Maryland Law Review

Volume 73 | Issue 1 Article 4

1-1-2013

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Recommended Citation

Julie Novkov, *The Dangerous Fantasy of Lincoln: Framing Executive Power as Presidential Mastery*, 73 Md. L. Rev. 54 (2013)
Available at: http://digitalcommons.law.umaryland.edu/mlr/vol73/iss1/4

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THE DANGEROUS FANTASY OF *LINCOLN*: FRAMING EXECUTIVE POWER AS PRESIDENTIAL MASTERY

JULIE NOVKOV*

A wave of surprise and delight swept the star-studded room as the silver-haired man with the winning smile strode to the microphone at the 2013 Golden Globe awards. After the tumultuous standing ovation, former President Bill Clinton introduced Steven Spielberg's *Lincoln*,[1] which would net Daniel Day-Lewis a best actor award before the night was over:[2]

> President Lincoln's struggle to abolish slavery reminds us that enduring progress is forged in a cauldron of both principle and compromise. This brilliant film shows us how he did it and gives us hope that we can do it again. In "Lincoln," we see a man more interesting than the legend, and a far better guide for future presidents. Every hard-fought effort to perfect our union has demanded the same, sane combination of steely resolve and necessary compromises that Lincoln mastered to preserve the union and end slavery.[3]

Clinton's introduction simultaneously resisted Lincoln the "legend" while resituating him as a primary agent: a masterful politician who both saved the union and ended slavery.[4] This was no anomaly. The movie went on to garner multiple nominations for Academy Awards, and Day-Lewis was honored with an Oscar for Best Actor.[5]

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* University at Albany, SUNY. Many thanks to the participants in the 2013 Schmooze, whose enthusiastic responses and thoughtful insights improved this article significantly. The author also thanks teenagers Asher Novkov-Bloom and Jarod Croteau, who opted to go watch Lincoln with her, enjoyed the movie, and tolerated with aplomb and good humor her hissed commentary throughout.

1. LINCOLN (DreamWorks Studios 2012); Aly Weisman, *Bill Clinton Presents 'Lincoln' During Surprise Golden Globes Appearance*, BUSINESS INSIDER (Jan. 13, 2013, 11:01 PM), *available at* http://www.businessinsider.com/bill-clinton-makes-suprise-appearance-at-golden-globes-for-lincoln-2013-1.

2. *See infra* note 5.

3. *The 70th Annual Golden Globe Awards* (NBC television broadcast Jan. 13, 2013), *available at* http://www.youtube.com/watch?v=NCrlq34caJE.

4. *Id.*

5. Jill Serjeant, *Daniel Day-Lewis Wins Record Third Best Actor Oscar*, REUTERS, Feb. 25, 2013, *available at* http://www.reuters.com/article/2013/02/25/us-oscars-bestactor-

The 2012 release of *Lincoln* raises anew questions about what it means for American presidents to claim the mantle of the first Republican president and the Great Emancipator. Historians have weighed in to challenge the narrative presented by the film, noting particularly the omission of the work that abolitionists, both black and white, did to advance the cause of emancipation, about which Lincoln was decidedly ambivalent.[6] The point of this Article is not to pick apart the historical elisions or participate in the debate over how emancipation happened (to lay my cards on the table, I believe that Eric Foner is right), but rather to think about the cultural salience of *Lincoln*—the movie and the president—in contemporary presidential politics and rhetoric.

Another striking moment invoking the sixteenth president took place in 2003, when President George W. Bush stood on the deck of an aircraft carrier under a large banner that read "Mission Accomplished."[7] President Bush had just become the first sitting American president to land on an aircraft carrier in a fixed wing aircraft, and, aboard the U.S.S. Abraham Lincoln, declared that combat operations in Iraq had been completed.[8] While he did not speak about Lincoln directly, he portrayed the war in Iraq as an example of America's commitment to "the cause of liberty," and celebrated the military intervention as an extension of American investment in freedom at home and throughout the world.[9] The mission accomplished was not merely the end of combat operations in Iraq, by President Bush's account, but it also entailed the benevolent liberation of the Iraqi people from the tyranny of President Saddam Hussein.[10]

The image of an American president displaying American triumphal military might on a vessel named for Abraham Lincoln was controversial, primarily because it soon became clear that the mission, however it was defined, was not "accomplished."[11] President George W. Bush's critics continued to question both his conduct of the war in Iraq and his decision to

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idUSBRE91O05V20130225; Todd Leopold, *'Lincoln' Leads Oscar Race with 12 Nominations*, CNN.COM, Jan. 10, 2013, http://www.cnn.com/2013/01/10/showbiz/movies/oscar-nominations.

