used by the President for that purpose, yet it has been done." Highlighting the text of the Constitution, he concluded that such an action was "clearly against the Constitution."[109] Powell's legal analysis is likely correct—Lincoln *could* have been impeached—but his conclusion that Lincoln *should* be impeached was probably politically motivated. Powell was no great friend of the administration and his appeal to the "earlier and better days of the Republic" conveniently overlooked similar precedents that ended in ratification, not impeachment.[110] While Powell very well may not have

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[107] Cong Globe, 37th Cong, 1st Sess 69 (July 11, 1861) (emphasis added).
[108] Id.
[109] Id.
[110] During the American Revolution "governors regularly sought post hoc legislative sanction" for illegal acts like transferring arms to the Continental Army without authorization or illegally seizing private property as military supplies. Prakash, Imperial from the Beginning, 209–10. In a similar vein, President George Washington violated a statute instructing him to cease construction of navy ships if peace was reached with Algiers. Washington, believing it to be in the public's interest, continued construction and informed Congress of what he had done. Washington was not impeached nor was he censured despite having apparently violated

been familiar with these earlier examples, his failure to discuss any precedent at all shows his argument to sound more in political rhetoric than law.

Recognizing that impeachment was politically off the table, Powell instead implored his colleagues to do their "duty" and deliver "a stern rebuke" to Lincoln for his assumption of power. He wanted Congress to follow in the footsteps of "Athens" who "decree[d] all her magistrates who did not administer her government, or execute the functions of the government according to law, to be tyrants." Even in the context of the Civil War, he found the lack of "a single legislative resolve censuring the Chief Magistrate for his conduct" to be "one of the most alarming symptoms . . . of these troubled times."[111] This call to action rings even more political than the last. It was a ploy to label Lincoln a tyrant and not a serious argument about the need for a strong Congress to check executive power.

Senator John Breckinridge of Kentucky, who was expelled from the Senate on December 4, 1861 for joining the Confederate Army as a Brigadier General,[112] also framed the debate specifically in legal terms about the separation of powers. First he explained the general structure of the Constitution,

> I deny . . . that one branch of this Government can indemnify any other branch of the Government for a violation of the Constitution or the laws. The powers conferred upon

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Congress' power to "provide and maintain a Navy." Congress instead statutorily authorized the continued expansion of the navy. Id. at 94.

[111] Cong Globe, 37th Cong, 1st Sess 70–71 (July 11, 1861). While Lincoln was never censured for his actions, the House did pass a resolution censuring Secretary of War Simon Cameron over his handling of government funds. Lincoln, however, informed the House that he was "equally responsible" for those actions and based on that information the House on March 2, 1875 rescinded the censure of Cameron. Abraham Lincoln, "To the Senate and House of Representatives," May 26, 1862 in 5 CWAL 242; Cong Globe, 43rd Cong, 2d Sess 2084–85 (Mar. 2, 1875) (Hon. Simon Cameron).

[112] U.S. Senate Historical Office, United States Senate Election, Expulsion and Censure Cases: 1793-1990 102–03 (1995).

> the General Government by the people of the States are the measure of its authority. *Those powers have been confided to the different departments and the boundaries of those departments determined with perfect exactitude*. The President has his powers and rights conferred on him by the Constitution; the legislative authority its powers and rights; the judicial authority its powers and rights; and I deny that either can encroach upon the other, or that either can indemnify the other for usurpation of powers not confided to it by the Constitution.[113]

Next, Breckinridge explained how those principles should apply to the joint resolution in question and the more general question of one branch ratifying the usurpation of its power by another branch:

> Congress . . . has no more right, in my opinion, to make valid a violation of the Constitution and the laws by the President, than the President would have by an entry upon the executive journal to make valid a usurpation of the executive power by the legislative department. Congress has no more right to make valid an unconstitutional act of the President, than the President would have to make valid an act of the Supreme Court of the United States encroaching upon executive power; or than the Supreme Court would have the right to make valid an act of the Executive encroaching upon the judicial power. To say that Congress, by joint resolution, may indemnify the President against a breach of the Constitution is substantially to declare that Congress may alter the Constitution in a manner not provided by the instrument.[114]

Since Breckinridge believed Lincoln's acts to be "usurpations on the part of the Executive," he opposed any measure to ratify them. To do so would constitute an attempt to amend the

[113] Cong Globe, 37th Cong, 1st Sess 137–38 (July 16, 1861) (emphasis added).
[114] Id.

Constitution by resolution. Instead he thought Lincoln "should be rebuked by the vote of both Houses of Congress." While it is unclear precisely what form Breckinridge's rebuke would take, it is quite possible he meant impeachment. Later in his speech, Breckinridge, in discussing the constitutionality of the blockade, quoted the recently deceased Senator Stephen Douglas on the proper remedy for an unconstitutional blockade: "There is no law that authorizes [a blockade]. To do the act, or attempt it, would be one of those high crimes and usurpations that would justly subject the President of the United States to impeachment."[115] In the context of Douglas' argument it would seem he along with Breckinridge believed impeachment to be one of the prime mechanisms for enforcing the separation of powers with "usurpation" counting as an impeachable offense.[116] They did not rely on the courts to enforce the boundaries between each branch.

In reaching such a determination, Douglas was in line with Joseph Story's seminal Commentaries on the Constitution. In § 762 of that work, Story flatly declared "The offences, to which the power of impeachment has been, and is ordinarily applied, as a remedy, *are of a political character*."[117] Alexander Hamilton, writing as Publius, made the same point in *Federalist 65* arguing that offenses subject to impeachment should "be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself."[118] Story acknowledged that "crimes of a strictly legal character" can also lead to impeachment, but maintained that the clause had an "enlarged operation" that "reaches . . . political offences,

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[115] Id. at 138.
[116] In making this argument, Douglas referred to but altered the language of the Constitution. Article 3 § 4 provides for impeachment of the president for "Treason, Bribery, or other high Crimes and Misdemeanors." U.S. Const. art. 3., § 4. Douglas changed that to "high crimes and usurpations."
[117] Joseph Story, Commentaries on the Constitution, § 762 (1833) (emphasis added).
[118] Federalist Paper No. 65 (Alexander Hamilton).

growing out of personal misconduct, or gross neglect, or usurpation, or habitual disregard of the public interests, in the discharge of the duties of political office."[119] From this premise Story concluded that the Senate and not the Court was in fact the correct place to try political offenses. He saw these offenses as "indefinable" under the positive law. Instead, he thought the acts subject to potential impeachment needed to "be examined upon very broad and comprehensive principles of public policy and duty."[120] That meant judging actions, like Lincoln's actions,

> by the habits, and rules, and principles of diplomacy, of departmental operations and arrangements, of parliamentary practice, of executive customs and negotiations, of foreign, as well as of domestic political movements; and in short, by a great variety of circumstances, as well those, which aggravate, as those, which extenuate, or justify the offensive acts.[121]

That was a job not for "judges," but for "statesmen," who would understand these duties.[122] Given the political nature of impeachment, Hamilton in *Federalist 66* also explained its role within the separation of powers: The "negative in the executive, upon the acts of the legislative body, is . . . [a] barrier against the encroachments of the latter upon the former . . . the powers relating to impeachments are . . . an essential check in the hands of that body upon the encroachments of the executive."[123]

Returning to Breckinridge's position, the Senator maintained Congress could not cure executive constitutional violations. Thus, it also could not prevent "any succeeding [Congress]

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[119] Joseph Story, Commentaries on the Constitution, § 762.
[120] Id.
[121] Id.
[122] Id.
[123] Federalist Paper No. 66 (Alexander Hamilton).

from holding any officer of the Government responsible for any violation of the Constitution."[124] Breckinridge saw many plain constitutional violations:

> The Constitution declares that Congress alone shall have power "to declare war." The President has made war. Congress alone shall have power "to raise and support armies." The President has raised and supported armies on his own authority. Congress shall have power "to provide and maintain a navy." The President has provided an immense Navy, and maintains it without authority of law. The Constitution declares that no money shall be taken from the Treasury except in pursuance of appropriations made by law. The President has taken money from the Treasury without appropriations made by law for the purpose of carrying out the preceding unconstitutional acts.[125]

Breckinridge explicitly identified these violations of the Constitution's text as violations of the separation of powers. He concluded "The Executive of the United States has assumed legislative powers. The Executive of the United States has assumed judicial powers . . . He has, therefore, concentrated in his own hands executive, legislative, and judicial powers, which in every age of the world, has been the very definition of despotism."[126] Breckinridge argued all of this had been done on a claim of necessity, but he disputed both the factual basis for such a claim and the "doctrine of necessity" itself. He attacked that doctrine as "utterly subversive of the Constitution . . . [and] of all written limitations of government; as it substitutes, especially when you make him the ultimate judge of that necessity, . . . the will of one man for a written constitution."[127] Given this view of Lincoln's actions, it is unsurprising that Breckinridge alluded to Congress'

[124] Cong Globe, 37th Cong, 1st Sess 139 (July 16, 1861).
[125] Id.
[126] Id.
[127] Id. at 140.

power of impeachment in reviewing the administration's measures.[128] Breckinridge too seems to have been influenced by his politics. While his analysis of the separation of powers, at times, reads like a modern day formalist separation of powers Supreme Court opinion, he also carried the argument to an unnecessary extreme. Unlike Bayard who explored Congress' authority to ratify the varying types of action Lincoln took, Breckinridge just categorically denied Congress' authority to ratify anything without offering a solid legal explanation to justify that position.

Overall, these critiques of Lincoln's expansive use of executive power and arguments against ratifying his actions are primarily legal ones rooted in legal understandings of the separation of powers. They are not primarily policy arguments. They are not denials of the necessity of Lincoln's actions. This course of debate demonstrates that the minority saw the law and appeals to the principles of the separation of powers as their best chance for success. Yes, they had a political reason for deploying legal arguments to counter Lincoln and many of the men making these arguments were Southern sympathizers. But it is still telling about the presumed power of the law that they thought those arguments—whether they believed them themselves like Bayard, or were using them in large part as a political tool like Breckinridge and Powell—would be the most effective ones in their arsenal. It is equally telling that the majority in support of Lincoln's actions felt compelled to respond legally.

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[128] Not all such references to impeachment, however, were critical of Lincoln's actions. Senator Andrew Johnson of Tennessee, the focus of Part II of this paper, in discussing why the South should have accepted Lincoln as the constitutional president, made the point that in all elections "it was the duty of the whole people to acquiesce; if he made a good President, sustain him; if he became a bad one, condemn him; *if he violated the law and the Constitution, impeach him*. We had our remedy under the Constitution and in the Union." Id. at 295 (emphasis added). While not calling for Lincoln's impeachment for his actions in the opening days of the war, Johnson clearly believed in Congress' power to impeach a president for violating the Constitution.

2. SUPPORTERS OF LINCOLN AND RATIFICATION

The primary legal defense of Lincoln's actions and the proposal to ratify them came from the administration itself, but some legislators also took to the floor to supplement the administration's argument. Their arguments were commonly quite similar to those of Lincoln and Attorney General Bates. Senator Wilson's defense of the president, for example, was clearly influenced by Lincoln's position. Wilson argued:

> Everybody knows that these acts of the Administration were forced upon it by the condition of the country. The Administration felt that it must exercise all the powers within the Constitution to save the Union. The legislation of the country had not provided the necessary means, and the President took the responsibility, and in doing it he was then sustained by the voice of the loyal portion of the Country; and I am sorry now, when those acts have saved . . . this Government, that there should be any doubt or any hesitation in legalizing by our votes the action of the Government of the country, extorted from it in an emergency.[129]

While not as extensive as Lincoln's defense, this speech contained the essential elements of Lincoln's position. First, Lincoln's actions were forced upon the government by the crisis confronting the nation. Second, all the powers used were within the Constitution, even if they were not strictly executive powers. Third, the President had to take responsibility for these actions—he could either be held accountable under the Constitution for his acts; or the people and the legislature could sustain him, which is precisely what Wilson sought to do. For Lincoln and Wilson that was not a violation of the separation of powers; it was the separation of powers in action.

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[129] Id.

Not all of Lincoln's defenders, however, saw the need to engage legally. Republican Senator Edward D. Baker of Oregon, who was "an old friend of Lincoln [and] had named his second son after him,"[130] for one, provided a very expansive understanding of executive power in time of war that bordered on writing Lincoln a blank check. Baker openly declared on the floor of the Senate that, "I do not think anybody can conduct [a determined] war as well as a dictator." As such, he would "ratify whatever needs ratification." He would not only support all of Lincoln's measures, but also the motives behind them. He would vote to provide more money and more men than the Administration had requested. But even with these views, Baker recognized that "*as a Senator*" he had a distinct "duty" "to venerate the principles of the Constitution" and to consider the implications of the government's actions in war once peace returned. Thus, despite his full-throated support for Lincoln, he also favored efforts to limit the increase of the army to the duration of the war.[131] He saw a massive distinction between times of war and peace. He would give a president everything the country had to offer in a time of war, but would insist upon "resum[ing] the condition and the arts of peace" at the end of the war.[132] He concluded: "I will give the President . . . all the power that he wants; I will obey his wishes, and adjourn the moment we pass these bills. When peace comes, *I will hold him and every member of his Cabinet to a strict accountability for the exercise of that power.*"[133] Baker would actively cede power to the president to prosecute the war and allow him to take whatever actions he deemed necessary in the absence of Congress. Baker, however, would be sure to judge the use of that power later. For him that was sufficient. While it is possible to stretch this argument into a legal one stemming from the law or war, it is probably better read as political support of the

[130] McPherson, Battle Cry of Freedom, 362.
[131] Cong Globe, 37th Cong, 1st Sess 44 (July 10, 1861).
[132] Id. at 45.
[133] Id.

president couched in somewhat legal terms. Baker's theory appeared to be designed to allow him to give Lincoln whatever he asked for in a time of war. Though his insistence on strict accountability would seem to fit well with his colleagues' attention to impeachment as a mechanism for enforcing the separation of powers.

Similarly, Democratic Senator James A. McDougall of California promoted total acceptance of Lincoln's actions. He proclaimed, "I came here to indorse the preliminary action of the Government. I hope that may be done, and that all our bills may pass without debate."[134] He also believed every other Senator had already considered and made up his mind on ratification.[135] Senators Baker and McDougall's speeches reveal that the law, strictly speaking, did not matter for every actor. Some individuals saw the issues in question to be predetermined. That, however, was not the case for every member of the legislative branch. Democratic Senator Willard Saulsbury Sr. of Delaware, who thought Lincoln had "been justified in some of the acts that he has done" pointedly disagreed with McDougall finding that Lincoln's actions had raised "very grave questions of constitutional law" that merited full debate.[136] Saulsbury won on that point – Congress had a full debate.

3. Mixed Support and Opposition of Lincoln and Ratification

The decision to support or oppose ratification was not an all or nothing choice. Some senators, like Senator M. S. Latham, a California Democrat, opposed ratification of some measures while supporting ratification of others. That stance did not mean that Latham had ignored legal arguments to just favor measures he preferred. Rather, Latham saw a legal distinction between Lincoln's actions that required treating them differently. Latham focused on

[134] Id. at 41.
[135] Id.
[136] Id.

the specific argument over necessity to determine which measures he would support. While Latham phrased it differently than Lincoln, he largely took the same approach to necessity and the constitutional duty of the president. Latham explained that he would endorse the executive in any action that "imperious necessity required him to do to support the Government, to enforce the laws, and secure obedience to the constituted authorities."[137] He argued that such actions were "right and proper" even if taking them was "a technical infraction of the authority delegated to [the president]." He would not justify any action, however, that lacked "imperious necessity." Unlike Lincoln, Latham did not leave the determination of necessity to the executive. He made that determination for himself.

In an extended address that criticized the hypocrisy of those attacking Lincoln's actions as unconstitutional while saying nothing about the unconstitutional actions of the seceded states, Latham also explained what measures he supported ratifying under his "imperious necessity" standard. Latham would not sanction the suspension of habeas corpus in Maryland. To do so would be inconsistent with his role "as a conscientious guardian of the liberties of the people." He also would not sanction Lincoln's "increase of the regular standing Army" finding such an expansion unnecessary; Lincoln could have simply relied on volunteers. Latham, however, would completely sanction the rest of Lincoln's measures: "as to the other acts of the Government—ordering the blockade; calling out of the volunteers of the country; suspension of the writ of habeas corpus in Florida, it being in open rebellion . . . and all the other acts enumerated in this joint resolution—he has my hearty approval." Recognizing the necessity of these actions, Latham believed that Lincoln was not only empowered to take them, but also actually obligated to do so as a constitutional duty. Latham thus concluded "that if he had not

[137] Cong Globe, 37th Cong, 1st Sess Appendix 19 (July 20, 1861).

exercised those powers, I would have voted to *impeach* him as unworthy of the place he occupies, and most derelict in his *duties* to the Government."[138] This conclusion strongly implies that Latham embraced Lincoln's legal necessity argument that he was duty bound by the Constitution to take those steps which were indispensably necessary to preserve the Constitution and the Union. Latham agreed with and promoted Lincoln's legal theory. He simply disagreed with Lincoln's application.

4. The Court Ratifies Congressional Ratification

While the courts generally stayed clear of the constitutional fray over Lincoln's actions, they did weigh in on a few matters including the validity of congressional ratification. Those few cases, however, tended to mirror the debates that had already occurred between and within the administration and Congress. The Supreme Court most prominently addressed the issue of ratification in the *Prize Cases* when the Court upheld Lincoln's declaration of a blockade absent a congressional recognition of a state of war. This decision rested on the Court finding, seemingly as a factual question, that a state of war could exist absent Congress declaring it or recognizing it. The Court explained that civil wars are "never solemnly declared," instead the war's existence depends upon

> the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold . . . a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities . . . the contest is a war.[139]

Relying on the executive vesting clause, the Take Care Clause, and the Commander-in-Chief Clause, as the president and his defenders had done earlier, the Court concluded that "the

[138] Id. (emphasis added).
[139] The Prize Cases, 67 U.S. 635, 667–668 (1863).

President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority . . . it is none the less a war, although the declaration be unilateral."[140] Since a war could exist absent congressional action, the blockade was also legitimate meaning the seizures made under it were valid.

The Court, however, was by no means unanimous on this point. Instead the justices split 5-4. Lincoln had appointed three of the justices in the majority. The dissent, authored by Justice Nelson and joined by Chief Justice Taney, Justice Catron and Justice Clifford, maintained that "the President does not possess the power under the Constitution to declare war or recognize its existence . . . this power belongs exclusively to the Congress . . . consequently, . . . the President had no power to set on foot a blockade" prior to Congress recognizing the insurrection on July 13, 1861.[141]

For our purposes, this case is important because it forced the majority and dissent to address Congress' ratification of Lincoln's actions. The majority argued that *if* legislative sanction were necessary, Congress had provided it during the special session of Congress where the legislature was "wholly employed in enacting laws to enable the Government to prosecute the war." Furthermore, the Court found that even "if the President had in any manner assumed powers which it was necessary should have the authority or sanction of Congress," their explicit ratification of Lincoln's acts had "operated to perfectly cure the defect" under the "well known principle of law, 'omnis ratihabitio retrotrahitur et mandato equiparatur.'"[142] In short, the Court

[140] Id. at 668.
[141] Id. at 698 (Nelson, J., Dissenting).
[142] The Prize Cases, 67 U.S. 670-71 (Translation: Every ratification is drawn back and placed on equal footing with what has been commanded).

upheld the validity of Congress' ratification of Lincoln's actions.[143] The dissenters, on the other hand, argued it was Congress' power to declare or recognize a war and denied the legislature the power to ratify the blockade because the seizures "were without any Constitutional authority, and void; and, on principle, no subsequent ratification could make them valid." Furthermore, the dissent viewed such a ratification as an "ex post facto law" as it would take conduct that was legal at the time it was done (before a declaration / recognition of war) and convert it to "illicit trade."[144] This is the exact legal conclusion that Senator Bayard had predicted, though he had hoped for it to be the majority's position. The legal battle at the Supreme Court had been fought on the same ground as the debate in Congress.