6. For a scathing response to David Brooks' laudatory editorial about *Lincoln*'s political wizardry see Eric Foner, Letter to the Editor, *Lincoln's Use of Politics for Noble Ends*, N.Y. TIMES, Nov. 26, 2012, at A30.

7. *Commander-in-Chief Lands on U.S.S. Lincoln*, CNN.COM, May 2, 2003, http://www.cnn.com/2003/ALLPOLITICS/05/01/bush.carrier.landing/.

8. *Id.*

9. George W. Bush, Address to the Nation on Iraq from the U.S.S. Abraham Lincoln (May 1, 2003), *available at* http://www.presidency.ucsb.edu/ws/?pid=68675.

10. *Id.*

11. Sean Loughlin, *One Year Later, Bush Defends Iraq Speech*, CNN.COM, Apr. 30, 2004, http://edition.cnn.com/2004/ALLPOLITICS/04/30/speech.anniversary/.

initiate military operations there in the first place, given the unfinished business with the Taliban and al Qaeda.[12] The question not asked, however, was whether President Bush was properly invoking Lincoln—or more fundamentally what it meant to invoke him.

In recent years, invoking Lincoln has been a troubling political maneuver in significant ways that the movie *Lincoln* highlights. Calls out to Lincoln by presidents and their political interlocutors (including the media) tend to take on two forms: either the president or interlocutor is claiming the mantle of Lincoln and calling attention, implicitly or explicitly, to his own Lincolnesque behavior, or a critic of the president is claiming that the president's behavior or rhetoric is not, in fact, Lincolnesque.[13] In either scenario, what is Lincolnesque is normatively good—an example of effective leadership in a context of crisis. The Lincolnesque president is one beset by conflict and turmoil, both in internal political circles and in the surrounding atmosphere, which is one of grave threat to the nation. He responds by managing the turmoil effectively, shouldering the burdens of leadership and bearing them with grace, self-deprecating humor, and ruthless pursuit of ultimate success. The Lincolnesque president is also one who promotes a narrow vision of racial equality properly centered between extremes of overt racism on the one hand and illegitimate racial reparations on the other.[14]

Lincoln was broadly released in the United States on November 9, 2012, three days after President Barack Obama was re-elected.[15] The movie focuses intensely on President Lincoln's involvement in the political struggle over the Thirteenth Amendment in the House of Representatives as the Civil War was moving toward its conclusion.[16] The movie thus delves deeply into the complex intra-party politics of the Republicans as well as the Democrats' struggles to reassert authority after their drubbing in the election of 1864 (as the movie underlines, the Democrats lost fifty seats).[17] President Lincoln is portrayed in three roles: as a masterful politician, as a

12. *Id.*

13. *See infra* Parts I–II.

14. *See supra* text accompanying notes 3–4.

15. Christopher Rosen, *'Lincoln' Release Date: Steven Spielberg's Latest Placed in Oscar Season*, HUFFINGTON POST (Jul. 18, 2012, 6:33 PM), http://www.huffingtonpost.com /2012/07/18/lincoln-release-date-steven-spielberg_n_1684377.html; Jeff Zeleny & Jim Rutenberg, *Divided U.S. Gives Obama More Time*, N.Y. TIMES Nov. 6, 2012, at A1.