Conclusion

In the opening months of the Civil War in the absence of Congress, Abraham Lincoln exercised expansive executive power. He spent money without an appropriation. He blockaded the Confederacy. He unilaterally expanded the Army and Navy. He suspended habeas corpus. Congress ultimately ratified many of these actions during its special session, but it did not ratify them all nor did it ratify them without debate. That debate showed that even in the crisis of the

[143] Two other cases also affirmed the legal effectiveness of Congress' ratification. Ex Parte Stevens, 4 RAPP 1508, 1517 (1861) (Wayne, J., in chambers) ("It is my opinion that Congress has constitutional power to legalize and confirm executive acts, proclamations, and orders done for the public good, although they were not when done authorized by any existing laws. That such legislation of Congress, may be made to operate retroactively, to confirm what may have been done under such proclamations and orders, so as to be binding upon the government in regard to contracts made, and the person with whom they were made. And that the third section of an act of Congress of the 6th day of August 1861, legalizing the acts, proclamations and orders of the President, after the 4th of March 1861, respecting the Army and Navy, and calling out and relating to the Militia and volunteers of the States, is constitutional and valid, as if they had been issued and done under the previous authority and direction of Congress."); United States v. Hosmer, 76 U.S. 432, 433-34 (1869) (Congressional ratification "ratifies the proclamation and orders in the strongest terms. It contains no exception or qualification. It gives to the orders the fullest effect.").

[144] The Prize Cases, 67 U.S. 698 (Nelson, J., Dissenting).

Civil War the separation of powers still mattered. The law still mattered. It set the terms of the discussion. It formed both the basis of the opposition to Lincoln's actions and ratification, and the justification for those actions and ratification. Yes, some participants in this debate were merely using legal arguments as a tool to advance political objectives. But in large part those individuals were simply extending legal arguments further than they should have. They were not creating new legal positions out of whole cloth. Just as importantly, nearly everyone involved felt compelled to argue legally in one way or another. And the legal arguments were effective. The ratification that passed was substantially narrower than the one initially proposed.

Part II. Andrew Johnson, Congress, Reconstruction, and Impeachment

Section 1: The Crisis of Reconstruction and Impeachment

Reliance on legal argument in the face of crisis was not unique to the debate over ratifying Lincoln's questionable actions in the early days of the Civil War. That reliance reappears a few years later in another constitutional crisis – the impeachment and trial of President Andrew Johnson. That process at first glance looks like a highly partisan affair. On February 21, 1868 Johnson removed Secretary of War Edwin Stanton, who was objectively disloyal to the Johnson administration, in apparent violation of the Tenure of Office Act.[145] That same day the Republican dominated Senate resolved "we do not concur in the action of the President" and "we deny the right of the President so to act, under the existing laws, without the consent of the Senate."[146] On February 22, the House Reconstruction Committee reported a resolution "[t]hat Andrew Johnson, President of the United States, be impeached of high crimes

[145] Michael Les Benedict, The Impeachment and Trial of Andrew Johnson 100 (1973); McKitrick, 495.
[146] Benedict, Impeachment, 102.

and misdemeanors in office."[147] On February 24, the House passed the resolution with every single Republican present voting in favor.[148] The eleven specific articles of impeachment would follow a few days later.[149] It took the House a mere three days to impeach the President on a party line vote.

On May 16, 1868, however, the Senate by a single vote found President Andrew Johnson not guilty on the Eleventh Article of Impeachment leveled against him by the House of Representatives.[150] Ten days later, a reconvened Senate by the same margin of 35 to 19 acquitted Johnson on the Second and Third Articles of Impeachment.[151] Following these votes, those in favor of impeachment conceded defeat and adjourned the trial without ever voting on the remaining eight Articles of Impeachment.[152] They knew they could not muster the two-thirds majority required by the Constitution for a conviction.[153] This vote remains the closest the country has ever come to utilizing the impeachment process laid out in the Constitution to remove a sitting president from office.[154] Critically, Johnson only survived conviction because seven Republican Senators broke from their party and voted to acquit.

While Johnson's impeachment, trial, and acquittal initially look political, the history of those events reveals a remarkably legalistic process. Johnson was impeached not because he and Congress identified with different parties, but because the two branches of government had been

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[147] Id. at 104.
[148] Id. at 112.
[149] Id. at 113.
[150] David O. Stewart, Impeached: The Trial of President Andrew Johnson and the Fight for Lincoln's Legacy 277 (2009); William A. Dunning, Essays on the Civil War and Reconstruction and Related Topics 301 (1931).
[151] Stewart, 280–81; Dunning, 300–01.
[152] Stewart, 281.
[153] U.S. Const. art. I, §3.
[154] Richard Nixon resigned before he could be impeached, while the Senate failed to even muster a majority in favor of convicting Bill Clinton. Peter M. Shane & Harold H. Bruff, Separation of Powers Law 218 (2016).

locked in a long struggle over control of Reconstruction with each branch exercising its full constitutional power and then some. The impeachment and trial themselves turned not simply on political identity, but also on legal questions – sometimes exceedingly narrow ones. Johnson's impeachment and trial centered not on whether the president had stymied congressional goals for reconstruction, but on if the Tenure of Office Act protected Secretary Stanton, if Johnson could be estopped from arguing that it did not, if the Constitution's "high crimes and misdemeanors" language required an indictable offense for impeachment, if the Tenure of Office Act was constitutional, if Johnson had the intent to commit a crime, and if it was a valid defense for an executive to claim he was seeking to test a questionable law in court. In short, Johnson's trial turned on legal questions. The law mattered for answering those questions. It was not just all politics.

A. HISTORIOGRAPHICAL DEBATE

The existing analysis of Johnson's impeachment and trial, however, has not recognized the central role law played. Instead it is largely engaged in a debate over Johnson and Congressional Republicans' competing visions for Reconstruction and the intriguing question of why seven Republicans voted to save Johnson. A first wave of scholarship was highly critical of the effort to impeach Johnson and praised the seven Republicans who voted against their party to acquit.[155] Specifically, this first wave saw the effort to remove Johnson as mere political

[155] Michael Les Benedict, Preserving the Constitution: Essays on Politics and the Constitution in the Reconstruction Era 32–33 (2006). A prime example of this wave is George Fort Milton, The Age of Hate: Andrew Johnson and the Radicals (1930). While an excellent book, Milton's language makes his pro-Johnson anti-Radical perspective quite clear. While not a friend to Johnson, John W. Burgess wrote in a similar vein regarding the impeachment effort. John W. Burgess, Reconstruction and the Constitution 1866–1876 189, 191-92 (1902) ("The truth of the whole matter is that, while Mr. Johnson was an unfit person to be President of the United States . . . he was utterly and entirely guiltless of the commission of any crime or misdemeanor. He was low-born and low-bred, violent in temper, obstinate, coarse, vindictive, and lacking in the sense

partisanship making the seven Republican dissenters champions of the Constitution and the separation of powers. Writing in 1974, Charles Black, a Yale law professor, concluded "the Johnson impeachment is, to say the least, by no means universally regarded today as a paradigm of propriety or of unimpassioned law."[156] Milton Lomask put it more bluntly calling the impeachment efforts an "attempt to depose an American President for political reasons."[157] Chief Justice Rehnquist concluded that Johnson's acquittal "surely contributed as much to the maintenance of our tripartite federal system of government as any case decided by any court."[158] Howard K. Beale agreed: "Had the impeachment succeeded . . . the fundamental principle of separation of powers would have been swept away."[159] John F. Kennedy even weighed in declaring Kansas Senator Edmund Ross' vote against impeachment "the most heroic act in American history."[160]

A second wave of scholarship that was more "sympathetic" to the goals of Radical Reconstruction and critical of Johnson's racial views revised this understanding.[161] This approach emphasized the reluctance of Congress to impeach Johnson and the necessity of doing so.[162] It also critiqued the view that opposition to impeachment was rooted in a respect for the

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of propriety, but he was not behind any of his accusers in patriotism and loyalty to the country, and in his willingness to sacrifice every personal advantage for the maintenance of the Union and the preservation of the Government. In fact, most of them were pygmies in these qualities behind him." On the other hand, "Stanton and those who abetted him were violators of law . . . the gathering of armed men about him with the purpose of sustaining him in holding on to the War Office after his dismissal by the President was treason.").

[156] Charles L. Black, Jr., Impeachment: A Handbook 51–52 (1974).

[157] Milton Lomask, Andrew Johnson: President on Trial 336 (1960).

[158] William H. Rehnquist, Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson 278 (1999).

[159] Howard K. Beale, The Critical Year: A Study of Andrew Johnson and Reconstruction 214 (1958).

[160] John F. Kennedy, Profiles in Courage 146-171 (1956).

[161] Benedict, Preserving the Constitution, 33.

[162] Id. at 43.

separation of powers by highlighting the political incentives for some Republicans to defend Johnson.[163] Finally, it challenged the narrative that the seven Republican dissenters were subsequently punished for their defense of Johnson and thus martyrs for the Constitution.[164]

Modern politics, however, has complicated the historiography.[165] First, the Watergate scandal bolstered the idea of impeachment as a necessary check on the executive and it partly led to the reexamination of the clash between Johnson and the Radicals.[166] But then the impeachment of Bill Clinton revived, for many, the concern that the process was rooted "on unambiguously political grounds" including in the case of Johnson.[167]

Overall, the historiography recognizes, but never directly addresses, the connection between law and politics. In wave one, the Radicals are political partisans opposing Johnson without regard to the law. In wave two, the Radicals are simply more justified in their political views, while Johnson's defenders are stripped of their noble defense of constitutional principles in favor of countervailing political considerations. Both waves miss the crucial role law played throughout the process for both sides of the contest. For example, Allen C. Guelzo covers the entire trial in a paragraph, dismissing it as "a wearisome affair" that "nearly all of the spectators who daily crowded the Senate galleries knew . . . would be settled by politics rather than

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[163] Benedict, Impeachment, 61–69.
[164] Stewart, 309.
[165] While this paper is focused on the interaction between law and politics, it is important to note that there is a similar connection between politics and history. The historiography of the Johnson impeachment demonstrates that modern political events influenced how historians interpreted the past. This is particularly important to recognize in impeachment scholarship where the few past impeachments are used as critical precedents in determining how to proceed.
[166] Benedict, Preserving the Constitution, 33.
[167] Id. at 34. David O. Stewart has highlighted a potential wrinkle to this debate – corruption. He argues that "it is more likely than not" that the President's supporters led by Edmund Cooper at the Treasury Department purchased votes to save Johnson, particularly those of Senators Edmund Ross of Kansas, Joseph S. Fowler of Tennessee, and John B. Henderson of Missouri. Stewart, 182–84, 294–95. It is important to note, however, that even Stewart concedes that there is "no solid proof" of such a claim. Id. at 294.

evidence."[168] Guelzo is half right. The factual evidence introduced at trial, while receiving a great deal of attention, did not play a critical role, as both sides largely agreed upon the facts. Rather it was the legal arguments made during the trial, which Guelzo dismisses as "arguments turn[ing] on [] constitutional niceties," that mattered.[169] Howard K. Beale took a similarly cynical approach to legal arguments made in the Reconstruction era, calling them "pure shams."[170] He argued, "Lawyers and Congressmen, true to form, made lengthy speeches on matters of constitutionality, for this gave them an air of erudition, and satisfied the legalistic conscience of their constituents."[171] Those speeches, however, "determined nothing" and were merely "justification[s] in law for what [speakers] intended to do in practice."[172] Beale's argument, and many of those like it, border on self-contradiction. In nearly the same breath, Beale claimed that "few cared about constitutional niceties" while also admitting "it was a day when constitutional theories were required for all practice" and that politicians addressed those theories to appease "the legalistic conscience of their constituents."[173] Apparently, some Americans did care about legal issues. Otherwise there would be no need to spend substantial time and energy addressing them. It is also odd to attribute a legalistic nature to the mass of Americans, while denying any such impulse to individual actors who did actually address those issues.

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[168] Allen C. Guelzo, Fateful Lighting: A New History of the Civil War & Reconstruction 501 (2012).
[169] Id.
[170] Howard K. Beale, The Critical Year: A Study of Andrew Johnson and Reconstruction, 147–50 (1958). Beale was specifically discussing the debate over the constitutional status of the former Confederate states.
[171] Id. at 147.
[172] Id.
[173] Id.

Critiquing scholars like Beale, Eric L. McKitrick comes the closest to appreciating the role of law in the clash between Johnson and Congressional Republicans. While conceding that "political needs" existed, he also recognized that "constitutional discussion did form an indispensable part of the framework within which men thought in the nineteenth century."[174] Instead of tossing that framework to the curb when confronted "with new political requirements, men were still much concerned over the question of how the Constitution would square them."[175] Thus he concluded "it would not be wise to assume hypocrisy, claptrap, and sham as a formula for explaining any problem of this magnitude."[176] Rather scholars should pay attention to "the legal idiom" actors used to express their positions.[177] McKitrick, however, does not take the point far enough. First, his claim is largely cabined to a discussion of the constitutional theories of Reconstruction. Second, he limits it to a discussion of general constitutional principles on the broadest questions. Hans L. Trefousse similarly misses the multiple levels the law operated on even in the specific context of the impeachment trial of Andrew Johnson. In explaining why the trial failed, Trefousse only highlights the "political importance of the trial," the "tactics used by the managers," and the "constitutional issue . . . [of] the tripartite system of government."[178] He missed many of the legal issues that influenced the trial below the great separation of powers question.

Many of these authors are correct that politics influenced the law and legal decision making. But the law also influenced and channeled political impulses. The law constrained the debate and defined its terms. It also, for better or worse, likely saved Andrew Johnson while also

[174] McKitrick, 95.
[175] Id.
[176] Id.
[177] Id.
[178] Trefousse, 178–79.

moderating Radical frustration so that it could be expressed safely and without violence. That story is currently missing from Reconstruction historiography. This paper hopes to provide it.

B. CONSTITUTIONAL TEXT

Before examining the historical context of the Johnson impeachment and the role law played in the trial, it is important to understand the details of the procedure established by the Constitution.[179] In discussing the executive, the Constitution provides that "The President . . . shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."[180] It then places this power firmly in the hands of the legislative branch, but establishes a two stage process: the House of Representatives has "the sole Power of Impeachment,"[181] while the Senate has "the sole Power to try all Impeachments."[182] While trying impeachments, Senators are "on Oath or Affirmation" and a vote "of two thirds of the Members present" is required for conviction.[183] If the President is on trial, the Chief Justice of the U.S. Supreme Court presides.[184] The penalty in "Cases of Impeachment" is limited to "removal from Office and disqualification to hold and enjoy any

[179] For the authoritative modern account of the impeachment process see Charles L. Black, Jr. Impeachment: A Handbook (1974).
[180] U.S. Const. Art. II, §4.
[181] U.S. Const. Art. I, §2.
[182] U.S. Const. Art. I, §3.
[183] U.S. Const. Art. I, §3.
[184] U.S. Const. Art. I, §3. In the case of Andrew Johnson, this meant Chief Justice Salmon P. Chase, who had previously served as Abraham Lincoln's Secretary of the Treasury, presided. Notably, Chase thought impeachment was a mistake and had presidential ambitions of his own believing he might receive the Democratic nomination. Trefousse, 177; Foner, 335. Chase's son-in-law, William Sprague, was a Republican Senator from Rhode Island during the impeachment trial and his connection to Chase sparked speculation that he would vote to acquit. While Sprague ultimately voted to convict, it is rumored he would have flipped his vote if necessary to prevent removal. Trefousse, 169, 177.

Office of honor, Trust or Profit under the United States."[185] The impeached party, however, is not immune from further actions and remains "liable and subject to Indictment, Trial, Judgment and Punishment, according to Law."[186] In short, the Constitution establishes a mechanism for one branch of government to remove the head of another branch from power.

C. THE ROAD TO IMPEACHMENT

1. POLITICAL DIFFERENCES – ANDREW JOHNSON AND THE RADICAL REPUBLICANS

Andrew Johnson and the Reconstruction congresses existed in a historically unique political alignment that both raised the potential need for the power of impeachment and made its successful use possible. Namely, despite serving as Abraham Lincoln's vice president, Johnson and the Republican majorities in Congress were not truly of the same party.[187] Prior to the Civil War, Johnson served as a Democratic Senator from Tennessee, owned slaves, and voted for Southern Democrat John C. Breckinridge in the 1860 presidential election.[188] Johnson, however, did hold the distinction of being the only senator from a state to secede to remain loyal to the Union. That loyalty led Lincoln to appoint him military governor of Tennessee and the Republican nominating convention to tap him for the vice presidency over Hannibal Hamlin in the 1864 election.[189] Lincoln's reelection in 1864 was by no means a guaranteed outcome given the progress of the war and the fact that Democrats had won 44 percent of the vote in the three-

[185] U.S. Const. Art. I, §3. This is a stark departure from the English version of impeachment where one's life was also at risk. This feature of the Constitution led to one of Alexis de Tocqueville's few glaring errors about the American political system. He predicted that impeachment would be "the most formidable weapon ever placed in the hands of the majority" and that it would "be used day in and day out" because "no one shrinks from imposing a punishment" that only deprives one from "wielding . . . power" instead of "depriving him of life and liberty." Alexis de Tocqueville, 2 Democracy in America 125 (Oliver Zunz ed., Arthur Goldhammer trans., Library of America 2012) (1835).
[186] U.S. Const. Art. I, §3.
[187] Stewart, 50.
[188] Hans Trefousse, Impeachment of a President: Andrew Johnson, the Blacks, and Reconstruction, 4–5 (1975).
[189] Guelzo, 488.

way 1860 presidential election. Democrats, however, had since splintered into War Democrats and Peace Democrats and Republicans saw a chance to win the support of the former by running as the "National Union Ticket" and including Andrew Johnson on that ticket.[190] Thus Lincoln's tragic assassination produced a president and a Congress who agreed on preserving the Union and not much else.

Republicans also constituted a uniquely powerful majority in the Congresses Johnson battled with, including the impeaching Congress. The 1864 elections produced a Republican Senate majority of 40 to 12 and a House majority of 145 to 40.[191] A key element of these Republican majorities was that both the House and Senate used their constitutional power to determine whether to seat members to exclude representatives from states that had previously seceded.[192] In the Senate, this meant refusing to recognize a number of former Confederate officials including former Confederate vice president Alexander Stephens, and former Confederate senators Herschel V. Johnson and William A. Graham.[193]

Organization of the House was particularly contentious. In calling the roll, the clerk of the House, Edward McPherson, followed a preplanned strategy and only called representatives from loyal states.[194] When Horace Maynard, a purported representative from Tennessee, sought to object to his name being skipped, the clerk responded "the Clerk will be compelled to object to any interruption of the call of the roll."[195] While McPherson's denial was pre-planned, so too

[190] Id. at 227–28, 464.
[191] Id. at 464.
[192] Stewart, 43.
[193] Guelzo, 491–92; McPherson, The Political History of the United States of America During the Period of Reconstruction, 107–08 [hereinafter McPherson].
[194] Foner, 239.
[195] Cong Globe, 39th Cong, 1st Sess 3 (Dec. 4, 1865) (Organization of the House).

was Maynard's interruption.[196] All of the representatives from former Confederate States were passed over, but the Johnson administration tagged Maynard to object as his loyalty to the Union was undeniable.[197] Like the President, Maynard had remained in Congress even after Tennessee seceded and repeatedly pushed Lincoln to liberate Eastern Tennessee.[198] Not all purported representatives had such sterling credentials. Delegations from the former Confederate states included Confederate generals, colonels, legislators, and members of the state secession conventions.[199] At the conclusion of the roll, Maynard once again spoke up but the clerk denied him the floor ruling "as a matter of order, that he cannot recognize any gentleman whose name is not upon his roll."[200] McPherson himself had drafted the roll.[201] At this, New York Democrat

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[196] Aware of the Radicals' intention to exclude representatives from the former Confederate States, Johnson had told Navy Secretary Gideon Welles that the Radical plan "would be knocked in the head at the start. There would be a Representative from Tennessee who had been a loyal member of the House since the war commenced, or during the War, who could present himself." Gideon Welles, 2 Diary of Gideon Welles: Secretary of the Navy Under Lincoln and Johnson, 387 (1911) quoted in McKitrick, 258.