16. LINCOLN, *supra* note 1.

17. *Id*. While the movie highlights the vast political gulf between the radical and conservative Republicans, it does not address the split between the Copperheads and War Democrats that contributed to the Democrats' poor electoral performance.

loving father, and as a husband in a troubled marriage.[18] In each of these roles, he balances his compassion and commitment to his values with his pragmatic negotiation of difficult situations to achieve desired outcomes.[19] The audience is encouraged to sympathize with the extraordinarily difficult circumstances he faces and to appreciate the grace and humor he employs as he achieves success.[20] The movie honestly acknowledges President Lincoln's moderate stances on black rights and Reconstruction, but downplays these issues in favor of presenting the man himself as a foresighted and wise leader who wants (and maneuvers to achieve) particular political results for deeply moral reasons.[21]

One critical scene in the movie features President Lincoln discussing with his advisors the reasons for pressing the Thirteenth Amendment forward at this historical moment.[22] His advisors are wrangling over whether it is worth the effort and political capital to pursue the Amendment, given that the war is moving toward conclusion.[23] President Lincoln interrupts the bickering to situate himself as a leader: "I decided that the Constitution gives me war powers, but no one knows just exactly what those powers are. Some say they don't exist. I don't know. I decided I needed them to exist to uphold my oath to protect the Constitution . . . ."[24] Lincoln, and he alone, was the interpreter of war powers and seized them, using his oath to uphold the Constitution as a bootstrap.[25] He then determined that his war powers enabled him to seize slaves and consider them confiscated property (a determination that historically was made first by his generals and to which he only reluctantly acceded to after a time).[26]

This left Lincoln in a further conundrum, however, because of his maintenance of the argument that the South was not a nation.[27] How could he continue to insist that the South was merely a pack of individual rebels, that the southern states themselves were not in revolt, much less in secession, while simultaneously justifying the effective abrogation of states' laws

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. Lincoln *Quotes*, IMDB [hereinafter *Quotes*] http://www.imdb.com/title/tt0443272/quotes (last visited July 14, 2013).

25. *Id.*

26. Sean Wilentz, *Congress Confiscates Confederates' Slaves*, N.Y. TIMES BLOG (July 16, 2012, 8:30 PM), http://opinionator.blogs.nytimes.com/2012/07/16/congress-confiscates-confederates-slaves/.

27. *Quotes*, *supra* note 24.

concerning slavery? Despite the contradiction, Lincoln continues, "Negroes in those states are slaves, hence property, hence my war powers allow me to confiscate 'em as such. So I confiscated 'em."[28] What enables him to cancel state laws in this fashion? Lincoln explained: "I felt the war demanded it; my oath demanded it; I felt right with myself; and I hoped it was legal to do it, I'm hoping still. Two years ago I proclaimed these people emancipated—'then, hence forward and forever free.'"[29] The Gordian knot has been slashed by the necessities of war, and the sword Lincoln wields is his oath of office.

Why then the need for the Thirteenth Amendment if war powers could be used to justify emancipation? Lincoln explains:

> But let's say the courts decide I had no authority to do it. They might well decide that. Say there's no amendment abolishing slavery. Say it's after the war, and I can no longer use my war powers to just ignore the courts' decisions, like I sometimes felt I had to do. Might those people I freed be ordered back into slavery? That's why I'd like to get the Thirteenth Amendment through the House, and on its way to ratification by the states, wrap the whole slavery thing up, forever and aye. As soon as I'm able. Now. End of this month. And I'd like you to stand behind me. Like my cabinet's most always done.[30]

The danger Lincoln foresees is that emancipation will not be seen as a permanent act.[31] It could be interpreted as producing only a temporary legal status subject to change once the power behind the Proclamation evaporates with the cessation of hostilities.[32] He expresses concern about how the courts will handle these questions in the wake of the war's end, and uncertainty that emancipation will stick.[33]

The answer to this problem, he asserts, is rapid action on the Thirteenth Amendment.[34] Implied underneath the speech, read into it by the audience's presumed collective knowledge of Lincoln as the emancipator, is an understanding that he is pressing forward to secure emancipation for

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28. *Quotes*, *supra* note 24. In this speech, screenplay writer Kushner avoids mentioning *Dred Scott*, the legal basis for Lincoln's surety that states retain the right to defend slavery and define slaves as property; *Dred Scott* has become something of a dog whistle for anti-abortion opponents of *Roe v. Wade*. Colleen McCain Nelson, *Did Bush Link Abortion, Dred Scott Reference?*, DALLAS MORNING NEWS, Oct. 13, 2004, at 10A.