[197] McKitrick, 258.

[198] Id; "Horace Maynard to Abraham Lincoln," Oct. 1, 1862 ("Having provided for the freedom of the slaves, can you not, I beg you, in God's name, do something for the freedom of the white people of East Tennessee? Their tears & blood will be a blot on your Administration that time can never efface, & no proclamations can cover up.") This was not the last time that Maynard's congressional seat would cause controversy. In 1866, he would gain his seat in Congress when Tennessee was restored and he still held that seat in 1868 when Tennessee Governor William Brownlow appointed him to the State Supreme Court. Maynard, however, continued to serve in Congress despite the Tennessee constitution prohibiting an U.S. Congressman from also holding state office. The State Supreme Court was forced to address the issue when a party challenged Judge Maynard's "authority" to issue a writ of error. The court conveniently held that Judge Maynard was not in violation of the State constitution as by accepting a second office that was incompatible with his first Maynard had impliedly resigned from Congress and had "thereby surrendered his right to a seat in Congress." In the court's opinion "the fact that Mr. Maynard continued to serve out his time as a member of Congress" did not "affect the question." His right to a congressional seat "was a matter entirely for the adjudication of Congress." Calloway v. Sturm, 48 Tenn. 764, 765–67 (Tenn. 1870). On this last point, the Reconstruction Congresses would certainly agree.

[199] McPherson, 109.

[200] Cong Globe, 39th Cong, 1st Sess 3 (Dec. 4, 1865) (Organization of the House); Guelzo, 492.

[201] McKitrick, 258.

James Brooks objected that if the clerk could "exclude members from the floor of this House by his mere arbitrary will, this then ceases to be a Congress," and the clerk would transform from being "a servant of the House" to being "omnipotent over its organization."[202] Brooks also quipped that if Tennessee was excluded from Congress as not part of the Union then its citizens were "aliens and foreigners to this Union" making the President ineligible for his office.[203] When the clerk offered to explain his decision, Radical leader Pennsylvania Representative Thaddeus Stevens retorted, "It is not necessary. We know all."[204] Brooks continued to object decrying the use of a Republican caucus resolution to determine which states would be recognized, but his objections were to no avail.[205] The House, like the Senate, was organized without any representatives from seceded states. As the *New York Times* noted that day, "there is much unanimity of feeling among the Union members as to the propriety of excluding the applicants for seats from States that have been in rebellion."[206] This unanimity is politically easy to explain – the excluded representatives were not Republicans. Adding insult to injury, Congress also refused to pay the living expenses of the excluded Southerners—they could "go home or starve."[207]

Johnson later criticized Congress for legislating for the seceded states after having refused to seat their representatives, referring to them as "a body called, or which assumes to be, the Congress of the United States, while, in fact, it is a Congress of only a part of the States."[208] In his veto of the Freedman's Bureau Bill, Johnson readily admitted that it was "the

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[202] Cong Globe, 39th Cong, 1st Sess 3 (Dec. 4, 1865) (Organization of the House).
[203] Id.
[204] Id. at 4.
[205] Id. at 4–5.
[206] N.Y. Times, "From Washington: The Southern Members," Dec. 3, 1865.
[207] Quote in Foner, 239.
[208] Stewart, 50, 67.

unquestionable right of Congress to judge, each house for itself, . . . the qualifications of its members," but he urged Congress to admit representatives from the eleven former Confederate States.[209] While Johnson had a political reason for wanting more Southerners in Congress, his argument for why they had to be admitted was legal and rooted in the text of the Constitution. First, he noted the constitutional provisions that guaranteed representation for every state:

> The Constitution imperatively declares, in connection with taxation, that each State SHALL have at least one Representative, and fixes the rule for the number to which, in future times, each State shall be entitled. It also provides that the Senate of the United States SHALL be composed of two Senators from each state; and adds, with peculiar force, "that no State, without its consent, shall be deprived of its equal suffrage in the Senate."[210]

Johnson interpreted this language to mean that Congress' power over its own member's qualifications could not "be construed as including the right to shut out, in time of peace, any State from the representation to which it is entitled by the Constitution."[211] To legislate for a state without it being represented would violate the "firmly fixed [principle] . . . that there should be no taxation without representation," result in bad policy by excluding the voices of those with "local knowledge," and foster "a spirit of disquiet and complaint."[212] Importantly, Johnson recognized that the case was different in time of war when it was "necessar[y]" to legislate for states in their absence because their people "were then contumaciously engaged in the rebellion." But once a state was restored and had sent representatives to exercise "the constitutional right of

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[209] Andrew Johnson, "Veto of the Freedman's Bureau Bill," February 19, 1866 in McPherson, 71.
[210] Id.
[211] Id.
[212] Id. at 71–72.

representation," Johnson saw no legal basis for excluding them.[213] He also felt compelled to raise this objection to Congress because unlike a congressman, "the President is chosen by the people of all the States" and thus he had a "duty" to present the "just claims" of the unrepresented states.[214] Congress disagreed with Johnson's analysis and shortly after receiving Johnson's veto message, both houses resolved "no Senator or Representative shall be admitted into either branch of Congress from any of [the eleven States which have been declared to be in insurrection] until Congress shall have declared such State entitled to such representation."[215] This legal clash over the seating of representatives reflected both the growing animosity between Johnson and Congress, but also the legal form that their battles culminating in impeachment would take.

Johnson's stance on the seating of representatives was not a quixotic argument. Rather it was closely related to a wide-ranging debate over the constitutional status of the former Confederate States. Four main legal theories were in circulation among Johnson and the Republicans in Congress – Restoration, Conquered Provinces, State Suicide, and Forfeited Rights.[216] Upon rising to the presidency, Andrew Johnson quickly set forth his view on the constitutional status of the former Confederate states. In short, they were still states under the Constitution. In making this argument, Johnson first highlighted the central role of the states in

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[213] Id.

[214] Id. at 71. This last point particularly piqued members of Congress who remembered how Johnson had risen to the presidency. Representative John Lynch of Maine wrote that Johnson's position that "Members of Congress represent only localities (as though the aggregate did not completely represent the whole) while the President is the representative of the whole people," was a "monstrous and arrogant assumption" that was "modest for a man chosen to preside over the Senate, and made President by an assassin." McKitrick, 290.

[215] "When Representatives Shall be Admitted from States declared in Insurrection," in McPherson, 72.

[216] Alongside the four theories debated by Republicans was the "Southern" theory, which maintained that the war had settled the question of secession leaving the so called seceded states to revert to their pre-war relationship to the Union. Such a theory was dead on arrival in the North. McKitrick, 97.

general under the Constitution. He began his First Annual Address to Congress by noting that the Union was "perpetual" and the "States . . . are essential to the existence of the Constitution of the United States."[217] Along with adopting the Declaration of Independence and the Articles of Confederation, "it was the assent of the States, one by one, which gave [the Constitution] vitality."[218] He highlighted that the text of the Constitution itself presupposes the continued existence of the States as their consent is necessary in the amendment process.[219] Johnson had made this point more broadly when he reminded an audience of Indianans that the Constitution provided "for the admission of new States; no provision is made for the secession of old ones."[220] He also argued that governing such a vast country required the States as a practical matter. For Johnson, the Constitution and the States went hand in hand and *always* would:

> The perpetuity of the Constitution brings with it the perpetuity of the States; their mutual relation makes us what we are, and in our political system their connection is indissoluble. The whole can not exist without the parts, nor the parts without the whole. So long as the Constitution of the United States endures, the States will endure. The destruction of the one is the destruction of the other; the preservation of the one is the preservation of the other.[221]

This language, however, only speaks generally to the need for a category of governmental units called "States." It does not necessarily require the continued existence of the same States. Johnson recognized that the Civil War had thrown the status of the former Confederate states

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[217] Andrew Johnson, "First Annual Message to Congress," Dec. 4, 1865.
[218] Id.
[219] See John Harrison, The Lawfulness of the Reconstruction Amendments, 68 U. Chi. L. Rev. 375 (2001) for a discussion of the constitutional status of the former Confederate States and their governments related to the validity of the Reconstruction Amendments.
[220] Andrew Johnson, "Remarks at an Interview with Citizens of Indianan," April 21, 1865 in McPherson, 45.
[221] Andrew Johnson, "First Annual Message to Congress," Dec. 4, 1865.

into question. He was forced to decide "[w]hether the territory within the limits of those States should be held as conquered territory" as men like Thaddeus Stevens proposed. Johnson answered with an emphatic no.

After explaining his policy objections to the conquered territory approach, Johnson questioned its constitutionality. He explained that "military rule over a conquered territory would have implied that the States whose inhabitants may have taken part in the rebellion had by the act of those inhabitants ceased to exist."[222] This, however, was not possible under the "true theory" of the Constitution as the States lacked the right to secede.[223] Instead their "pretended acts of secession were from the beginning null and void." Johnson analogized the attempt to secede to a State trying to "make valid treaties . . . with any foreign power," which unlike secession is explicitly prohibited by the Constitution.[224] Neither was possible. Both acts were void. This was not a new position for Johnson. During the secession crisis he took to the floor of the Senate to declare flatly: "We deny the doctrine of secession; we deny that a State has the power, of its own volition, to withdraw from the Confederacy."[225] Johnson made this point more vividly in an interview: "Individuals tried to carry [the States] out, but did not succeed, as a man may try to cut his throat and be prevented by the bystanders; and you cannot say he cut his throat because he tried to do it."[226] The effect of secession was not to remove those States from the Union, nor to terminate their existence. Rather "[t]he States attempting to secede placed themselves in a condition where their vitality was impaired, but not extinguished; their functions suspended, but

[222] Id.
[223] Id.
[224] Id.; U.S. Const. art. I, § 10, cl. 1. ("No state shall enter into any treaty").
[225] Cong Globe, 36th Cong, 2d Sess 118 (Dec 18, 1860) (Amendment of the Constitution).
[226] Andrew Johnson, "Interview with George L. Stearns," Oct. 3 1865, in McPherson, 49.

not destroyed."[227] Johnson concluded, "it was a State when it went into rebellion, and when it comes out . . . it is still a state."[228] But it was a State whose "life breadth [had] been . . . suspended" leaving the country "like a man that is paralyzed on one side" who needed to be "nursed" back to health.[229] Secession had left the institutions of the Confederate states "prostrated, laid out on the ground."[230] Johnson intended to lift them back up and restore them to their proper place in the Union.

Not only was it good policy to "revitalize" the Confederate states and put them "on [their] feet again," it was also required by the Constitution's guarantee of a republican form of government.[231] This clause in combination with the executive's exclusive pardoning power was the "great panacea" for the ailing States.[232] It allowed Johnson to appoint provisional governors, call conventions, and hold elections in order "to restore the constitutional relations of the States" while also choosing which of those individuals, who had rebelled merely as individuals, to forgive.[233] In taking this stance, Johnson believed himself to be "vindicat[ing] the Constitution."[234] And he called on others to do the same: "Let us enforce the Constitution. Let us live under its provisions. Let it be published in blazoned characters, as though it were in the heavens, so that all may read and all may understand it. Let us consult that instrument, and,

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[227] Andrew Johnson, "First Annual Message to Congress," Dec. 4, 1865.
[228] Andrew Johnson, "Remarks at an Interview with Citizens of Indiana," April 21, 1865 in McPherson, 46.
[229] Id. at 45–46.
[230] Andrew Johnson, "Interview with George L. Stearns," Oct. 3 1865, in McPherson, 49.
[231] Johnson, "Remarks at an Interview with Citizens of Indiana," April 21, 1865 in McPherson, 46.
[232] Id. at 45.
[233] Johnson, "First Annual Message to Congress," Dec. 4, 1865; Johnson, "Remarks at an Interview with Citizens of Indiana," April 21, 1865 in McPherson, 45–46.
[234] Andrew Johnson, "Speech of February 22, 1866" in McPherson, 62.

understanding its principles, let us apply them."[235] That meant that once the former Confederate states showed their loyalty and ratified the Thirteenth Amendment they should be allowed to "resume their places in the two branches of the National Legislature, and thereby complete the work of restoration."[236] Johnson, however, was quite aware of the constitutional clause giving each House the power to judge the qualifications of its own members.[237] He, however, did not see how those Houses could continue to keep representatives of the former Confederate states out after having consistently maintained that those States "had neither the right nor the power to go out of the Union."[238] His opponents agreed that this was the logical conclusion of Johnson's theory. Representative Thaddeus Stevens conceded that "if [Johnson's theory of] restoration prevails the prospect is gloomy . . . Under restoration every rebel State will send rebels to Congress, and they, with their allies in the North, will control Congress, and occupy the White House."[239]

As an alternative to this gloomy future, Representative Thaddeus Stevens promoted a "conquered provinces" theory. Under this view, secession had at least been de-facto effective removing the Confederate states from the Union and Constitution and thus turning them into conquered territory under the law of nations once occupied by Union armies. That in turn made

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[235] Id. Johnson issued this call that in many ways resembles Lincoln's Lyceum Address to abide by the Constitution after acknowledging that "it was said by some during the rebellion that the Constitution had been rolled up as a piece of parchment, and should be put away, and that in time of rebellion there was no constitution. But it is now unfolding; it must now be read and adjusted and understood by the American people." Id. In making this statement, Johnson did not make clear if he was criticizing the constitutionality of actions taken during the war, for example those discussed in part one of this paper, or merely criticizing those who had made such an argument. Either way it Johnson certainly saw himself as restoring the Constitution's proper role in American society and government.

[236] Johnson, "First Annual Message to Congress," Dec. 4, 1865.

[237] Id.

[238] Johnson, "Speech of February 22, 1866" in McPherson, 62.

[239] Thaddeus Stevens, "Hon. Thaddeus Stevens on the Great Topic of the Hour: An Address Delivered to the Citizens of Lancaster," Sept. 6, 1865, N.Y. Times, Sept. 10, 1865.

them territories under the Constitution that could seek readmission to the Union, but that were no longer states.[240] Key to understanding Stevens' preference for this theory is that the Constitution provides "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other property belonging to the United States."[241] Thus if the former Confederate states were territories, it was Congress who should properly control their reconstruction. Not only would Congress as opposed to the President be in charge, but Congress' power would not run into any federalism limits. Instead, its power would be plenary.[242] While there is an attractive consistency to the conquered province theory that has the added benefit of legally justifying the reality of expansive federal control of the former confederacy,[243] it was

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[240] Id.

[241] U.S. Const. art. IV, §3, cl. 2.

[242] American Ins. Co. v. 356 Bales of Cotton, 26 U.S. 511, 546 (1828) ("In legislating for [the territory belonging to the United States], Congress exercises the combined powers of the general, and of a state government.").

[243] This theory also had the potential to resolve the constitutional difficulty regarding admission of West Virginia as a state. That difficulty arose from the Constitution's requirement that "no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress." U.S. Const. art. IV, § 3, cl. 1. The admission of West Virginia thus required the consent of Virginia. That consent, however, came from the restored legislature of Virginia which lacked any representatives from two-thirds of the State raising the question of whether such a legislature could be counted as one of "the Legislatures of the States concerned." Randall, Constitutional Problems Under Lincoln, 452–53. While Lincoln ultimately favored admission finding that "the body which consents to the admission of West-Virginia, is the Legislature of Virginia," the matter had split his cabinet evenly with Attorney General Bates in opposition. Lincoln, Opinion on the Admission of West Virginia into the Union, in 6 CWAL 26–28. Bates in his formal opinion strongly rejected the idea that this constitutional requirement had been satisfied: "I think that no reflecting man will seriously affirm that 'the legislature of Virginia,' which . . . gave *its* consent (not the consent of Virginia) to the dismemberment of the old commonwealth, was, in truth and honesty, such legislature of Virginia as the Constitution speaks of." 10 Op. Att'y Gen. 426, 432 (1862). For a thorough discussion of the constitutional problem with the admission of West Virginia and the composition of the restored legislature that consented to the formation of West Virginia see e.g. Randall, Constitutional Problems Under Lincoln, 433–76 ("It has not been proved to the satisfaction of the writer that the exigencies of the Civil War alone furnished an adequate motive for the permanent disruption of the Old Dominion." Also describing Virginia's purported

unlikely to catch on for two main reasons: first, its starting premise was that secession had been effective in some form. That point of view simply was not going to gain traction in a nation that had just sacrificed a vast sum of blood and treasure to reach the opposite conclusion in a "trial by battle."[244] Second, Stevens wanted to use the theory "to confiscate all the estate of every rebel belligerent whose estate was worth $10,000, or whose land exceeded two hundred acres in quantity." As a policy matter, this measure was simply a step too far for most Northerners.[245]

Interestingly, Stevens embraced the logical conclusions of this theory and offered to defend Jefferson Davis at his treason trial.[246] If secession had been legal, Davis was a belligerent,

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consent as "theory and fiction" that "overlook[ed] realities."); Vasan Kesavan & Michael S. Paulsen, Is West Virginia Unconstitutional?, 90 Cal. L. Rev. 291 (2002) (concluding West Virginia is not an unconstitutional state). While Stevens supported the legislation admitting West Virginia he did so on a different theory than the one accepted by Lincoln. He explained:

> I voted for the admission of that State. I was not going to make either a fool or a knave of myself and say I voted for it under the Constitution, or I did not know what I was voting for. I held then, as I hold now, that having conquered that portion of another power—a power recognized as an independent belligerent by all civilized nations of the earth, ours as well as the rest—we had a right to treat them as a foreign nation and take them in or keep them out as we pleased. I said then that the Constitution had nothing to do with them. . . . when I spoke of being outside the Constitution I did not mean that the Constitution does not recognize the law of nations, and the law of nations recognizes the right of a conquering power to do with its conquered territories as it pleases. Hence we had a right to treat these rebel States after they had become a power just as we pleased, without the least reference to the Constitution except so far as the Constitution covered over them the law of nations under which we were acting. Cong Globe, 40th Cong, 2d Sess 2214 (Mar 28, 1868) (remarks of Rep Stevens).

Under Stevens' theory, Virginia was no longer a state of the Union. It was merely a territory of the United States conquered under the laws of war. In creating West Virginia out of territory that was formerly part of the state of Virginia, the Union was not forming a state "within the Jurisdiction of any other State." Rather, it was forming a state within the jurisdiction of a United States territory. Admitting West Virginia was more akin to creating a state out of the Louisiana Territory. Thus, the constitutional requirement for Virginia's consent simply was not triggered.

[244] For more on the Civil War as a trial by battle to settle the legal question of secession see Cynthia Nicoletti, The American Civil War as a Trial by Battle, 28 Law & Hist. Rev. 71 (2010).

[245] McKitrick, 100–01.

[246] Cynthia Nicoletti, The Treason Trial of Jefferson Davis: Secession in the Aftermath of the Civil War 189 (forthcoming).

not a traitor.[247] Stevens' offer, however, was critiqued by his contemporaries as an opportunistic move to further radical reconstruction by advancing the conquered provinces theory. Modern scholars have similarly concluded that he was merely trying to use the case and legal arguments as a political tool.[248] This critique is likely correct, at least when it comes to Stevens' conquered provinces theory. Stevens' rhetoric in large part admits that he started by identifying what he wanted to accomplish in the South and then went looking for a legal theory that would allow it.

On September 6, 1865, he questioned the legal basis of reconstruction in an address to the citizens of Lancaster. He explained that "It would be rank, dangerous and deplorable usurpation" for Congress or the Executive "to direct a convention to be held in a sovereign State of this Union, to amend its constitution and prescribe the qualifications of voters" because there is no "warrant in the constitution for such sovereign power."[249] He concluded, "no reform can be effected in the Southern States if they have never left the Union."[250] For Stevens, that was an unacceptable outcome. In his mind, "reformation must be effected; the foundation of their institutions, both political, municipal, and social, must be broken up and relaid."[251] Stevens, however, found a legal argument that would allow such a restructuring of Southern society – "treating and holding [the former Confederate states] as conquered people." Under such a course of action "all things which we can desire to do, follow with logical and legitimate authority. As conquered territory Congress would have full power to legislate for them; for the territories are not under the Constitution except so far as the express power to govern them is given to

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[247] Id. at 193.
[248] Id. at 189, 196–97 (concluding Stevens "was highly selective about when and where he decided to be doctrinaire. He deployed doctrine when it furthered his political goals and ignored it when it was convenient to do so.")
[249] Thaddeus Stevens, "Hon. Thaddeus Stevens on the Great Topic of the Hour: An Address Delivered to the Citizens of Lancaster," Sept. 6, 1865, N.Y. Times, Sept. 10, 1865.
[250] Id.
[251] Id.

Congress."[252] Stevens in large part embraced the conquered provinces theory because it would allow him to do what he wanted to do. While Stevens certainly had other noble goals, attachment to a strict conception of the rule of law was not one of them. His later maneuvering and reasoning during the impeachment and trial of Johnson make this abundantly clear.

It is important to note, however, that Stevens did not think it was enough to argue for his preferred policy. He had to come up with a coherent legal theory for why it could be implemented. He had to argue legally; and so he did.[253] The main thrust of his argument in support of a conquered provinces approach was a gesture towards supportive authority. After briefly mentioning the *Prize Cases*, he proceeded to belittle "Our new doctors of national law" who believed the rebel states "were never out" for thinking themselves "wiser than Grotius, and Puffendorf, and Rutherford, and Vattel, and all modern publicists down to Halleck and Phillimore" who "all agree that such a state of things as has existed here for four years is public war, and constitutes the parties independent belligerents, subject to the same rules of war as foreign nations engaged in open warfare."[254] In support of extending this theory to confiscation of Southern property, he cited law professor Theophilus Parsons, who in turn relied upon an asserted weight of authority:

> As we are victorious in war we have a right to impose upon the defeated party any terms necessary for our security. This right is perfect. It is not only in itself obvious, but it is asserted in every book on this subject, and is illustrated by all the wars of history.

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[252] Id.

[253] Stevens was by no means breaking new legal ground in advocating a right of conquest. In English legal history, the doctrine dated back to *Calvin's Case* in 1608. Nicoletti, The Treason Trial of Jefferson Davis, 190–91.

[254] In a separate legal argument, Stevens would also quote the "Dorr case" and its analysis of the Guarantee Clause as controlling authority in support of his claim that Congress "alone" held power over Reconstruction. This is a reference to Luther v. Borden, 48 U.S. 1, 7 HOW 1 (1849).

Overall, Stevens' legal arguments boiled down to stating a conclusion and asserting that legal authority supported that conclusion without offering any extensive analysis of why that was the case. While the law was doing work for Stevens, it was in a very weak sense.

Beyond citation to authority, Stevens also tacked on an argument that would reappear at Johnson's impeachment trial – estoppel. Stevens argued that the "'Confederate States' are estopped from denying" their status as an "alien enemy" because their secession ordinances had maintained the opposite and declared themselves and the Union to be "*foreign* States."[255] For the purposes of this paper, it is critical to recognize that while estoppel is a legal concept, it is not a legal argument. It is not an assertion about the correct answer to a general legal question, rather it is a claim that a specific party should not be able to reach the legal merits of that question because of their past action. In other words, but for a successful estoppel argument, the case might come out differently. Stevens was not making an argument about the legal and constitutional effectiveness of secession when he asserted that the former Confederate states could not claim to have legally never left the Union. He was only saying that they could not test the validity of such an argument since they had previously taken the opposite stance. This is only a legal argument in a weak sense.

Further highlighting Stevens' instrumental use of the law is the fact that he ignored a very similar estoppel argument cutting against his conquered provinces theory. The Lincoln administration had maintained that the Confederate states had never left and could never leave the Union.[256] Throughout the war, Lincoln even made a point of referring to them as the

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[255] Thaddeus Stevens, "Hon. Thaddeus Stevens on the Great Topic of the Hour: An Address Delivered to the Citizens of Lancaster," Sept. 6, 1865, N.Y. Times, Sept. 10, 1865.
[256] See e.g. Abraham Lincoln, "First Inaugural Address," March 4, 1861 in 4 CWAL 265 ("It follows from these views that no State, upon its own mere motion, can lawfully get out of the Union, that *resolves* and *ordinances* to that effect are legally void . . . I therefore consider that, in

"seceded States, so called" to emphasize the point that they had not successfully seceded and that their government was not a truly legitimate one.[257] If the former Confederate states were estopped from arguing that secession was constitutionally ineffective, surely the Union should also be estopped from maintaining that those states had in fact seceded. In Stevens' usage, the estoppel claim was less a legal argument than a political one in the vein of modern charges of "flip-flopping." It, however, looked legal. This would happen again regarding impeachment. Stevens would make plausible legal arguments in service of a preferred outcome.

Radical Republican Senator Charles Sumner proposed the second main legal theory concerning the constitutional status of the former Confederate states – State Suicide.[258] In brief, this theory held that the unconstitutional attempt to secede destroyed the then existing states. In a series of nine resolutions offered on February 11, 1862 Sumner argued that

> any vote of secession . . . is inoperative and void against the Constitution, and when sustained by force it becomes a practical *abdication* by the State of all rights under the

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view of the Constitution and the laws, the Union is unbroken"). Lincoln, however, started to back away from this position as his focus shifted from waging war to reconstructing the nation. In his final public remarks, Lincoln explained that he had "*purposely* forborne any public expression" on "the question whether the seceded States, so called, are in the Union or out of it." He did not consider the question a "practically material one" and thought "discussion of it" would only divide friends and create controversy. The answer would be "merely pernicious abstraction" since "all agree that the seceded States, so called, are out of their proper practical relation with the Union." Lincoln believed it would be "easier" to restore those States to their proper relation "without deciding, or even considering, whether these states have ever been out of the Union, than with it." Instead of arguing over this question, Lincoln encouraged everyone to "innocently indulge his own opinion." Abraham Lincoln, "Last Public Address," April 11, 1865 in 8 CWAL 402–03. Lincoln was certainly correct regarding the issue's power to divide.

[257] See e.g. Abraham Lincoln, "Message to Congress in Special Session," July 4, 1861 in 4 CWAL 427 (referring to "seceded States, so called" and "border States, so called"); Abraham Lincoln, "Proclamation of Amnesty and Reconstruction," December 8, 1863 in 7 CWAL 55 (referring to "the so-called confederate government" and "so-called act of secession"); Abraham Lincoln, "Last Public Address," April 11, 1865 in 8 CWAL 402–03 (referring "seceded States, so called").

[258] McKitrick, 110–13; Dunning, 105–07; Harrison, 390–91.

> Constitution, while the treason which it involves still further works an instant *forfeiture* of all those functions and powers essential to the continued existence of the state as a body-politic so that . . . the State being, according to the language of the law, *felo-de-se*, ceases to exist.[259]

The territory those former states encompassed, however, was "an inseparable" part of the United States and "so completely interlinked with the Union that it is forever dependent thereupon."[260] With the states gone but the territory remaining, Congress would "assume complete jurisdiction of such vacated territory where such unconstitutional and illegal things have been attempted, and will proceed to establish therein republican forms of government under the Constitution."[261]

The conversion of the seceded states to mere United States territory grants this theory the same logical benefits of Stevens' conquered provinces theory – it justified the reality of extensive federal control over the former Confederate states after the conclusion of the war that would not have been permitted to occur in regular federal-state relations.[262] Sumner, however, offered a stronger[263] legal argument in favor of his theory than Stevens. This is best seen in his article "Our Domestic Relations: Powers of Congress over the Rebel States."[264] That article began with a long exposition on the history of the American Constitution and its allocation of powers and restrictions on the States to conclude that "the pretention of State sovereignty [was] without foundation" and, thus, States could not constitutionally secede. He then argued by

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[259] Cong Globe, 37th Cong, 2d Sess 736–37 (Feb 11, 1862) (Relations of the Seceded States).
[260] Id. at 737.
[261] Id.
[262] In the author's opinion, it also provides a simple solution for the constitutional difficulty of West Virginia.
[263] "Stronger" here does not mean the author finds the argument persuasive. Rather it is a statement that the argument is taking the law seriously.
[264] Charles Sumner, "Our Domestic Relations: powers of Congress over the Rebel States," in Atlantic Monthly, (October, 1863) [hereinafter, Sumner, Domestic Relations].

analogy to examples provided by Blackstone and Phillimore for varying theories of State forfeiture, State abdication, or State Suicide in the context of the American Civil War. He, however, noted that such arguments were not necessary because there simply were no loyal governments with "functionaries bound by constitutional oaths" in the Confederate States and, thus, "there can be no State Government." Those governments were "vacated."[265]

Sumner, however, also rejected the proposition that secession's unconstitutionality meant the Confederate states retained their original relation to the Union with all of the same rights. Sumner responded legalistically to one of the cheekier arguments in favor of that position – Andrew Johnson had retained his seat in the Senate even after Tennessee had joined the Confederacy and thus Tennessee must have still been a State. Sumner rejected this argument based on "two principles of Parliamentary Law" drawn from the English system. First, he explained that "the power . . . conferred by an election . . . is irrevocable, so that it is not affected by any subsequent change in the constituency." For Sumner, this included secession. Second, he maintained that "a member, when once chosen, is a member for the whole kingdom." While Sumner admitted that these arguments rooted in the English system were not entirely on point (this is particularly true of the second one), he did find them sufficient to negate the Johnson argument.[266]

After reviewing the status of the Confederate states, Sumner moved on to a discussion of which branch should establish new governments in those states and where the power to do so originated. He first turned to Chancellor James Kent and the division of power between Congress and the executive in the Constitution to argue for congressional control over creating new governments in the Confederate states as opposed to executive control. Sumner highlighted three

[265] Sumner, Domestic Relations.
[266] Id.

separate sources of legal authority for Congress to establish governments in the former Confederate states. First, "from the necessity of the case . . . Congress must have jurisdiction over every portion of the United States where there is no other government."[267] In support of this claim, Sumner cited Chief Justice Marshall's decision in *American Insurance Co. v. Canter*[268] that "Perhaps the power of governing a Territory . . . which has not, by becoming a state, acquired the means of self-government, may result necessarily from the facts that it is not within the jurisdiction of any particular state, and is within the power and jurisdiction of the United States." This argument was the core of Sumner's theory of State Suicide resulting in territorial government. Second, he pointed to the "Rights of War" in an argument similar to Stevens' that relied on the same authorities – Grotius, Vattel, Wheaton. Third, he invoked the Guarantee Clause of the Constitution.[269]

Despite this thorough argument, the theory of "State Suicide" was not widely accepted. This was in part due to the identity of its proponent, but also because many Americans simply rejected the premise that a state could ever cease to exist under the American Constitution.[270] Instead, the "Forfeited Rights" theory put forth by Representative Samuel Shellabarger of Ohio became the "majority position."[271]

Shellabarger's theory had three parts – forfeiture, federal governance, and readmission.[272] First, it was possible for a loyal state government to be usurped. When that happened, as it did in the Confederate states, "such states and their people ceased to have any of the rights or powers of

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[267] Id.
[268] 1 Pet. 511 (1828).
[269] Sumner, Domestic Relations.
[270] McKitrick, 112; Dunning, 109.
[271] Cong Globe, 39th Cong, 1st Sess 142–46 (Jan 8, 1866) (Rep. Shellabarger on Reconstruction); McKitrick, 113.
[272] Cong Globe, 39th Cong, 1st Sess 142–46 (Jan 8, 1866) (Rep. Shellabarger on Reconstruction).

government as States of this Union."[273] In other words, they forfeited their rights and powers. Second, in the absence "of the lost State Governments," the federal government "ought to assume and exercise local powers" previously held by those governments.[274] Third, the federal government could "control the readmission of such States to their powers of government in this Union, subject to and in accordance with the obligation to 'guaranty to each State a republican form of government.'"[275] Shellabarger's theory also held that the "rebellion" had not removed any "subject" of the United States from "under its sovereignty" nor had "any State lost its territorial character or defined boundaries."[276]

On the floor of the House, Shellabarger offered an overtly legal explanation of this theory with a few moments of rhetorical flair interspersed among his legal citations.[277] He opened with the question of what are "the necessary elements of every State in this Union?"[278] He started with the requirements of "the law of nations," which he assumed are part of the Constitution. Quoting Wheaton and citing Grotius and Burlamaqui for additional support, Shellabarger found that under the law of nations one "necessary element of a State" was the "habitual obedience of its members to those in whom the superiority is vested."[279] Applied to the facts of the Civil War, Shellabarger argued the seceded States failed this criteria. He explained, "In them . . . there was no obedience to law except the law which compelled the defiance of all 'supreme laws;' there was no government except that one which consisted in enforcing disloyalty to Government."[280] Thus, under "the settled precepts of public law those eleven districts, called 'confederate states,'

[273] Id. at 142.
[274] Id.
[275] Id.
[276] Id.
[277] Id. at 142–46.
[278] Id. at 142.
[279] Id.
[280] Id.

ceased to be States."[281] This argument, however, is slightly muddled. For example, it would seem absurd to say that Burlamaqui's definition of a State cited by Shellabarger did not apply to Confederate South Carolina: "It is a multitude of people united together by a common interest and common laws, to which they submit with one accord."[282] Shellabarger had to presume the invalidity of secession to conclude that South Carolinians were submitting to the wrong authority. This flaw is resolved if one takes Shellabarger to be arguing about the requirements for being a state under the Constitution. While such a reading initially seems unnatural since Shellabarger specifically treats that topic as a separate inquiry, it does make logical sense when one remembers that Shellabarger considered the law of nations to be part of the Constitution.[283]

Turning to the question of "What is a State of this Union?" Shellabarger identified four necessary elements rooted in specific constitutional clauses: 1. Its citizens render "habitual allegiance and obedience to the Constitution, laws, and treaties of the United States." 2. State officers take an oath to support the Constitution. 3. The United States has admitted the State and thus guaranteed it republican government and protection against invasion and domestic violence. 4. "Certain rights of participation in the control of the Federal Government."[284] From here, Shellabarger turned to list every provision of the Constitution that "deals with States" separating the provisions imposing duties and restrictions[285] from those granting rights.[286] He did this to prove "that there could be, under the Constitution, none of the rights or powers of a State where

[281] Id.
[282] Id.
[283] Id.
[284] Id.
[285] This list included, for example, the prohibitions on states entering into any treaty, coining money, or impairing contracts. Id. at 142–43.
[286] This listed included, for example, the power of each state to elect two Senators, the power to elect at least one Representative, and the right to be protected against insurrection. Id.

there were recognized none of the obligations or duties of a State."[287] It was not only individuals who could forfeit their rights.

After establishing the possibility of forfeiture, Shellabarger argued that it had in fact occurred, resulting in the "confederate states ha[ving] no powers or rights as States of this Union."[288] Specifically, he analyzed the position each branch of government took regarding the Confederate states and concluded that the "Government in all its departments and recently all its actions, proceeds upon the assumption that these rebel States had lost all the rights of States."[289] As evidence of this claim for Congress, he briefly pointed to the closing of ports in rebel States, which he would consider to be a constitutional violation if the rebel States had retained their rights. For the President, he pointed to Johnson's appointment of Governor Holden in North Carolina under the Guarantee Clause. That appointment would have been nonsensical had Johnson believed the former "laws and constitutions and powers of [the former Confederate states] sprang into life and force . . . when the war was gone" as such a rebirth would establish a republican government and negate Johnson's ability to act under the Guarantee Clause.[290] In keeping with the legal nature of his argument, Shellabarger spent by far the most time on the "Supreme Court's position."[291] His analysis while far reaching and largely on point regarding the relevance of the *Prize Cases* did run into some legal difficulties. For example, he rejected the argument as "utterly discarded" by the Supreme Court's precedent that individuals can only forfeit their own rights and not those of their state. Instead he embraced the Court's declaration that it was "not capable of comprehending" the argument for "a distinction . . . between a State

[287] Id.
[288] Id. at 145.
[289] Id. at 143.
[290] Id.
[291] Id. at 144.

and the people of a State [who are] integral parts of it, all together forming a body politic."[292] This argument, however, had one main flaw – Shellabarger was quoting Justice Iredell's dissent.[293] While he may have found the point persuasive, it was in fact not the language of the Court as he led his audience to believe.

Believing himself to have established that the states forfeited their rights, Shellabarger turned to explain the legal basis for federal, and more specifically, congressional control over readmission. First, he argued it would be absurd for the resumption of state powers to depend solely on the "determination of the rebel inhabitants" that they once again desired to exercise those powers. Instead, the United States must decide "as a great and sovereign people acting through their Government, what shall be a 'State' in her high Union." To hold otherwise would have empowered rebel senators and representatives to paralyze the government during the war simply by taking their seats in government. Shellabarger rejected the argument that each House could avoid this absurdity by excluding such representatives under its power to judge its members' elections and qualifications. He thought that if the power were used to exclude only individual representatives as "rebels," the purported check would be "in vain" as it would be impossible to actually determine which representatives were disloyal. On the other hand, if the power were used broadly to exclude all "duly elected and qualified" representatives from "disloyal states," it was no different from the power he was asserting, except his theory would not risk a different number of states being considered loyal in each house due to each house making its own determination.[294] Shellabarger, however, did not rest on this politically

[292] Id.
[293] Penhallow v. Doane's Adm'rs, 3 U.S. 54, 3 Dall. 54, 93 (1795) (Iredell, J. Dissenting).
[294] Cong Globe, 39th Cong, 1st Sess 145 (Jan 8, 1866) (Rep. Shellabarger on Reconstruction).

compelling argument rooted in preventing absurdity. He also turned to Supreme Court precedent. Namely, *Luther v. Borden* and its argument that

> it rests with Congress to decide which government is the established one, for as the United States guaranties to each State a republican government, *Congress must necessarily determine what government is established in a State before it can decide whether it is republican or not*. When the Senators and Representatives of a state are admitted into the councils of the Union the authority of the government under which they are appointed . . . is recognized by the proper constitutional authority. And its decision is binding on every other department of the Government.[295]

Shellabarger used this case that other members of Congress were widely familiar with[296] in support of his claim that the federal government had the power to decide what counted as a "State." Understanding how this language supports Shellabarger's theory requires recognizing that he was not using the term "State" the same way it was used by Chief Justice Taney in *Luther v. Borden*. Shellabarger's "State" is conceptually closer to what Taney calls the "government." In making that clarification, the Supreme Court's language becomes directly on point. Translated into Shellabarger's terminology, *Luther* would read as "Congress must necessarily determine what *State as body politic* is established in *defined territorial lines* before it can decide whether it is republican or not."[297]

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[295] Id. at 145, Luther v. Borden, 48 U.S. 1, 42, 7 HOW 1 (1849) (emphasis added) (ellipses inserted to reflect the portion of the sentence contained in the actual opinion, but not mentioned by Shellabarger).