29. *Quotes*, *supra* note 24.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

fundamentally moral reasons; pragmatic motivations play no role in his discussion either of the Emancipation Proclamation or of the significance of emancipation generally.[35] Convinced, his advisors cease their bickering and prepare to move forward together to muster the necessary votes to pass the amendment in the House.[36]

The key moment in the speech, however, is in Lincoln's simultaneous justification of his occasional circumvention or defiance of the law coupled with his implied acknowledgement that only the war justifies these acts, and that this justification will expire with the cessation of hostilities.[37] This critical speech presents two fundamental arguments of the movie about Lincoln and about politics.

The first argument is that Lincoln is great and admirable because he is both driven by a fundamental moral compass and because he is capable of acting pragmatically to true his aim. (In fact, one scene between Lincoln and Representative Thaddeus Stevens invokes the compass image, with Lincoln praising Stevens's compass's unwavering point to true north but pointing out that it cannot help to navigate the swamps that lie in the way).[38] Lincoln does face moral dilemmas, but we know that his resolution of them—choosing to press for the Thirteenth Amendment rather than negotiating an end to the war with slavery as a bargaining chip, and finally realizing that he must heartlessly press Mary Todd Lincoln into allowing their oldest son to go to war[39]—are the morally better choices. In making these choices, he stands forth among advisors and opponents (and Mary Todd Lincoln) who act as foils.

The second fundamental argument of the movie is highlighted by Lincoln's posture toward the law, buried toward the end of his self-described "sermon." His war powers render him simultaneously a lawmaker, enabling him to justify the Emancipation Proclamation as a legal act (both in terms of invoking law and being permissible under the law), and a creature above the law itself, with the power to exercise his discretion to determine when he "has to" ignore the rulings of the courts.[40]

Here and throughout the movie, the fundamental rightness of his ultimate choices acts to justify the means he employs—that he must employ—

35. *Id.*
36. LINCOLN, *supra* note 1.
37. *Quotes*, *supra* note 24.
38. LINCOLN, *supra* note 1.
39. *Id.*
40. *Quotes*, *supra* note 24.

to achieve them.[41] Lincoln starts by discussing the necessity for obtaining twenty additional votes for the Amendment with his skeptical Secretary of State William Seward (played to perfection by David Straithaim).[42] Seward is eventually convinced that these votes must be obtained by any means necessary and unhappily shoulders the unsavory task of working with political operatives to distribute promises of spoils positions to defeated Democrats to secure their votes.[43] Ultimately, Lincoln himself must contribute to this effort, though he is portrayed only as using moral suasion to sway wavering members of Congress.[44] More of a grey area, however, is his promise to conservative Republican Francis Blair to meet with Confederate delegates to discuss peace, a promise that he fails to mention and about which he misdirects, and ultimately lies, to prevent angering the radical Republicans and several members of his own cabinet.[45] To add insult to injury, Lincoln consciously chooses to double-cross the Confederate commissioners by deciding, in a dramatic scene late at night with only his two telegraphers as witnesses, to delay the commissioners and prevent their entry into the District of Columbia prior to the vote on the Amendment.[46] Lincoln breaks a lot of eggs to prepare his omelet as the audience nods approvingly at his audacity and capacity to, as Mary Todd Lincoln notes, pick his way carefully through the treacherous swamp of politics better than any other living man.[47]

Of course, by 1865, the real Lincoln had engaged in many more controversial and constitutionally questionable acts.[48] He had suspended habeas corpus independently, only gaining congressional approval post hoc.[49] He had cracked down on free speech vigorously to stem anti-enlistment and anti-draft fervor, targeting newspaper editors in particular.[50] And he had imposed martial law in areas far from combat.[51] A few of these issues are raised in the movie, but only by being placed as hyperbolic charges in the mouths of unsympathetic and racist opponents to the Thirteenth Amend-

41. LINCOLN, *supra* note 1.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. Debora K. Kristensen, *Finding the Right Balance: American Civil Liberties in Time of War*, ADVOCATE, Dec. 2001, at 20–21.

49. Jonathan Hafetz, *A Different View of the Law: Habeas Corpus During the Lincoln and Bush Presidencies*, 12 CHAP. L. REV. 439, 444–45 (2009).