[296] See, Harrison, The Lawfulness of the Reconstruction Amendments, 415, nn. 213, 214, (providing examples of other representatives relying on and debating *Luther*).

[297] Shellabarger may have been better off quoting different language from *Luther*. For example, "No one, we believe, has ever doubted the proposition, that, according to the institutions of this country, the sovereignty in every State resides in the people of the State, and that they may alter and change their form of government at their own pleasure. But whether they have changed it or

The logical connection of *Luther* to Reconstruction, especially congressional reconstruction, however, is limited by the facts and context of that case. The case stemmed from Thomas Dorr's 1841–42 rebellion in Rhode Island over the state's continued reliance on its colonial charter and suffrage restrictions. The Dorrites established their own state government in competition with the existing Charter government. At this point, the Governor of the Charter government citing the Guaranty Clause requested President Tyler call out the militia to aid in restoring order.[298] President Tyler had this authority under the Militia Act of 1795 which provided "in case of an insurrection in any state, *against the government thereof*, it shall be lawful for the President of the United States, *on application of the legislature of such state, or of the executive,* (when the legislature cannot be convened,) to call forth . . . the militia."[299] Tyler refused to exercise the power explaining that he could only act after an insurrection had occurred and not before,[300] but Taney noted that in these dealings the President "recognized [the Charter Governor] as the executive power of the State" and that "determination" was "equally authoritative" as if he had actually called out the militia in support of the Charter government.[301] Importantly, Tyler was acting under statutory authority as opposed to exercising constitutional power.[302] He also explained that in deciding which government to support he would not "look

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not by abolishing an old government, and establishing a new one in its place, is a question to be settled by the political power." Luther v. Borden, 48 U.S. 1, 47, 7 HOW 1 (1849).

[298] Bruce Ackerman, 2 We the People: Transformations 443–44 n.23 (1998).

[299] Militia Act of 1795, ch. 36, 1 Stat. 424 (emphasis added).

[300] "John Tyler to the Governor of Rhode Island," April 11, 1842 in Alexander Gurdon Abell, Life of John Tyler, President of the United States, Up to the Close of the Second Session of the Twenty Seventh Congress (1843), 239–40.

[301] Luther, 44. For a partial challenge to Taney's interpretation of Tyler's actions as recognition of the Charter government see Michael A. Conron, Law, Politics, and Chief Justice Taney: A Reconsideration of the Luther v. Borden Decision, 11 American Journal of Legal History, 377 380 (1967) (describing Tyler's promise to provide troops as "ambivalent for by refusing to consider the merits of either claim to legitimacy, Tyler promised only to guarantee civil order").

[302] Harrison, 427, n. 249.

into real or supposed defects of the existing government, in order to ascertain whether some other plan of government proposed for adoption was better suited to the wants . . . of her citizens."[303] Rather it would be his "duty . . . to respect the requisitions of the that government which has been recognized as the existing government of the state through all time past, until I shall be advised, in regular manner, that it has been altered and abolished."[304] Tyler's reliance on statutory authority and refusal to make his own independent determination of which government was legitimate and entitled to recognition does support Taney's interpretation of events and Shellabarger's claim that ultimate control of the issue resisted with Congress. But, at the same time Congress never actually rejected the Dorrite government as it never sent representatives to Congress. Taney in fact admitted in the sentence that came immediately after the passage quoted by Shellabarger: "It is true that . . . as no senators or representatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy."[305] Thus, the case hinged entirely on the actions of the executive. Furthermore, the case did not present an instance of the President and Congress disagreeing as occurred during Reconstruction. More fundamentally, *Luther* dealt with rival state governments, while only one possible government existed in each of the former Confederate states.[306] The

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[303] "John Tyler to the Governor of Rhode Island," in Abell, Life of John Tyler, 239.
[304] Id.
[305] Luther, 42.
[306] This point is aptly made by Bruce Ackerman in an argument that has many hints of Andrew Johnson's position: "The Thirty-ninth Congress did not merely disagree with the President over which state government was truly republican; it rejected the only governments that could even plausibly be called republican, and thereby deprived the Southern states of all representation of any kind. Thus, a court would be required to weigh not only the President's judgment that the United States had satisfied its guarantee of republican government, but also the explicit constitutional command that all states receive at least one Representative and two Senators in Congress. Since this latter factor was entirely absent from Taney's contemplation in *Luther*, it would be rash to apply Taney's dicta in a mechanical way to the Exclusion Crisis." Bruce Ackerman, 2 We the People: Transformations 443–44 n.23 (1998).

question was not which government to recognize, but whether a government should be recognized at all. These differences raise serious challenges to relying on *Luther* to justify the exclusion of representatives from the former Confederate states.

Resolving the precise applicability of *Luther*, while an interesting question, is not necessary for the purposes of this paper. Rather Shellabarger's deployment of *Luther* is just further evidence of his overall legalistic approach to determining the constitutional status of the former Confederate states. While Shellabarger's legal argument had its flaws, he did offer a more extensive legal justification for his theory than either Stevens, Sumner, or Johnson. His defense was rooted in legal citations and authority, and, unlike Stevens, he explained the relevance of those authorities instead of just asserting they supported his position. His speech focused the House on legal questions and even prompted questioning regarding Shellabarger's familiarity with potentially conflicting authorities mentioned in a legal treatise they were apparently all familiar with – "Lawrence's Wheaton."[307] In the context of this paper, it is interesting to note that it was the most legalistic theory that became the majority position among Republicans.

With Johnson's divide with Congress rooted in these competing conceptions of the constitutional basis for restoration / reconstruction growing, the President began to actively campaign against Republicans. In the 1866 midterms he took a three-week campaign trip known as the "Swing Around the Circle."[308] While Johnson's swing ended in ridicule and was out of sync with the traditional campaign practices of the 1860s, it had not been destined to fail from the start. Johnson's trip started strong garnering positive reviews, but then the President

[307] Cong Globe, 39th Cong, 1st Sess 144 (Jan 8, 1866) (Rep. Deming Questioning Rep. Shellabarger). This was a reference to either the sixth or seventh edition of Wheaton's Elements of International Law published by William Beach Lawrence. Henry Wheaton & William Beach Lawrence, Elements of International Law (1855).
[308] Guelzo, 496.

proceeded to give a nearly identical stump speech at every stop – a decision made worse by the fact that nearly everyone in attendance had already read the speech in newspapers. Johnson was widely mocked for his repetition and the campaign trip devolved into rhetorical jousting with hecklers.[309] This failure was further compounded by much of the press abandoning Johnson and the president taking the blame for a race riot in Memphis and a similar riot in New Orleans that killed or wounded 200 blacks and white unionists.[310] Primarily, the election boiled down to a referendum on both Johnson's policy of immediate restoration and the proposed Fourteenth Amendment.[311] The results were clear: Republicans secured a Senate majority of 43 to 9 and a House majority of 173 to 53.[312]

Democrats, however, would make progress across the North in the 1867 elections. This included sweeping California and winning New York by more than 50,000 votes. Democrats even took control of the Ohio legislature.[313] Prior to ratification of the Seventeenth Amendment, Senators were elected by state legislators instead of directly.[314] Thus, by taking control of the Ohio legislature, Democrats also gained the power to eventually oust Republican Senator Ben Wade, who as president pro tempore of the Senate would have succeeded to the presidency had Johnson been impeached.[315] Wade, however, could not be removed until after Johnson's trial. Importantly, the 1867 elections were limited in scope containing Republican losses.[316] While the

[309] Foner, 264–65; McKitrick, 428–38.
[310] McKitrick, 421–27; Foner 261–63.
[311] McKitrick, 449; Foner, 267.
[312] Guelzo at 597. Republicans also won every contested governor's race and carried every state legislature up for election. McKitrick, 447.
[313] Foner, 315
[314] U.S. Const. Amend. XVII.
[315] Stewart, 97.
[316] Foner, 315.

Democratic gains did embolden Johnson, Republicans maintained their overwhelming advantage in both houses to the point that they were able to regularly override Johnson's vetoes.

Even in the face of these majorities, Johnson continued to clash with Congress over Reconstruction. General William T. Sherman, who generally agreed with Johnson's politics, aptly described his predicament: "He attempts to govern after he has lost the means to govern. He is like a General fighting without an army."[317] At the time of the trial, the Republican Senate majority stood at 42 to 12.[318] Had the Senate vote to convict followed straight party lines, Johnson would have been removed from office. Yet, impeachment failed. Seven Republicans, precisely the number needed, broke from their party and sustained Johnson by voting not guilty.[319]

2. The Clash over Reconstruction

a. Johnson Takes Control of Reconstruction

Congress did not attempt to remove Johnson from office simply because the House and Senate majorities identified with a different party than the president. Rather, the impeachment effort stemmed from a longstanding clash between the Radicals in Congress and President Johnson over the Constitution and control of Reconstruction. Impeachment was not a sudden event. This paper will not dwell long on that conflict, which has been well documented by other

[317] Foner, 334.
[318] John R. Labovitz, Presidential Impeachment in Thomas E. Cronin, Inventing the American Presidency 107 (1989). As a practical matter, Labovitz notes that "the recurrence of such a lopsided partisan majority in Congress in opposition to the president is highly improbable." Id.
[319] Guelzo, 501. While Johnson survived by only one vote, it is speculated that other senators were prepared to vote to acquit if their votes were needed. Foner, 336.

authors,[320] but it is important to recognize the extent of the antagonism between Congress and the President and how they used their constitutional powers to do battle with one another.

Initially, Republicans in Congress, including those who would come to be known as Radicals, thought they might find an ally in President Johnson given his remarks to them the day of Lincoln's death that they should "judge of my policy by my past . . . Treason is a crime; and crime must be punished . . . Treason must be made infamous and traitors must be impoverished."[321] Radical Representative George W. Julian went so far as to declare a preference for Johnson over Lincoln claiming, "I believe that the Almighty continued Mr. Lincoln in office as long as he was useful, and then substituted a better man to finish the work."[322] Johnson quickly began to whittle away at that impression.

A mere six weeks after assuming the presidency, Johnson set out to direct Reconstruction unilaterally when he issued two proclamations. The first proclamation was a grant of amnesty and pardon.[323] It granted amnesty and restored civil rights to former Confederates upon taking an oath with only fourteen exceptions primarily focused on high-ranking officers of the Confederate government and military.[324] Individuals who fell within the exceptions would have to apply directly to the President for a pardon, but the proclamation accurately predicted that "such

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[320] For more on the general history of Reconstruction see e.g. Eric Foner, Reconstruction: America's Unfinished Revolution 1863–1877 (1988); Allen C. Guelzo, Fateful Lighting: A New History of the Civil War & Reconstruction (2012); Eric L. McKitrick, Andrew Johnson and Reconstruction (1960); Gregory P. Downs, After Appomattox: Military Occupation and the Ends of War (2015); William A. Dunning, Essays on the Civil War and Reconstruction (1931); John W. Burgess, Reconstruction and the Constitution 1866–1876 (1902).
[321] Guelzo, 488.
[322] Foner, 178.
[323] Andrew Johnson, "Of Amnesty," May 29, 1865, in McPherson, 10; Foner, 183.
[324] Johnson, "Of Amnesty," May 29, 1865, in McPherson, 10. For a comprehensive discussion of the pardon power during the Civil War and Reconstruction see Jonathan Truman Dorris, Pardon and Amnesty Under Lincoln and Johnson: The Restoration of the Confederates to Their Rights and Privileges, 1861-1898 (1953).

clemency will be liberally extended."[325] Johnson's second proclamation appointed a provisional governor for North Carolina and outlined a plan to reorganize the state.[326] Johnson's plan directed the governor to convene a state constitutional convention "to restore [North Carolina] to its constitutional relations to the Federal Government, and to present . . . a republican form of State government."[327] This included repudiating secession and Confederate debt, holding elections, and ratifying the Thirteenth Amendment.[328] Johnson followed up on this action over the next two months by either appointing provisional governors for or recognizing pre-existing Unionist state governments in every former Confederate state and directing them to write new constitutions and form state governments.[329] This resulted in not a single government allowing freedmen to vote, former confederates dominating state governments, and the election of federal representatives who had previously served in the Confederate government and military.[330]

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[325] Johnson, "Of Amnesty," May 29, 1865, in McPherson, 10; Dorris, Pardon and Amnesty, 313–16. The Constitution provides that "The President . . . shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment." U.S. Const. Art. II, §2. By September 7, 1867, Johnson had issued around 13,500 individual pardons. McKitrick, 143. After that date, additional general amnesties reducing the number of excepted classes largely removed the need for wide scale individual pardons. These general amnesties were granted on September 7, 1867, July 4, 1868, and December 25, 1868. Id. The September 7 Proclamation, for example, reduced the fourteen exceptions in the May 29 Proclamation to only three: 1. High ranking Confederate government officials, diplomats, and military officials. 2. Those who failed to treat United States military personnel as lawful prisoners of war 3. Those currently in custody or on bail and anyone involved with the Lincoln assassination. Andrew Johnson, "Proclamation 167—Offering and Extending Full Pardon to All Persons Participating in the Late Rebellion," Sept. 7, 1867 available online at http://www.presidency.ucsb.edu/ws/?pid=72125. After the September 7, proclamation only about three hundred people were still in need of a pardon with most of them falling into the first remaining excepted class. Dorris, 343–44.

[326] Andrew Johnson, "Appointing William W. Holden Provisional Governor of North Carolina," May 29, 1865, in McPherson, 9–11.

[327] Id. at 11.

[328] Guelzo, 490

[329] Id.; Stewart, 22–23. Virginia, Tennessee, Arkansas, and Louisiana had pre-existing loyalist governments. Harrison, 381–88, 394–95.

[330] Stewart, 23.

Johnson even ignored the Test Oath Act when he appointed former Confederate officials as provisional governors.[331] His administration similarly ignored the oath requirement in doling out patronage.[332]

Johnson was able to launch this unilateral plan for Reconstruction because of a key initial advantage over Congress—he was in D.C. and capable of exercising his constitutional powers to their fullest extent starting on April 15, 1865, while Congress was scattered for a six month recess and did not reconvene until December, 1865.[333] Radical leader Representative Thaddeus Stevens recognized this disadvantage and repeatedly wrote to Johnson urging him to call Congress into "extra Session" or to at least "suspend[]" reconstruction "until the meeting of Congress."[334] He argued that to do otherwise would cause others to "think that the executive was approaching usurpation" of Congress' power to direct Reconstruction "exclusively."[335] Stevens similarly cautioned

> [a]mong all the leading Union men of the North with whom I have had intercourse I do not find one who approves of your policy. They believe that "restoration" as announced by you will destroy our party (which is of but little consequence) and will greatly injure the country. Can you not hold your hand and wait the action of Congress and in the meantime govern them by military rulers?[336]

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[331] Benedict, Preserving the Constitution, 40.
[332] Id.
[333] Guelzo, 492; Stewart, 19.
[334] Thaddeus Stevens to Andrew Johnson, May 16, 1865 in Paul Bergeron, 8 The Papers of Andrew Johnson, May–August 1865, 80 (1989); Stewart, 22–23.
[335] Id.
[336] Thaddeus Stevens to Andrew Johnson, July 6, 1865, in Paul Bergeron, 8 The Papers of Andrew Johnson, May–August 1865, 365 (1989).

Johnson ignored the advice and continued to take advantage of Congress' absence.[337] This would not be the last time Johnson timed his actions to coincide with an absent legislature.

Johnson's initial steps to control Reconstruction, however, did not cause an immediate rupture with congressional Republicans. In fact, they were generally supportive of what he had done. But that support was premised on the idea that Johnson was merely "experimenting" with possible paths for Reconstruction and would be willing to change course if needed.[338] Once they realized that was not the case, their relationship began to sour.

When Congress assembled, Johnson transitioned from setting forth his own policy to blocking Congress'. He primarily did this by repeatedly exercising his constitutional power to veto legislation – this included vetoing the Freedmen's Bureau bill, the Second Freedmen's Bureau bill, the Civil Rights bill, the Reconstruction bill and the Tenure of Office Act among others.[339] While some of these vetoes were the result of animosity between the two political branches, others were the source of that animosity. Specifically, the Freedman's Bureau and Civil Rights vetoes created substantial friction between Johnson and Congress. Senator Lyman Trumbull of Illinois, a conservative Republican[340] who could have worked with Johnson, introduced both bills that most Republicans viewed as necessary Reconstruction measures.[341] Trumbull even met with Johnson about the Civil Rights Bill to make sure the president supported it.[342] Johnson, however, vetoed both measures and in the process criticized Congress for

[337] McKitrick, 162.
[338] McKitrick, 78–80, 175, 254.
[339] Guelzo, 494–95; Stewart, 50, 53.
[340] McKitrick, 270.
[341] Foner, 243.
[342] McKitrick, 317.

legislating for the South in their absence.[343] These two vetoes severely strained Johnson's relationship with Congress.

His opposition to the Fourteenth Amendment only made matters worse. Johnson made his stance clear on June 22, 1866, when he informed Congress that his administration's forwarding of the proposed amendment to the States was "purely ministerial, and in no sense whatever commit[ed] the Executive to an approval or a recommendation of the amendment to the State Legislatures or to the people."[344] Returning to one of his favorite points, Johnson also raised a "question as to the constitutional validity" of the proposed amendment – it was proposed by a Congress that "excluded [eleven States] from representation . . . although, with the single exception of Texas, they have been entirely restored to all their functions as States."[345] The former Confederate states picked up on Johnson's position and all but Tennessee rejected the amendment.[346]

In addition to vetoing legislation and opposing the Fourteenth Amendment, Johnson's administration also construed laws narrowly to frustrate congressional intent. This started with Attorney General James Speed who limited confiscation proceedings and barred any confiscation of corporate property.[347] The administration also returned the confiscated land of pardoned rebels, unless it had already been sold to a third party.[348] The narrow legal interpretations continued when Henry Stanbery became Attorney General. Under his leadership the

[343] Andrew Johnson, "Veto of the Freedman's Bureau Bill," February 19, 1866 in McPherson, 68–74; Andrew Johnson, "Veto of the Civil Rights Bill," March 27, 1866 in McPherson, 74–81.
[344] Cong Globe, 39th Cong, 1st Sess 3349 (June 22, 1866) (Message from President Johnson).
[345] Id.
[346] McKitrick, 358.
[347] Benedict, Impeachment, 41.
[348] Id. at 42–43.

administration ended all confiscation proceedings.[349] More importantly, Stanbery narrowly construed the Military Reconstruction Acts in a number of opinions.[350] In one he limited who the act would disenfranchise.[351] In another he declared that military commanders in the military districts could not "remove the executive and judicial officers of the State, and . . . appoint other officers in their place."[352] Nor could they "suspend the legislative power . . . [or] change the existing laws in matters affecting purely civil and private rights."[353] These narrowing constructions were so disruptive to congressional intent that Congress felt the need to directly override them.[354]

On April 3, 1866, the Supreme Court decision in *Ex Parte Milligan* called into question military reconstruction in the South though it did not directly address it.[355] Thaddeus Stevens referred to the decision in nearly the harshest terms possible: "although . . . not as infamous as the Dred Scott decision, [it] is yet far more dangerous."[356] On May 1, 1866, Johnson directly undermined military tribunals and the Freedmen's Bureau Court by circulating an order referring back to his Peace Proclamation, but not the Court's decision in *Ex Parte Milligan* declaring that "whenever offenses committed by civilians are to be tried where civil tribunals are in existence which can try them, their cases are not authorized to be, and will not be, brought before military courts-martial or commissions, but will be committed to the proper civil authorities."[357] He also ordered the release of everyone previously sentenced by a military tribunal who had been

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[349] Id. at 42.
[350] Harrison, 407.
[351] 12 Op. Att'y Gen. 141 (1867) (Attorney General Henry Stanbery).
[352] 12 Op. Att'y Gen. 182, 186–87 (1867) (Attorney General Henry Stanbery).
[353] Id.
[354] Harrison, 407.
[355] Ex parte Milligan, 71 U.S. 2 (1866).
[356] Cong Globe, 39th Cong, 2nd Sess 251 (Jan 3, 1867) (Rep. Stevens on Reconstruction).
[357] Andrew Johnson, "Order in Relation to Trials by Military Courts and Commissions," May 1, 1866 available online at http://www.presidency.ucsb.edu/ws/index.php?pid=71996.

imprisoned for six months, unless they had been convicted of murder, rape or arson.[358] It is important to note, however, that Johnson's assertion of peace also stripped him of the war powers claim underlying Lincoln's efforts to control reconstruction unilaterally.