50. Kristensen, *supra* note 48, at 20.

51. *Id.*

ment.[52] (The one time Spielberg's Lincoln addresses his own policy of imposing the death penalty on deserters, it is to puzzle briefly over, and then grant, a pardon request for a sixteen-year old boy.)[53]

For a movie so deeply steeped in politics and partisanship, *Lincoln* was received in an oddly apolitical fashion. Its liberal (in modern terms, read Democratic) credentials were impeccable: Director Steven Spielberg has supported the Democratic Party and counts former President Bill Clinton among his friends,[54] and screenplay author Tony Kushner is best known for his Tony-winning play about the AIDS epidemic, *Angels in America*.[55] Yet modern Republicans continue to invoke themselves as the party of Lincoln and the Democrats in the movie are portrayed as racist, venal, or both.[56] The movie garnered praise from a wide variety of critics, earning an eighty-nine percent fresh rating from Rotten Tomatoes.[57] As noted above, David Brooks waxed rhapsodic about *Lincoln's* message, lauding it as a celebration of politics and the good that can be achieved by skilled political actors, and urging people to see the movie to regain their faith in the political process despite its warts.[58] The more liberal Ruth Marcus opined that Congress itself should be invited to a special screening.[59] Why does a movie that celebrates Lincoln and emancipation while highlighting the corruption and nastiness of politics not simply get read as more Hollywood liberalism? And why *this* portrait of Abraham Lincoln *now*, a portrait that has obviously tapped into something deeply salient in American culture and politics?[60]

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52. LINCOLN, *supra* note 1.

53. *Id*.

54. *See* Weisman, *supra* note 1; Adam Wollner, *House Committee Considers Online Ad Disclosure, Tweeting Donations and More in Capital Eye-Opener*, STATES NEWS SERV, June 20, 2012, *available at* http://www.opensecrets.org/news/2012/06/620-capital-eye-opener.html.

55. Aileen Jacobsen, *Why a Braodway Hit Soars: The Scriptures For 'Angels In America'*, NEWSDAY, June 11, 1993, at Part II Weekend.

56. LINCOLN, *supra* note 1. One of the few moments of comic relief comes when Thaddeus Stevens invites to his office a Democratic House member seeking assistance in retaining his seat after a contested election. *Id.* Stevens's task is to convince the Democrat to vote for the amendment in exchange for Stevens's support. *Id.* Stevens sourly questions him: "You are a Democrat. What's the matter with you? Are you wicked?" *Quotes*, supra note 24.

57. *Lincoln (2012)*, ROTTEN TOMATOES, http://www.rottentomatoes.com/m/lincoln_2011/ (last visited July 16, 2013).

58. David Brooks, Op-Ed., *Why We Love Politics*, N.Y. TIMES, Nov. 22, 2012, at A35.

59. Ruth Marcus, Commentary, *Congress Should See the Movie Lincoln*, STAR TRIBUNE, Nov. 25, 2012, http://www.startribune.com/opinion/commentaries /180442191.html?refer=y.

60. I can recall only a few other movies about politics and about congressional politics in particular that had this kind of cultural resonance, and these—for example, *Mr. Smith Goes to Washington* and *Advise and Consent*—date back to 1939 and 1962 respectively. MR. SMITH GOES TO WASHINGTON (Columbia Pictures 1939); ADVISE AND CONSENT (Columbia Pictures 1962).

To answer these questions, I turn to the presidencies of George W. Bush and Barack Obama. *Lincoln* the movie, I argue, is a reflection of Bush's presidency and a frame for Obama's. Both men have portrayed themselves as leading the nation through parlous times and situated themselves (or attempted to do so) as strong leaders whose primary goal is to protect and preserve national security.[61] In doing so, they have both on occasion donned Lincoln's mantle or had it placed on their shoulders, looking to make difficult and painful choices with bloody consequences but justifying these choices by invoking the Executive's duty to the nation. And both men have employed the Lincoln maneuver of using war powers to situate themselves as lawmakers and persons above the law.[62]