Finally, Johnson also utilized his power over personnel to enforce his vision for Reconstruction: first, after Congress asserted control over Reconstruction and broke the former Confederate states except for Tennessee into five military districts under military control, Johnson removed the generals in control of those districts who enforced Congress' vision of Reconstruction in favor of more conservative officers.[359] For example, on August 17, 1867 Johnson started the process of replacing Major General P.H. Sheridan with Major General Winfield S. Hancock.[360] Similarly on December 28, 1867, Johnson ousted Major General E.O.C. Ord from the fourth military district replacing him with Major General Irvin McDowell and removed Major General John Pope from the third military district and put Major General George G. Meade in his place. This order also relieved Major General Wager Swayne from duty in the "Bureau of Refugees, Freedmen, and Abandoned Lands."[361] Second, Johnson used his control of patronage in an attempt enforce allegiance to his approach and loyalty to his administration.[362] This strategy, however, stopped working once office seekers realized being tied to Johnson would not help their career, while being fired for opposing Johnson could.[363] In short, Johnson repeatedly and successfully frustrated Congress' plans for Reconstruction. It is important to

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[358] "Release of Convicts, General Orders, No 46," July 13, 1866 in McPherson, 198–99; Benedict, Impeachment, 45.
[359] McKitrick, 494.
[360] "Andrew Johnson to General U.S. Grant," August 17, 1867 in McPherson, 306; "Andrew Johnson to General U.S. Grant," August 26, 1867 in McPherson, 308.
[361] Assistant Adjunct General E.D. Townsend, "General Order 104," December 28, 1867 in McPherson 345–46.
[362] McKitrick, 378, 383, 388.
[363] Foner, 266.

recognize, as Michael Les Benedict did, that "[i]n pursuing his own policy, Johnson had destroyed [Congress' reconstruction policy], without violating a law, using only his constitutional powers as president of the United States."[364] Johnson had relied on his veto power to oppose legislation, his pardon power to restore former Confederates, his power as commander-in-chief to control the military, and his appointments power to oversee patronage.

B. CONGRESS STRIKES BACK

Congress, however, knew how to use its own constitutional powers to respond. First, it frequently overrode Johnson's vetoes.[365] Congress also exercised the power of the purse to deny funding for presidential actions it disapproved of – for example, the House refused to appropriate funds to pay the salaries of former rebels appointed by Johnson.[366] Congress also sought to limit Johnson's power over the judiciary. In 1866, Johnson nominated Attorney General Stanbery to fill a vacancy on the Supreme Court. Congress responded not by stalling the nomination, but by eliminating the seat outright and providing that the Court would continue to shrink until it had only seven members.[367] Furthermore, Congress passed new legislation to override narrow executive interpretations of previously enacted laws when necessary.

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[364] Benedict, Preserving the Constitution, 39.

[365] U.S. Const. art. I., § 7 cl. 2 ("If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law.").

[366] Benedict, Impeachment, 51.

[367] Stewart, 54. For an argument that reducing the size of the Supreme Court was not part of Congress' battle with Johnson nor designed to block Stanbery's nomination see Stanley I. Kutler, Reconstruction and the Supreme Court: The Numbers Game Reconsidered, 32 Journal of Southern History 42 (1966). Similarly, Congress over Johnson's veto limited the power of the Supreme Court to interfere with Reconstruction by repealing the 1867 grant of habeas appellate jurisdiction to the Supreme Court. 15 Stat. 44 (1868). In *Ex Parte McCardle,* the Supreme Court "dismissed for want of jurisdiction" based on this statute. 74 U.S. 506, 515 (1869).

Following their 1866 electoral victory over Johnson, Republicans in Congress sought to restrict executive authority legislatively and to reassert their control over Reconstruction. First, they called for the 40th Congress to assemble immediately after the close of the 39th to prevent Johnson from taking advantage of their absence again.[368] Next, Congress over Johnson's veto passed the First Reconstruction Act on March 2, 1867 declaring that "no legal State governments or adequate protection for life or property now exists in the rebel states" and breaking the former Confederacy except Tennessee into five military districts each overseen by a general appointed by the President.[369] Congress would recognize a reconstructed rebel state and seat its representatives once the state in a vote of all adult males regardless of race, but excepting former Confederate officials and officers, adopted by a majority a constitution that embraced the Fourteenth Amendment and was approved by Congress.[370] Until that point, the governments of the former Confederate states would be "provisional only, and in all respects subject to the paramount authority of the United States at any time to abolish, modify, control, or supersede the same."[371] Congress built on this framework and enacted measures to implement it with supplementary Reconstruction Acts.[372]

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[368] Guelzo, 497.
[369] An Act to provide for the more efficient Government of the Rebel States, 14 Stat. 428 ch. CLIII (1867).
[370] Id.
[371] Id.
[372] Act of March 23, 1867 ch. VI, 15 Stat. 2 (process for implementing the First Reconstruction Act); Act of July 19, 1867, ch. XXX, 15 Stat. 14 (clarifying meaning of First Reconstruction Act); Act of Mar. 11, 1868, ch. XXV, 15 Stat. 41 (changing the requirement to adopt a constitution from a majority of eligible voters to a "majority of the votes actually cast."). For a full discussion of the various elements of the Reconstruction Acts see McKitrick, 484, n. 86; Foner, 276; Harrison, 405–08; Guelzo, 499–500.

Importantly, these supplementary acts, particularly the July 19, 1867 supplement, responded directly to Johnson's attempts to hinder Congress' intent.[373] First, it took aim at Stanbery's opinions by declaring that "this act . . . shall be construed liberally, to the end that all the intents thereof may be fully and perfectly carried out."[374] Not trusting Stanbery to follow this instruction, however, the act also removed all authority from his opinions by declaring that "no district commander . . . shall be bound in his action by any opinion of any civil officer of the United States."[375] The act also specifically overruled Stanbery on the commander's authority to remove civil officers: "the commander of any district . . . shall have power . . . to suspend or remove from office . . . any officer . . . under, any so-called State or the government thereof, or any municipal or other division thereof."[376] Furthermore, the commander could then provide for another to perform the duties of that office.[377] The act also extended that same power to "the General of Army," which meant Grant, as part of an effort to transfer presidential power away from Johnson.[378] Showing their displeasure with Johnson's pardon policy, Congress also declared that "no person shall, at any time, be entitled to be registered or to vote by reason of any executive pardon or amnesty."[379]

Alongside the First Reconstruction Act Congress also passed language in an appropriations bill requiring Johnson to issue all orders to the military through the general in chief, meaning General Ulysses S. Grant.[380] This law arguably violated the Commander-in-Chief

[373] Act of July 19, 1867, ch. XXX, 15 Stat. 14.
[374] Id. §11.
[375] Id. §10.
[376] Id. §2.
[377] Id.
[378] Id. §3; Guelzo, 499–500.
[379] Act of July 19, 1867, ch XXX, 15 Stat. 14 §7.
[380] Guelzo, 498.

Clause of the Constitution.[381] Even more importantly for our purposes, Congress passed the Tenure of Office Act, which greatly restricted the President's patronage power and ability to remove executive officers that the Senate had previously consented to.[382] That law also mimicked the Constitution by declaring a violation of the act to be a "high misdemeanor."[383] Ultimately, it was the alleged violation of this act when Johnson removed Secretary of War Edwin Stanton, an ally of the Radicals in Congress, from office that triggered his impeachment and trial.

3. THIRD TIME'S THE CHARM – JOHNSON IMPEACHED

While attempting to rein in the power of the presidency, some in Congress also began to explore using their overwhelming majorities and constitutional power of impeachment to simply remove Johnson from office. As Johnson had no vice president, Radical Republican Senator Benjamin Wade of Ohio as president pro tem of the Senate would assume the office if Johnson were ousted.[384] First, on January 7, 1867, Radical Republican James Ashley of Ohio successfully referred an investigation of the necessity of impeachment to the House Judiciary Committee charging the President "of high crimes and misdemeanors" including "corruptly us[ing]" the "appointing power . . . the pardoning power . . . the veto power."[385] This effort alleging the use of the president's executive power to constitute a high crime and misdemeanor died in

[381] U.S. Const. Art. II, §2 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States").
[382] Guelzo, 498; Tenure of Office Act, 14 Stat. 430 (1867).
[383] Tenure of Office Act, 14 Stat. 430, § 9 (1867).
[384] At the time, presidential succession was still governed by the Succession Act of 1792 which provided "in the case of removal, death, resignation or inability both of the President and Vice President of the United States, the President of the Senate pro tempore, and in case there shall be no President of the Senate, then the speaker of the House of Representatives, for the time being shall act as President of the United States until the disability be removed or a President shall be elected." 1 Stat. 240. The modern order of succession places the Speaker of the House ahead of the President of the Senate. Presidential Succession Act of 1947, 61 Stat. 380.
[385] Cong Globe, 39th Cong, 2d Sess 320 (Jan. 7, 1867) (Impeachment of the President).

committee.[386] This was not Ashley's first call to impeach the President and he had previously peddled in some absurd theories.[387] For example, he testified to Congress that he personally believed Johnson had been involved in Lincoln's assassination. When asked by Democratic Congressman Charles Eldredge of Wisconsin "Have you not stated to members of the House . . . that you had evidence in your possession which would implicate Mr. Johnson in the assassination of Mr. Lincoln?" Ashley dodged saying no such evidence was "in my possession," but he admitted that from what he "had been able to gather during this investigation" he was "induced [] to believe it."[388] He concluded that "Mr. Johnson had a guilty knowledge of the assassination" and was "certainly" "connected with or implicated in the assassination."[389] Ashley, however, never presented any of this evidence as he thought it was insufficient for a criminal conviction. He was personally satisfied by it though because it fit his overarching "theory" of executive murder: "I have always believed that President Harrison and President Taylor and President Buchanan were poisoned, and poisoned for the express purpose of putting the Vice Presidents in the presidential office . . . then Mr. Lincoln was assassinated, and from my stand-point I could come to a conclusion. . ."[390] Given this open hostility to Johnson, modern audiences should be wary of any legal argument advanced by Ashley.

A second serious attempt at impeachment actually made it to a vote on the floor where it failed following extended debate by a vote of 57 to 106 with 22 not voting.[391] The failure of

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[386] Guelzo, 499.
[387] Foner, 333.
[388] Impeachment, Testimony Taken Before the Judiciary Committee of the House of Representatives in the Investigation of the Charges Against Andrew Johnson Second Session Thirty-Ninth Congress, and First Session Fortieth Congress, Testimony of Hon. James M. Ashley, November 23, 1867 (1868), 1198.
[389] Id.
[390] Id. at 1199.
[391] Cong Globe, 40th Cong, 2d Sess 67–68 (Dec. 7, 1867) (Impeachment of the President).

these efforts in combination with Democratic victories in the 1867 elections, however, emboldened Johnson and led to his actions that would result in a third impeachment attempt.[392]

Johnson had set his sights on removing Edwin Stanton as Secretary of War. He first turned to an old maneuver – waiting until Congress was out of session. Days after Congress entered its summer recess, Johnson requested Stanton's resignation, which Stanton refused. In response, Johnson suspended the secretary and replaced him with General Grant. Grant, however, believing the Tenure of Office Act to apply, refused to hold the office after the Senate rejected the appointment on January 13 after reconvening.[393] After this failure, Johnson found a general who would maintain his claim to the office in the face of Senate opposition – on February 21, 1868 Johnson fired Stanton and appointed Adjutant General Lorenzo Thomas in his place.[394] Despite repeated attempts to oust Stanton, the secretary refused to cede his office (both legally and physically) to Thomas and actually had Thomas arrested for violating the Tenure of Office Act.[395] Upon hearing of Johnson's attempt to remove Stanton, Radical Senator Charles Sumner of Massachusetts immediately telegraphed the secretary a single word: "Stick."[396] Stanton also made sure to inform his allies in the House of his firing.[397] That same day the House referred Representative John Covode's resolution that "Andrew Johnson . . . be impeached of high crimes and misdemeanors" to the Committee on Reconstruction.[398] The following day the committee favorably reported the same resolution to the floor, which, following a single day of

[392] Trefousse, 115; Foner, 334.
[393] Guelzo, 500; Dunning, 262–67.
[394] Trefousse, 132–34.
[395] Id. at 134 – 37.
[396] Id. at 134.
[397] Cong Globe, 40th Cong, 2d Sess 1326–27 (Feb. 21, 1868) (War Department).
[398] Cong Globe, 40th Cong, 2d Sess 1329–30 (Feb. 21, 1868) (Impeachment of the President).

debate and a Sunday break, the House approved on February 24 by a party line vote of 128 to 46.[399]

3. A Second Civil War – The Potential for Violence

The impeachment of Andrew Johnson cannot be divorced from its historical context. It came closely on the heels of a bloody civil war that had torn the country apart and left hundreds of thousands dead.[400] It occurred while the nation was still trying to piece itself back together and bitterly fighting over how precisely to do that. The idea that the violence could be renewed was not as foreign as we may consider it today.[401] It is critical to note that Johnson's impeachment was triggered not by the removal of just any cabinet secretary; he had fired the Secretary of War. Stanton, however, had refused to cede his office and instead had posted guards outside the building.[402] This only fed the rumors that the political clash between the president and Congress would end in military action. Even prior to Johnson's removal of Stanton, Radicals in Congress had feared Johnson would use the army to make himself king and dissolve Congress, while Johnson supporters maintained that the army would be deployed to enforce obedience to the rule of the Republican party in Congress.[403] The Radical Republican leader Congressman George S. Boutwell of Massachusetts even predicted that Johnson would use the military to keep blacks

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[399] Cong Globe, 40th Cong, 2d Sess 1336 (Feb. 22, 1868) (Impeachment of the President); Trefousse, 137.
[400] Guelzo, 515–16.
[401] For a wonderfully well-documented discussion of the perceived risk of renewed violence see William A. Russ Jr., Was There Danger of a Second Civil War During Reconstruction?, 25 The Mississippi Valley Historical Review, 39 (1938); See also Mark Wahlgren Summers, A Dangerous Stir: Fear, Paranoia, and the Making of Reconstruction 150 (2009) ("denying any desire for a clash is a different thing from doubting that one will occur, or that the other side shares that wish for peace. Reasonable men on both sides could panic, however briefly, and even they could not rule out the possibility that a situation would begin that might get out of their control.").
[402] Trefousse, 135.
[403] Dunning, 267–68; Russ, 39–49.

from voting in the next presidential election leading to a "renewal of fratricidal strife."[404] Due to Johnson's attack on the exclusion of representatives from the former Confederate states, Republicans in 1866 also feared the formation of a rival Congress backed by Johnson and composed of southerners and northern Democrats.[405] At one point a story even spread that Johnson had sought a legal opinion from the Attorney General that would allow him to side with such a congress.[406] Rumors of and calls for a coup d'etat even sprang up.[407] *The New York Times*, in supporting Congress, criticized papers partial to the President for their "bold strokes for power" and talk of "nothing less than a grand coup d'etat . . . as the final of his conflict with Congress."[408]

All of these fears, however, were dependent upon Johnson controlling the military. Thus his removal of the Secretary of War was particularly troubling to the Radicals in Congress, who had urged Stanton to retain his office even when disagreeing with Johnson's policies so that he could moderate and control the connection between the President and the Army.[409] Once Johnson attempted to remove Stanton, fears of armed conflict spiked. Rumors spread, particularly when the Governor of Maryland Thomas Swann appeared at the White House, that the Maryland militia would descend on Washington in support of the President.[410] Johnson was also receiving

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[404] Benedict, Preserving the Constitution, 41.
[405] Id. at 42; Summers, 145–48.
[406] Summers, 145.
[407] Id.
[408] N.Y. Times, Executive Rashness—Republican Moderation, Sept. 17, 1867.
[409] Benedict, Impeachment, 15; Summers, 204 ("There was not just anger but, especially among radicals, a lingering fear: fear of a coup, of a new civil war, of rival armies, one serving the president and one serving Congress.").
[410] Summers, 207; Stewart, 140, 145. Radical fear of the Maryland militia had existed for some time. On September 18, 1867, F.M. Thomas wrote Benjamin Butler that based on Johnson's defiance of Congress "that it all means fight." This concerned Thomas because of "the standing army, which Maryland has now in her service, 7/8 of whom are returned rebels, wearing the rebel uniform." He went on to note, however, the growing strength of the Grand Army of the

letters offering troops from across the country.[411] The Radicals in Congress, however, would not be caught off guard. Illinois Congressman and commander-in-chief of the Grand Army of the Republic John A. Logan arranged for a cot in the War Department and instructed the veterans organization's administrator to "quietly and secretly organize all of our boys, so that they can assemble at a signal that you may agree upon . . . ready to protect the Congress of the U.S." because "the House will impeach A. J. and a Row may Ensue."[412] Similarly, Massachusetts State Senator Benjamin F. Pratt wrote Senator Sumner predicting the possibility of war: "A. Johnson should be removed at once . . . One step more, and he may have gone so far, that he will resort to arms—well, we have been through one war, but rather than to have treason and traitors triumph, we will fight again."[413] Republicans were not the only ones to fear armed intervention.

Democratic Congressman James Brooks of New York responded on the floor of the House to the widespread talk of potential violence, warning the Radicals that they must follow the constitutional process of impeachment or face the consequences:

> If you throw him out of office by any other process than impeachment, I tell you in behalf of thousands and tens of thousand and hundreds of thousands and millions of the people

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Republic in Washington, D.C. and their ability to "arm ourselves in short notice if an emergency required it." Russ, 44.

[411] Trefousse, 137; Russ 50–52 (for example "David Crowley, of Lowell, Massachusetts, offered to march, at short notice, with a company to Washington to sustain the President. The same was promised by M. I. Bryne, a late major of the Thirteenth Pennsylvania Regiment. John Burleigh, of New York, offered to raise a regiment in forty-eight hours; William G. Douglas, of Warrenton, Virginia said that 30,000 men could be raised in Virginia if Johnson gave the word . . . .")

[412] Trefousse, 135; Stewart, 141; Russ, 55. Just as Radicals were concerned with the Maryland Militia, the Johnson administration was worried about the military capacity of the Grand Army of the Republic and even dispatched Charles O'Beirne to gather information on the organization. Summers, A Dangerous Stir, 134. Regardless of their accuracy his reports were not reassuring to the administration. In one sent on October 12, 1866 he concluded "I for one shall prepare for fighting when I get home." Wallace Evan Davies, Patriotism on Parade: The Story of Veterans' and Hereditary Organizations in America 1783–1900 192 (1955).

[413] Russ, 54.