I. CASTING GEORGE W. BUSH AS ABRAHAM LINCOLN

President George W. Bush, unlike President Lincoln, was not elected in a moment of national crisis. While upper echelon security experts knew of the threat of al Qaeda, the nation voting for President Bush and watching his inauguration did not see the threat of imminent war on the horizon. After September 11th, though, President Bush had to find his feet immediately as a wartime commander in chief. Throughout his presidency, he and those around him turned to Lincoln for inspiration.[63]

In his State of the Union address in 2006, President Bush situated himself as a hero refusing the easy path:

> Fellow citizens, we've been called to leadership in a period of consequence. We've entered a great ideological conflict we did nothing to invite. . . . Sometimes it can seem that history is turning in a wide arc toward an unknown shore. Yet the destination of history is determined by human action, and every great movement of history comes to a point of choosing. Lincoln could have accepted peace at the cost of disunity and continued slavery. . . . Today, having come far in our own historical journey, we must decide: Will we turn back or finish well?[64]

The unspoken easy path President Bush was rejecting was also a path of peace along with appeasement of an evil enemy—in his case, the perpetrators of the "great ideological conflict" the United States had not invited.[65] He presented himself as determined to stay the course, an image reinforced

61. *See infra* Parts I–II.

62. *See infra* Parts I–II.

63. *See infra* text accompanying note 64.

64. George W. Bush, Address Before a Joint Session of the Congress on the State of the Union, 42 WEEKLY COMP. PRES. DOC. 145, 152 (Jan. 31, 2006).

65. *Id.*

by some conservative columnists who portrayed him as a steadfast adherent to a challenging, but correct, path.[66]

As his second term drew nearer to its close, President Bush made a point of highlighting his interest in Lincoln. He talked about reading biographies of Lincoln, and at one point, together, he and Karl Rove apparently read Doris Kearns Goodwin's *Team of Rivals*,[67] the main source for Kushner's *Lincoln* screenplay.[68] In his final news conference, he repeated the by-then well-established theme of how Lincoln had been an inspiration for him in his refusal to bow down before public criticism and hostility.[69] He noted the hostility and anger that his critics had expressed toward him, but stated that:

> It's not the first time, however, in history that people have expressed themselves in sometimes undignified ways. I've been reading, you know, a lot about Abraham Lincoln during my Presidency, and there was some pretty harsh discord when it came to the 16th President, just like there's been harsh discord for the 30th—43d President.[70]

He then likened himself to Lincoln as a President who did not avoid controversy by failing to make hard decisions:

> That's just not my nature. I'm the kind of person that, you know, is willing to take on hard tasks, and in times of war people get emotional; I understand that. Never really, you know, spent that much time, frankly, worrying about the loud voices. I, of course, hear them, but they didn't affect my policy, nor did they affect how I made decisions.[71]

In this statement, by invoking Lincoln and Lincoln's war, President Bush presented Lincoln as a President who had made hard and controversial, but ultimately right, decisions during wartime. He then paralleled his own experiences to Lincoln's, both in terms of refusing to respond to criticisms either of his substantive policy positions or his decisionmaking processes.

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66. *See, e.g.*, *Newt Gingrich, Bush and Lincoln*, WALL ST. J., Sept. 7, 2006, at 7, *available at* http://extendedremarks.blogspot.com/2007/08/newt-gingrich-on-lincoln-and-bush.html (comparing the difficulties President Bush faced with the war on terrorism to those President Lincoln faced in the Civil War and affirming President Bush's decisions).

67. DORIS KEARNS GOODWIN, TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN (2005).

68. Karl Rove, Op-Ed., *Bush Is a Book Lover*, WALL ST. J., Dec. 26, 2008, http://online.wsj.com/article/SB123025595706634689.html.

69. George W. Bush, The President's News Conference, 45 WEEKLY COMP. PRES. DOC. 55 (Jan. 12, 2009).

70. *Id.* at 59.

71. *Id.*

He was almost certainly thinking of his handling of the military conflicts in Afghanistan and Iraq, and perhaps specifically of the firestorm of criticism that engulfed his handling of individuals he termed enemy combatants.[72] Many books and articles have considered the legalities and illegalities of the Guantánamo Bay detention facility, the use of evidence elicited by torture in quasi-legal proceedings, and the President's fudging of civil liberties issues during the military engagements.[73] The issue on which this discussion will concentrate is the Bush Administration's handling of detainees and attempts to articulate and justify policies regarding them. The point is not so much to add any new insights to the debate over the legalities, but rather to show how the Bush Administration's actions keyed pretty consciously on a Lincolnian framework, thereby setting up a debate over whether President Bush resembled the masterful political genius he was invoking.

From near the beginning of the United States' military engagement in Afghanistan, the Bush Administration portrayed the conflict as unprecedented and as posing an existential threat to the nation. He pressed the view that the executive branch had broad plenary powers available not only to prosecute the war, but also to make determinations about the thorny legal issues it raised. This stance is evident in Jay Bybee's memo of January 2002, where he declares that "Article II of the Constitution makes clear that the President is vested with all of the federal executive power . . . ."[74] While he acknowledges that Congress "possesses its own specific foreign affairs powers," the Article II grant provides "an undefined executive power" and Article I's grant to Congress is "limited."[75] Therefore, he asserts, "[f]rom the very beginnings of the Republic, this constitutional arrangement has been understood to grant the President plenary control over the conduct

72. *See, e.g.*, William Glaberson, *U.S. Won't Label Terror Suspects as 'Combatants,'* N.Y. TIMES, Mar. 14, 2009, at A1 (noting critics of President Bush's administration said officials used the term enemy combatant to permit detentions that would not have otherwise been authorized).

73. *See, e.g.*, LOUIS FISHER, THE CONSTITUTION AND 9/11: RECURRING THREATS TO AMERICA'S FREEDOM (2008) (discussing the historical tension between national security efforts and citizens' constitutional rights); LAUREL FLETCHER ET AL., THE GUANTÁNAMO EFFECT: EXPOSING THE CONSEQUENCES OF U.S. DETENTION AND INTERROGATION PRACTICES (2009) (documenting the rise of prison abuse from accounts by prisoners, government officials, military experts and more); ERIC POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS (2006) (defending the use of unilateral executive power in times of emergency); ANDY WORTHINGTON, THE GUANTÁNAMO FILES: THE STORY OF THE 774 DETAINEES IN AMERICA'S ILLEGAL PRISON (2007) (revealing the story of each prisoner held in Guantánamo).

74. Memorandum from Jay Bybee, Assistant Att'y Gen., to Alberto Gonzales, Couns. to the President, and William J. Haynes II, Gen. Couns. of the Dep't of Def. (Jan. 22, 2002), *available at* http://www.washingtonpost.com/wp-srv/nation/documents/012202bybee.pdf.

75. *Id.*

of foreign relations," including the capacity to make legal determinations about treaty status and the appropriate treatment of captured individuals.[76]

This general belief grounded specific findings among the President's legal staff and officers in the Departments of Justice and Defense that the executive branch had the power to determine that detainees captured in the war were not prisoners of war subject to the protections of the Geneva Conventions,[77] to establish military commissions outside of the normal procedures of court martials to determine the fate of detainees,[78] to authorize torture to obtain information from detainees,[79] and to set up a system for continuing detention and interrogation of detainees,[80] among other things. All of these actions reinforced the idea that what the Administration was calling the War on Terror was a unique war against a unique kind of enemy, and that only the executive branch had the capacity and authority to respond appropriately.

President Bush understood himself to face a challenge not unlike Lincoln's.[81] Where Lincoln was in the difficult position of prosecuting a war that could not be declared a war because he could not acknowledge secession, Bush was prosecuting a war against a non-state enemy. Both had a need to define and understand their respective military conflicts in terms of war because both relied on the legal frame of war as an existential threat to the nation to leverage the vast expansion of executive authority contemplated in their orders and those of their subordinates.[82] Yet both faced political and legal imperatives not to define the conflicts as war. In Lincoln's case, to do so would acknowledge secession as legitimate and define the southern states (and not just certain individuals in them) as in rebellion.[83] In President Bush's case, to define the conflict as a traditional war would afford the Geneva Convention's legal protections to the detainees, trigger greater collaborative responsibilities with Congress, and imply significant limits in the

76. *Id.*

77. Memorandum from Donald Rumsfeld, Sec. of Def. for the Joint Chiefs of Staff (Jan. 19, 2002), *available at* http://www.torturingdemocracy.org/documents/20020119.pdf.