> of this country we will never, never, so help me God! Never submit. We have the physical power of this country with us. The labor, the industry, the bone, the muscle of the country are ours . . . Four fifths of the Army of the United States now are composed of the Democracy of the country; and if you proceed to introduce politics into the Army the Democratic soldier will follow the Democratic instinct and stand by the Constitution and laws of his country. I therefore . . . bid you beware . . . [if you] step an inch . . . over the bounds of that Constitution . . . you precipitate this country upon the verge of violence and revolution.[414]

While neither side sought out violence, both expected that it may come and were prepared for it. That fact makes it all the more impressive and important that the efforts to oust Johnson were confined to the constitutional process of impeachment and that impeachment evolved into lawyerly combat over legalistic points.

Section 2: Trial for Impeachment – A Legalistic Affair

A. The Articles of Impeachment

The impeachment process forced the political clash between Johnson and the Radicals to take a legal form. Radicals in Congress were furious with Johnson over his efforts to stymie their plans for Reconstruction, but the Articles of Impeachment barely addressed that. Instead they were focused on the details of the Tenure of Office Act and Johnson's removal of Stanton. Only two articles out of eleven even addressed the political confrontation. In brief**:** Articles I and II charged violations of the Tenure of Office Act for removing Secretary Stanton and appointing

[414] Cong Globe, 40th Cong, 2nd Sess 1336–37 (Feb. 22, 1868) (Impeachment of the President).

General Thomas.[415] Article III claimed Johnson violated the Constitution in appointing Thomas to an already-filled position.[416] Articles IV, V, VI, VII, and VIII charged different versions of conspiracy to violate the Act, to remove Stanton both with and without force, and to seize control of the property of the War Department.[417] Article IX claimed that Johnson had told General William Emory that the act requiring orders from the president to the military to first pass through General Grant was unconstitutional and attempted to induce Emory to violate the act.[418] Article X charged Johnson with the high misdemeanor of "attempt to bring into disgrace, ridicule, hatred, contempt and reproach the Congress" through his stump speeches.[419] This included Johnson "deliver[ing] with a loud voice intemperate, inflammatory, and scandalous harangues . . . against Congress."[420] One such harangue the articles specifically pointed to was Johnson's questioning of Congress' legitimacy when he referred to them as "a body called, or which assumes to be, the Congress of the United States, while in fact it is a Congress of only a part of the States."[421] Article XI, added at the suggestion of Radical leader Thaddeus Stevens, combined legal charges of violation of the Tenure of Office Act with political charges of Johnson "declar[ing] and affirm[ing] in substance, that the Thirty-Ninth Congress of the United States was not a Congress of the United States authorized by the Constitution to exercise legislative power" and thus could not bind him legislatively or propose constitutional

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[415] "The Proceedings of the Senate Sitting for the Trial of President Andrew Johnson, President of the United States," Supplement to the Congressional Globe, 40th Congress, 2nd Sess 3 (1868) [hereinafter Trial Supplement].
[416] Id.
[417] Id. at 3–4.
[418] Id. at 4.
[419] Id.
[420] Id.
[421] Id. This article is referring to the clash over seating representatives from the former Confederate states and the constitutional status of those states.

amendments.[422] In short, the legal requirements for impeachment channeled the titanic clash between Johnson and the Radicals over Reconstruction into a narrow set of legal charges against the President largely focused on only one of his acts.

B. Legal Efforts to Forestall Trial

In the face of impeachment threats, however, Johnson attempted to use legal maneuvering to prevent his case from going before the Senate in the first place. His first attempt centered on Stanton having General Thomas arrested for violating the Tenure of Office Act.[423] While Thomas would complain that he was arrested in the morning before he could even eat breakfast, this was a major gift to the administration and a potential strategic blunder for the Radicals.[424] Thomas' arrest gave the administration a direct path to challenge the constitutionality of the Tenure of Office Act in federal court. If the act was unconstitutional, then Stanton had wrongly arrested Thomas. Johnson and Thomas' lawyers initially planned to bring a *quo warranto* action[425] against Stanton challenging his right to the office of Secretary of War, but they changed course when they realized such a case would not reach the Supreme Court for over a year.[426] Such a decision might vindicate the President, but it would come too late to affect impeachment. Instead, they would seek a writ of habeas corpus. There was one problem with this plan—Thomas was free on $5,000 bail. To solve this issue, Thomas would refuse to post new bail and seek to re-enter custody so that he could petition the Supreme Court for a writ of habeas

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[422] Id.
[423] Dunning, 268.
[424] Stewart, 148, 154.
[425] Quo Warranto is "a common-law writ used to inquire into the authority by which a public office is held or a franchise is claimed." QUO WARRANTO, Black's Law Dictionary (10th ed. 2014).
[426] Milton, 522.

corpus.[427] Stanton, however, recognized his blunder and had the charges dropped over the objection of the defense counsel in order to moot the case.[428] Johnson lost his direct path to Supreme Court review.

It is important to recognize that while an appeal to the courts would seem on its face to be legal in nature, it was possibly motivated by politics. Radicals believed that five of the eight justices opposed congressional reconstruction and thus feared that the Supreme Court would side with Johnson over the Tenure of Office Act as a way of favoring Johnson's vision for reconstruction.[429] This fear of a "hostile" Supreme Court was reinforced by that body's earlier decisions in *Ex Parte Milligan*, *Cummings v. Missouri,* and *Ex Parte Garland*.[430] The first case raised doubts about the constitutionality of Republican plans for governing the former Confederate states when it held "citizens of states where the courts are open, if charged with a crime, are guaranteed the inestimable privilege of trial by jury" and that "Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction."[431] The second two struck test oaths as incompatible with the Federal Constitution's prohibitions on bills of attainder and ex post facto laws. *Cummings* invalidated Missouri's test

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[427] Milton, 522; Stewart, 138–39; Dunning, 269.
[428] Dunning, 269; Stewart, 155. This alignment of a defendant's counsel insisting upon his client's prosecution raises the longstanding problem with test cases – the personal interests of the client frequently will not be served by trying to keep a case alive long enough to reach the Supreme Court so that it can produce an authoritative ruling. While this case involved sophisticated actors at the highest levels of American government, that is usually not the case. See generally, Risa Goluboff, Vagrant Nation: Police Power, Constitutional Change, and the Making of the 1960s (2016).
[429] Stewart, 155. This concern raises a critical question in studying the relationship between law and politics that this paper will not address as Johnson's impeachment never directly raised it due to his failure to get the issue into court – if the Court becomes an overtly political institution, what role is left for law to play? The importance of law in channeling and restricting the arguments at Johnson's trial before a body of politicians suggests that law would still play a significant role before a politicized court.
[430] Milton, 401–02; Foner, 272.
[431] Ex parte Milligan, 71 U.S. 2, 123, 127 (1866).

oath for clergymen, lawyers, and teachers[432] while *Ex Parte Garland* invalidated a congressionally established test oath for lawyers seeking admission to a federal bar.[433] Since Johnson had pardoned the petitioner in *Ex Parte Garland*, the Court also had a chance to address the scope of the pardon power and came down strongly on the side of executive power. The Court called the power "unlimited" and specifically protected it from legislative interference by noting it was "not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions."[434] Furthermore, "It is not within the constitutional power of Congress thus to inflict punishment beyond the reach of executive clemency."[435] While not related to the legal issues at the center of impeachment, these opinions were not promising for the Radicals and even led some to believe Johnson held sway over the Court.[436] Following full publication of the decision in *Ex Parte Milligan*, Radical John W. Forney writing in the Radical paper the *Washington Chronicle* claimed "Time and reflection have only served to strengthen the conviction of the partisan character of the decision and the apprehension that it is the precursor of other decisions in the interest of unrepentant treason in the support of the apostate President."[437] This was by no means isolated criticism.[438] With that perspective in mind, whether justified or not, it is easy to see why Radicals wanted to keep Johnson's case away from the Supreme Court.

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[432] Cummings v. Mo., 71 U.S. 277, 317 (1867).
[433] Ex parte Garland, 71 U.S. 333, 374, 380 (1867).
[434] Id. at 380.
[435] Id. at 381.
[436] Dorris, 332.
[437] Milton, 402; Charles Warren, 3 The Supreme Court in United States History 1856–1918 155 (1922).
[438] Id.

Denied a path to the courts, Johnson would have to make his arguments before an overtly political body controlled by his opponents – the United States Senate. Fortunately for Johnson, it would take a two-thirds vote to convict him, and he had an incredibly capable legal team. This team consisted of Attorney General Henry Stanbery, who resigned to lead the defense, former Supreme Court Justice Benjamin Curtis, Thomas Nelson, William Groesbeck, William Evarts, and Jeremiah Black, who resigned from the defense before the trial began. These selections reflected the role both law and politics would play. The team had clear legal expertise, but it was also politically balanced with Curtis and Evarts serving as notable Republicans.[439] They would face off against seven House Manager who served as the prosecutors before the Senate: Benjamin Butler, John Bingham, Thaddeus Stevens, George Boutwell, James Wilson, Thomas Williams, and John Logan.[440] While all of the managers were Republicans, their group included moderates like James Wilson who had opposed earlier impeachment efforts and Radicals like Boutwell who had been the driving force behind those earlier efforts.[441] While Stevens was the primary Radical leader in the efforts to impeach Johnson, it was Butler who took charge of the trial.[442]

Before the trial began, the President's allies made one final attempt to block it. On March 23, Kentucky Senator Garrett Davis moved for the court of impeachment[443] to order that such a court "for the trial of the President cannot be legally and constitutionally formed."[444] Arguing in the same legal vein as Johnson in his veto of the Freedman's Bureau, Davis maintained that it would be unconstitutional to proceed while the Senate continued to deny the chosen senators of

[439] Stewart, 173.
[440] Id. at 172
[441] Id.
[442] Id.
[443] This body is the Senate when acting on impeachments.
[444] "An Illegal and Unconstitutional Court," March 23, 1868, in McPherson, 271.

Virginia, North Carolina, South Carolina, Georgia, Alabama, Mississippi, Arkansas, Louisiana, and Texas their seats in that body "without any judgment by the Senate against them personally and individually on their elections, returns, and qualifications."[445] He acknowledged the Senate's discretion over its members' qualifications, but like Johnson denied a construction of that power that allowed wholesale exclusion of a state because that would violate the Constitution's requirement that the Senate "be composed of two senators from each State."[446] Davis concluded that since the power to try impeachments was vested *solely* in the Senate, the current unconstitutionally composed body could not exercise that power because it was not truly the Senate. Unsurprisingly, this motion that impliedly denied the legitimacy of the Senate failed on a vote of 2 to 49.[447] The motion, however, foreshadowed the intense legal arguments that were to come.

C. A LEGALISTIC AFFAIR

The trial of Andrew Johnson centered on four legal questions. First, whether the constitution required an indictable offense for impeachment. Second, whether the Tenure of Office Act applied to Secretary of War Stanton. Third, if the Act did apply to Stanton, whether the Tenure of Office Act was constitutional. Fourth, whether Johnson had the requisite intent to be impeached and convicted. While politics operated in the background of all of these legal debates, discussions in the lead up to impeachment and arguments at the trial itself show that for at least some of the Senators, the law truly mattered. Just as importantly, nearly everyone felt compelled to at least clothe their position in legal argument. The law may not have been

[445] Id.
[446] Id.
[447] Id.

dispositive, but it certainly was not irrelevant or a mere afterthought. It drove the direction of the debate and restricted the range of available arguments.

1. The Meaning of High Crimes and Misdemeanors

As a threshold matter, it was necessary to decide whether any of Johnson's actions were impeachable under the Constitution. The Constitution provides for impeachment in cases of "Treason, Bribery, or other high Crimes and Misdemeanors."[448] Johnson had neither committed treason nor been bribed, leaving the critical question of what constituted a high crime or misdemeanor.[449] While this phrase lacked a clearly established meaning, it was by no means a new issue at Johnson's trial. In its earlier efforts to impeach Johnson, the House had repeatedly debated the question with the issue boiling down to whether the "high crimes and misdemeanors" language required an indictable offense.

The second effort to impeach Johnson failed primarily because the House decided impeachment was only an appropriate remedy in the face of an indictable offense. The House, however, only reached that conclusion after an extended and remarkably legalistic argument between the majority and minority Judiciary Committee reports regarding the meaning of the phrase that spilled over onto the floor of the House in a clash between two of the future impeachment managers – George Boutwell and James Wilson. Wilson and the minority report maintained that impeachment could only be based upon violation of a criminal statute,[450] while

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[448] U.S. Const. art. II, §4.

[449] The meaning of this phrase is still debated today. See generally, Peter M. Shane & Harold H. Bruff, Separation of Powers Law 207–28 (2016).

[450] Cong Globe, 40th Cong, 2nd Sess Appendix 63 (Dec. 6, 1867) (Speech of James Wilson on Impeachment) ("The position which the minority of the committee occupy in this case may be summed up in these words: that no civil officer of the United States can be lawfully impeached except for a crime or misdemeanor known to the law; that this body must be guided by the law, and not by that indefinite something called its conscience, which may be one thing today and quite a different one tomorrow.").

Boutwell and the majority report believed a president could be impeached for misfeasance or malfeasance.[451] Boutwell, after reviewing the Constitution's impeachment clauses and citing Blackstone and Chief Justice Joseph Story for common law and constitutional principles, flatly declared on the floor "neither the President, [nor] the Vice President . . . can lawfully do any act, either official or otherwise, which in . . . a public sense is contrary to the good morals of the office he holds. Misconduct in office, misbehavior in office, misdemeanor in office, are equivalent terms."[452] Boutwell's reliance on legal arguments was by no means the exception in this debate. Both sides focused their arguments on precedent and the text of the Constitution.

Before debating the meaning of any given precedent, however, the two sides first had to determine which precedents were even relevant. Specifically, the majority and minority had to grapple with the applicability of English impeachments. These precedents were decidedly mixed. The minority could point to the 1806 impeachment of Viscount Melville where the House of Lords had acquitted the accused after discovering his acts were not indictable.[453] The majority, however, could point to a number of successful English impeachments where the acts charged were not indictable.[454] Given the mixed nature of the English precedents, it is not surprising that the proponents of each side treated them inconsistently. For example, the majority report cited to English cases while Boutwell's speech on the floor in support of that report claimed that "the experience of Great Britain affords much instruction and something of warning in reference to proceedings by impeachment, but it does not furnish precedents which ought to control or in a

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[451] Benedict, Impeachment, 27, 33.
[452] Cong Globe, 40th Cong, 2nd Sess Appendix 58 (Dec. 5 and 6, 1867) (Speech of G. S. Boutwell on Impeachment). This position was not legally unmoored and was in fact in line with many of the views on impeachment expressed in Part I of this paper.
[453] Cong Globe, 40th Cong, 2nd Sess Appendix 63 (Dec. 6, 1867) (Speech of James Wilson on Impeachment); Benedict, Impeachment, 28.
[454] Benedict, Impeachment, 27–28.

large degree to influence the House of Representatives acting under the Constitution" due to the "manifest and important distinctions between the English and American systems" of impeachment.[455]

From there, the two sides turned to debate the limited American precedents. Once again, however, there was a question of which precedents mattered – should they define the scope of impeachment based upon the articles leveled by the House in the past or should they look to whether or not the Senate had convicted the accused on those articles? This distinction mattered. In every previous American impeachment, the House had brought articles that charged non-indictable acts.[456] But should that precedent matter if the Senate failed to convict on those articles as they did in the judicial impeachments of Samuel Chase in 1805 and James H. Peck in 1830?[457] And what was to be made of the Senate simply deferring to the House on if an action constituted an impeachable offense as they did in the trial and conviction of Judge John Pickering?[458] In short, each side could point to favorable precedents on both sides of the Atlantic. For the purposes of this paper, what matters is not which side correctly interpreted those precedents, but the mere fact that each side felt compelled to engage in a legal debate about precedent. The participants in this early debate recognized that the legal questions, not the political implications, were dispositive. Boutwell freely admitted, "If the theory of the law

[455] Id. at 79; Cong Globe, 40th Cong, 2nd Sess Appendix 55 (Dec. 5 and 6, 1867) (Speech of G. S. Boutwell on Impeachment).
[456] Benedict, Impeachment at 34.
[457] Id. at 29; Cong Globe, 40th Cong, 2nd Sess Appendix 64 (Dec. 6, 1867) (Speech of James Wilson on Impeachment).
[458] Cong Globe, 40th Cong, 2nd Sess Appendix 64 (Dec. 6, 1867) (Speech of James Wilson on Impeachment); Benedict, Impeachment, 30.

submitted by the minority be in the judgment of this House a true theory, then the majority have no case whatever."[459]

Recognizing the mixed nature of the available precedents, the minority report and its supporters also turned to the text of the Constitution. First, the Constitution requires Senators to try an impeachment under oath or affirmation. The minority concluded that this meant the Senate was "as much restrained by law as any other criminal court."[460] Second, under the Constitution an individual could still be prosecuted after he was impeached, which would not be possible if the act was not an indictable offense.[461] Third, the requirement of a jury trial for all crimes except impeachment and the power to pardon men for all "offences against the United States, except in cases of impeachment" both implied, for the minority, that impeachable acts were tied to indictable acts in the view of the Constitution.[462] While there are clear flaws in these textual arguments (for example, the availability of later criminal prosecution is arguably about preventing a claim of double jeopardy rather than defining the scope of an impeachable offense), their use shows once again that the clash over impeachment was a legal battle, not a wholly political one.

While the second attempt at impeachment that produced this debate over the meaning of high crimes and misdemeanors failed, that did not settle the matter. The House was largely able to sidestep the question in its successful impeachment of Johnson because of his purported violation of the Tenure of Office Act, which specifically "deemed guilty of a *high misdemeanor*"

[459] Benedict, Impeachment, 77.
[460] Id. at 31.
[461] Id.
[462] Cong Globe, 40th Cong, 2nd Sess Appendix 63 (Dec. 6, 1867) (Speech of James Wilson on Impeachment).

anyone violating "any of the [act's] provisions."[463] Despite the focus on the Tenure of Office Act, this clash over the meaning of the Constitution still mattered because of the mixed nature of the eleven articles of impeachment – they did not all charge a violation of a statute. As we saw, Article X (the stump speech article) charged Johnson with bringing disgrace to Congress while Article XI took a comprehensive approach and combined legal and political charges into one article.[464] Thus, while some of the articles by charging indictable offenses and offenses that were statutorily defined to constitute high misdemeanors were clearly within the meaning of the Constitution's "high crimes and misdemeanors" language, the appropriateness of other articles would depend upon the conclusion of this legal debate.[465]

Thus, the legal argument over the meaning of the Constitution's words continued before the Senate. At trial, Butler for the managers would define an impeachable offense as

> one in its nature or consequences subversive of some fundamental or essential principle of government, or highly prejudicial to the public interest, and this may consist of a violation of the Constitution, of law, of an official oath, or of duty, by an act committed or omitted, or, without violating a positive law, by the abuse of discretionary powers from improper motives, or for any improper purpose.[466]

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[463] Tenure of Office Act, 14 Stat. 430, § 9 (1867) (emphasis added).
[464] Trial Supplement, 3–4.
[465] This maneuver raises interesting questions about Congress' ability to define a constitutional term by statute. For example, Congress cannot by statute say Amtrak *for purposes of the Constitution* is not part of the government. It can, however, make that determination "for purposes of matters that are within Congress' control" like statutory obligations. Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 392, 400 (1995). Since Congress has the sole power over impeachments, however, this matter is arguably within its control. But there would seemingly have to be an outer limit to that argument. One would doubt that Congress could declare having red hair to be a high crime or misdemeanor.
[466] Benedict, Impeachment, 144–45.

Johnson's defense proposed multiple possible definitions of "high crimes and misdemeanors," the loosest of which was the requirement of an indictable offense. His team also argued that not only was an indictable offense required, but that the offense must be subversive of the public interest or fundamental principles of government. One defense lawyer, Thomas Nelson, went so far as to claim the constitutional language only considered crimes that were crimes at the time of ratification to be impeachable.[467] Overall, the debate in the Senate mirrored the one that had already occurred in the House and it played a crucial role in the votes of the seven Republican dissenters. The six Republican dissenters who filed opinions explaining their votes all maintained that a violation of positive law creating an indictable offense was necessary for impeachment.[468]

In short, the meaning of high crimes and misdemeanors mattered. It was the legal argument that those words only encompassed indictable offenses that blocked earlier efforts to impeach Johnson. It was that legal argument that compelled Congress to define a violation of the Tenure of Office Act to be a high misdemeanor. It was that legal argument that transformed Wilson from the primary opponent of impeachment on one set of facts into a House Manager prosecuting the President on another. It was that legal argument that justified nearly all of the Republican dissenters in their acquittal of Johnson.

2. The Scope of the Tenure of Office Act

A. Statutory Interpretation

The trial of Andrew Johnson also centered on whether or not Stanton was actually protected from unilateral presidential removal by the Tenure of Office Act. This critical question turned on a narrow matter of statutory interpretation. The Tenure of Office Act mandated that

[467] Id. at 145.
[468] Benedict, Impeachment, 173.

while the Senate was in session the President could only remove civil officers who had been appointed with the advice and consent of the Senate if he first had their replacements confirmed by the Senate.[469] Alternatively, during a Senate recess the President could "suspend" covered officers and designate a temporary replacement.[470] Once the Senate reconvened, however, the President had twenty days "to report to the Senate such suspension, with the evidence and reasons for his action."[471] If they "concur in such suspension and advise and consent to the removal," the removal would stand, but if the Senate "shall refuse to consent" the suspended officer would retake their office.[472]

No one disputed that Johnson had removed Stanton from office without Senate approval. That would have been a violation of the act, except the administration denied that the act even applied to Secretary Stanton. In their answer to the Articles of Impeachment, Johnson's defense maintained that "the case of the said Stanton and his tenure of office were not affected by the first section of the [Tenure of Office Act]."[473] The administration argued that the act did not protect Stanton from removal, because the enacted version of the law had a special exception for department heads including "the Secretar[y] . . . of War." Unlike other civil officers, the law provided that department heads would only "hold their offices respectively for and during the term of the President by whom they may have been appointed and for one month thereafter."[474] Outside of that period, the president could replace department heads without the consent of the Senate. This precise statutory language creating this exception was incorporated into the Act in

[469] Tenure of Office Act, 14 Stat. 430, § 1 (1867); Benedict, Impeachment, 51–52.
[470] Tenure of Office Act, 14 Stat. 430, § 2 (1867).
[471] Id. at § 2.
[472] Id.
[473] "Answer of President Johnson" in McPherson, 273.
[474] Tenure of Office Act, § 1.

conference committee at the suggestion of Ohio Senator John Sherman as a solution to the House and Senate bills diverging on whether cabinet officers were covered by the law.[475]

This language, however, contained a crucial ambiguity – what was the applicable "term of the President" for Stanton? President Lincoln, not President Johnson, had appointed Stanton. Furthermore, his appointment occurred during Lincoln's first term. No additional action was taken after Lincoln's second inauguration.[476] Thus, under one interpretation of the statute's language, Stanton was only protected until Lincoln's death because that marked the conclusion of "the term of the President by whom they may have been appointed." Under another interpretation, Lincoln's term did not conclude until he would have left office had he lived, which would mean Stanton was protected by the law for all of Johnson's presidency. These competing interpretations of an ambiguous statute mattered tremendously. If Lincoln's term in the meaning of the statute had ended upon his death, then Johnson could not be impeached for violating the act because Stanton would not have been protected by it.[477]

This question created a rather unique use of legislative history for determining the meaning of a law. The same Senators who drafted and approved the ambiguous language were those tasked with interpreting and applying it. Ultimately, the author of the language, Senator Sherman, announced that the conference committee compromise language exempted Stanton from the statute. He explained in his filed opinion at the conclusion of the trial that

> I can only say, as one of the Senate conferees under the solemn obligations that now rest upon us in construing this act, that I did not understand it to include members of the Cabinet not appointed by the President . . . I stated explicitly that the act as reported did

[475] Trefousse, 44–45. Initially, the Senate favored an exception for the cabinet, while the House rejected the idea. Dunning, 294.
[476] Dunning, 295.
[477] Stewart, 76.

not protect from removal the members of the Cabinet appointed by Mr. Lincoln, that President Johnson might remove them at his pleasure.[478]

Thus, he would not vote to convict on any of the Tenure of Office related articles of impeachment, but he would vote to convict on the other articles.[479] If Sherman were voting solely on political grounds, there would be no reason to draw this distinction. Sherman's view was adopted as highly persuasive by many of the other "not guilty" votes.[480]

B. ESTOPPEL

The legal debate over the reach of the Tenure of Office Act did not end with statutory interpretation and the examination of legislative history; it also invoked the doctrine of estoppel.[481] The House managers contended that Johnson, by initially complying with the Act in his attempts to remove Stanton, had conceded that Stanton, even though he was a department head, was covered by the act. Thus, he should be estopped from maintaining otherwise at trial. The defense, however, dismissed the doctrine of estoppel as inappropriate for an impeachment trial. Benjamin Curtis declared "[t]hat the President of the United States should be impeached and removed from office, not by reason of the truth of his case, but because he is estopped from telling it, would be a spectacle for gods and men."[482] He predicted that such an act would "[u]ndoubtedly . . . have a place in history which it is not necessary for me to attempt to foreshadow."[483] Stevens retorted for the House managers that "nothing is more powerful" than

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[478] Trial Supplement, 449.
[479] Benedict, Impeachment, 170.
[480] Id.
[481] Estoppel is the legal concept that "prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true." ESTOPPEL, Black's Law Dictionary (10th ed. 2014)
[482] Benedict, Impeachment, 151.
[483] Id.

"the question of estoppel . . . for it is an argument by the party against himself."[484] As discussed previously, estoppel is not a "strong" legal argument. Instead, it is designed to avoid answering a legal question on its own merits. Here, however, the argument seems to be more about the evidence behind the claim of estoppel instead of actually advocating for Johnson to be formally estopped.

While the lawyers disputed the relevance of the doctrine of estoppel in an impeachment trial, the facts only further muddied the argument. Johnson never admitted that he was required to comply with the law in general or with respect to Secretary Stanton, but he still appeared to follow its procedures. It is unclear whether or not Johnson believed the Tenure of Office Act covered Stanton. On August 12, 1867, during his first attempt to remove the Secretary of War, Johnson in a letter to Stanton informed him that he was "suspended" and that General Grant would "act as Secretary of War *ad interim*."[485] The language of suspension implies that Johnson was acting under the Tenure of Office Act, but Johnson would explain at trial that he simply believed that "the executive power of removal from office . . . includes the power of suspension from office at the pleasure of the President."[486] Thus, in suspending Stanton he was merely exercising a lesser power; he was not complying with the requirements of the Tenure of Office Act. Further complicating the matter, Johnson informed the Senate of his action as required by the act when he later replaced Secretary Stanton with General Thomas.[487]

The Senate had also behaved as if the act applied to Stanton. Upon the secretary's first removal, the Senate following the procedures of the Tenure of Office Act resolved that "the

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[484] Id.
[485] "Johnson to Stanton," August 12, 1867, in McPherson 261.
[486] "Answer of President Johnson" in McPherson, 274.
[487] "Johnson to the Senate," February 21, 1868, in McPherson, 262.

Senate do[es] not concur in [Stanton's] suspension."[488] General Grant similarly operated under the assumption that Stanton was protected by the act during Johnson's first attempt to replace the secretary. Upon being informed of the Senate's resolution rejecting the suspension, Grant wrote Johnson that he had received "official notice" of the Senate's action.[489] He explained that "according to the provisions of section two of 'An act regulating the tenure of certain civil office,' my functions as Secretary of War ad interim ceased from the moment of the receipt of the within notice."[490] It is important to note that it was Grant and not Johnson who explicitly referred to the Tenure of Office Act. None of Johnson's prior communications had mentioned it. Instead Johnson had always declared that he was acting "by virtue of the power and authority vested in me as President by the Constitution and laws of the United States."[491] Similarly when Johnson replaced Stanton with Thomas he informed the Senate that he had done so "in further exercise of the power and authority so vested in the president" by "the Constitution and laws of the United States."[492] Thus, while Johnson's actions appeared to conform with the Tenure of Office Act's procedure, his reasoning never did. He would later argue that he had only made a show of complying with the act to avoid a constitutional clash that would have delayed the removal of Stanton.[493] In short, even if the doctrine of estoppel were to apply, it is not clear that Johnson's position at trial was actually inconsistent with his prior acts.

Overall, the debate over whether or not the Tenure of Office Act protected Stanton from removal reveals the importance of legal arguments to both the impeachment trial of Andrew Johnson and the votes of those Republicans finding the President not guilty. That debate began

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[488] "Action of the Senate," January 13, 1868, in McPherson, 262.
[489] "Grant to Johnson," January 14, 1868, in McPherson, 262.
[490] "Grant to Johnson," January 14, 1868, in McPherson, 262.
[491] "Johnson to Stanton," August 12, 1867, in McPherson, 261.
[492] "Johnson to the Senate," February 21, 1868, in McPherson, 262.
[493] Dunning, 277.

with the use of legislative history to determine the meaning of ambiguous statutory language. That language was then determinative for many senators in answering whether or not Johnson could be found guilty on any of the Tenure of Office articles. Furthermore, that debate included a discussion of the applicability of legal doctrines like estoppel to an impeachment trial and seriously explored how the facts fit such a theory. It was a legal debate.

3. The Constitutionality of the Tenure of Office Act

The Senate impeachment trial also addressed a legal issue that the House had not considered – whether the Tenure of Office Act was constitutional. If the act was unconstitutional, Johnson could not be impeached for violating it. Johnson's legal team opened his defense with an attack on the law's constitutionality declaring it to be "wholly inoperative and void by reason of its conflict with the Constitution."[494] They explained that

> the Constitution of the United States conferred on the President, as part of the executive power and as one of the necessary means and instruments of performing the executive duty expressly imposed on him by the Constitution of taking care that the laws be faithfully executed, the power at any and all times of removing from office all executive officers for cause to be judged of by the President alone.[495]

Thus, any law that purported to remove this power from the president or attempted to force him to share it with the Senate was unconstitutional. Johnson's lawyers did not root this argument solely on their theory of the executive vesting clause, the take care clause, and the structure of the Constitution. They also pointed to precedent and argued that the scope of the removal power had been "practically settled by the first Congress . . . and had been so considered, and, uniformly and in great numbers of instances, acted on by each Congress and President . . . from

[494] "Answer of President Johnson" in McPherson, 273.
[495] Id.

President Washington to, and including President Lincoln, and from the First Congress to the Thirty-Ninth Congress."[496] In support of this proposition, the defense provided long lists of past removals that were of questionable relevance to the current case since they all predated the Tenure of Office Act along with highlighting President John Adams' firing of Secretary of State Timothy Pickering on May 13, 1800. In that case, Adams removed Pickering while the Senate was in session, but without giving that body the chance to advise and consent.[497] In short, the defense team pointed to precedent to defend Johnson's actions as no different from any past president.

The House Managers, however, hotly contested this position and the relevance of the defense's examples. The managers argued that the defense was wrongly focused on removals prior to the Tenure of Office Act. They explained that the power of removal exercised by past presidents was a statutory power granted by Congress in 1789 when Congress first organized the executive department. [498] It was not a constitutional power. Importantly, that meant Congress could also remove or amend the power without violating the Constitution. The managers contended that the Tenure of Office Act had done precisely that making past precedents irrelevant. Johnson's defense recognizing the importance of this point countered that in 1789 Congress had merely been *recognizing* the executive's constitutional power of removal, instead of granting the power legislatively. [499] Regardless of which side was correct[500] about the source

[496] Id. For more on the First Congress' debate on this precise question and a discussion of what that Congress actually decided see Saikrishna Prakash, New Light on the Decision of 1789, 91 Cornell L. Rev. 1021 (2006).
[497] Dunning, 283–286.
[498] Id. at 285.
[499] Id.
[500] Johnson's position would be vindicated years later by the Supreme Court in *Myers v. United States*. 272 U.S. 52 (1926).

of the power of removal, the debate over the Tenure of Office Act's constitutionality with its focus on precedent again shows that Johnson's trial was a legally driven contest.

4. Johnson's Intent and Testing the Law

Johnson's defense also contended that given the uncertainty over the Tenure of Office Act's constitutionality and applicability to Stanton, the President could not have had the criminal intent necessary for impeachment.[501] The defense maintained as part of this argument that Johnson was simply trying to produce a test case so that the courts could determine the law's constitutionality. Johnson's legal team explained that the President believed that determining the scope of the Tenure of Office Act and the extent of the executive power "to remove one of the principal officers of one of the executive departments" were "questions of so much gravity and importance" that it was

> required . . . [that they] be in some proper way submitted to that judicial department of the government entrusted by the Constitution with the power, and subjected by it to the duty, not only of determining finally the construction and effect of all acts of Congress, but of comparing them with the Constitution of the United States and pronouncing them inoperative when found in conflict with that fundamental law.[502]

In this argument, the defense appeared to fully endorse judicial review, and perhaps even judicial supremacy, but the President's lawyers were also sure to carve out a special role for the executive in judging a law's constitutionality.

First, Benjamin Curtis for the defense pointed out that the executive was in a unique position when confronting a law that limited the president's power and that only he could bring into court. Curtis acknowledged that the president could not refuse to enforce just any law but

[501] Benedict, Impeachment, 152.
[502] "Answer of President Johnson" in McPherson, 273–74.

that "a question arises whether a particular law has cut off power confided into him by the people, through the Constitution, and he alone can raise that question."[503] At a more fundamental level, the defense drew a distinction between the president and private citizens based upon the president's constitutional power and the ultimate check of elections. Thomas Nelson explained:

> A private individual, if he violates the laws of the land, is amenable for their violation but the President of the United States, having the executive power invested in him by the Constitution, has the right to exercise his best judgment in the situation in which he is placed, and if he exercises that judgment honestly and faithfully, not from corrupt motives, then his action cannot be reviewed by Congress or by any other tribunal than the tribunal of the people in the presidential election.[504]

Nelson asked, "How can it be said that he had any wrongful or unlawful intent when the Constitution gave him the power to judge for himself in reference to the particular act?"[505] Thus, the defense imputed a pure intention to Johnson of simply wanting the proper branch (the judicial branch) to weigh in on the law's constitutionality, while also granting the president leeway to question the constitutionality of laws restricting executive power.

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[503] Benedict, Impeachment, 155. This argument is not unique to Curtis. In 1994, Assistant Attorney General Walter Dellinger in an Office of Legal Counsel opinion made a very similar point and specifically cited the concern that when a statute challenged the President's constitutional power there would be no one else who could raise the issue. 18 Op. O.L.C. 199, 201 (1994) ("The President has enhanced responsibility to resist unconstitutional provisions that encroach upon the constitutional powers of the Presidency. Where the President believes that an enactment unconstitutionally limits his powers, he has the authority to defend his office and decline to abide by it, unless he is convinced that the Court would disagree with his assessment. If the President does not challenge such provisions (i.e., by refusing to execute them), there often will be no occasion for judicial consideration of their constitutionality; a policy of consistent Presidential enforcement of statutes limiting his power thus would deny the Supreme Court the opportunity to review the limitations and thereby would allow for unconstitutional restrictions on the President's authority.").

[504] Benedict, Impeachment, 154.

[505] Id.

The House Managers, however, challenged the very basis of this position, arguing that once the President can "judicially" evaluate a law "the government is no longer a government of laws."[506] The managers even used Curtis' own words from his work *Executive Power* against him, repeating the line that "the powers of the President are executive merely. He cannot make a law. He cannot repeal one. He can only execute the laws. He can neither make nor suspend nor alter them."[507] In short, the president's power under the Constitution and the role of the courts became the central issue in deciding if his intentional violation of a law could constitute criminal intent. Illinois Republican Senator Lyman Trumbull would explain in his opinion that he in part voted to acquit because a failure to do so would allow "partisan zeal" to destroy "the checks and balances of the Constitution, so carefully devised, and so vital to its perpetuity."[508] He did this despite considering Johnson to be an "[un]fit person for President."[509] In other words, legal understandings of the separation of powers mattered, not his personal politics.

Conclusion

At the close of Johnson's impeachment trial, the Senate by a single vote found President Andrew Johnson not guilty.[510] Seven Republicans had defected from their party to make that possible. This paper does not seek to explain precisely why those seven senators voted to acquit. Nor does this paper seek to decide the constitutionality of the Tenure of Office Act, to define the meaning of "high crimes and misdemeanors," to discern Johnson's true intent in removing Stanton, or to determine if Stanton was protected by the Act. Rather, this paper has sought to

[506] Id.
[507] Id. at 155.
[508] Dunning, 301.
[509] Stewart, 281.
[510] Id. at 277, Dunning, 301.

demonstrate that those legal questions were open to debate and central to the impeachment, trial, and acquittal of Andrew Johnson.

In emphasizing the important role of legal argument, I do not mean to imply that politics did not matter at all. Politics certainly played a role, as is seen in the party line vote to impeach Johnson in the first place. It mattered that Johnson and the Radicals were engaged in a long-standing political battle over Reconstruction. It mattered that Republicans had uniquely large legislative majorities. Congressmen like Thaddeus Stevens and James Ashley likely would have voted to impeach Johnson regardless of the legal argument. For them, legal argument was merely a tool to wage political war, at least in the context of opposing Johnson. Historians, like Michael Les Benedict, have also offered a plausible political explanation for the seven Republican defections – they did not want Ben Wade to become president because they opposed his monetary policy and feared he would use the patronage power of the presidency to secure the 1868 presidential nomination.[511] Politics alone, however, is an insufficient explanation for what occurred. If opposition to Wade was the motivating factor, the Republican recusants should have relaxed their stance against removal once Grant formally secured the nomination, ending any permanent threat from Wade. Instead, their votes remained consistent between the articles voted on prior to Grant's nomination and those voted on after Grant's nomination. Politics alone also cannot explain the false starts at impeachment and the limited scope of the articles themselves. Only the law can do that.

Even if we accept a purely political explanation, the law was still doing important work. Nearly every actor in the clash between Johnson and Congress felt compelled to argue legally. That meant they had to tailor their arguments, like what constituted an impeachable offense, to

[511] Benedict, Impeachment, 61–69.

fit legal theories. That in turn restrained the potential paths of the political conflict between Johnson and the Radicals and narrowed its focus. The arguments on the floor of the House, the debates between the House Managers and Johnson's defense team, and the explanations in the opinions of senators issued at the conclusion of the trial, however, show that the law was doing more than just serving as a political tool. The law and legal arguments were actually influencing decisions. The text of the Constitution mattered. The separation of powers mattered. Statutory language mattered. Precedent mattered. Legal doctrines like estoppel mattered. The law mattered.

In the darkest moments of the Civil War and Reconstruction, the law still had a central role to play. It was not swallowed up by the press of events and partisan considerations. The American people and even their politicians had retained their characteristic attachment to the rule of law. This is not to say that everything done in the period was legal or constitutional. Nor is it a claim that the law mattered to everyone on every issue. Rather, it is an argument that debate over whether to ratify Lincoln's expansive use of executive power in the opening days of the war and whether to impeach Andrew Johnson were, at their core, legal debates. The law channeled the course of those debates. The law set the terms of the discussion. This is seen in the fact that nearly everyone involved at both moments of constitutional crisis felt compelled to make legal arguments. They could not simply ignore legal considerations and focus on political points or the practical necessities of the times. The law limited both the scope of Congress' ratification of Lincoln's actions and the range of charges levelled against Johnson. Ultimately, the law and legal arguments at every level influenced both the turn of events and how Americans thought about those events.