78. DEPARTMENT OF DEFENSE, MILITARY COMMISSION ORDER NO. 1 (Mar. 21, 2002), *available at* http://www.defense.gov/news/Mar2002/d20020321ord.pdf.

79. Memorandum from Jay Bybee, Assistant Att'y Gen., to Alberto Gonzales, Couns. to the President Re Standards of Conduct for Interrogation (Aug. 1, 2002), *available at* http://www.torturingdemocracy.org/documents/20020801-1.pdf.

80. Memorandum from Donald Rumsfeld, Sec. of Def., to the Gen. Couns., Dep't of Def., (Jan. 15, 2003), *available at* http://www.torturingdemocracy.org/documents/20030115-1.pdf.

81. *See supra* text accompanying note 64.

82. *See infra* text accompanying notes 92–94; *see also Quotes*, *supra* note 10.

83. *See supra* text accompanying notes 26–27 and 31–32.

extent to which the pursuit of al Qaeda could cross national borders or interfere with other sovereign nations.[84]

President Bush thus reprised Lincoln's triumph of will. The military conflict was a War on Terror without a declaration of war against another sovereign nation;[85] it involved massive deployments of American troops and the building of an international military coalition to engage in what almost any sane observer would identify as acts of war. Yet President Bush persisted in defining the war as unique in the nature of the combatants and in the threat it posed to the United States, using these claims to leverage his insistence that the executive branch alone had the authority to craft legal principles to govern the engagements.[86] Lincoln's words from Kushner's script—"I felt the war demanded it; my oath demanded it; I felt right with myself; and I hoped it was legal to do it, I'm hoping still"[87]—fit easily in President Bush's mouth.

Even President Bush's troubled relationship with the Supreme Court can fit into the Lincoln frame. The Justices were not impressed with his efforts to sort out the legalities of the war, and challenges to the military tribunals led to a series of rulings that repeatedly demanded that President Bush collaborate with Congress and afford a standard and internationally recognized set of due process protections to the detainees.[88] The detainee cases were hailed by liberal commentators as reinforcing the rule of law and drawing the line at an extreme interpretation of the unitary executive.[89] Yet just as Justice Taney's stern rebuke to Lincoln in *Ex Parte Merryman*[90] had no effect on Merryman's status, the rulings had a very limited concrete effect on the situation in Guantánamo Bay despite their bold rhetoric.[91]

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84. *See supra* text accompanying notes 77–80.

85. Noman Goheer, Comment, *The Unilateral Creation of International Law During the "War on Terror": Murder by an Unprivileged Belligerent Is Not A War Crime*, 10 N.Y. CITY L. REV. 533, 535 (2007).

86. *See supra* text accompanying notes 76–80.

87. *See Quotes*, *supra* note 24.

88. Kim Lane Scheppele, *The New Judicial Deference*, 92 B.U. L. REV. 89, 92 n.8 (2012).

89. *See, e.g.*, *id.* at 119–20 (noting the media's characterization of critical Supreme Court enemy combatant cases); RICHARD ELLIS, JUDGING EXECUTIVE POWER: SIXTEEN SUPREME COURT CASES THAT HAVE SHAPED THE AMERICAN PRESIDENCY (2009) (discussing landmark cases on presidential power).

90. 17 F. Cas. 144 (C.C.D. Md. 1861).

91. As Kim Lane Scheppele notes, the suspected terrorists got all of the ringing language from the courts, but the government maintained control of the facts on the ground, leading to rulings that endorsed high principle but had little concrete effect. Scheppele, *supra* note 88, at 123–24.

As but one example of his efforts to assert mastery, consider the signing statement President Bush issued in validating funding for the Detainee Treatment Act ("DTA") of 2005:[92]

> The executive branch shall construe Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and the President, evidenced in Title X, of protecting the American people from further terrorist attacks.[93]

In this remarkable statement, the President asserts his authority to supervise a unitary executive branch on the basis of his war powers and argues that the courts are limited in their capacity to challenge his actions.[94] The justification is the purpose of the President's policy (purportedly legitimized by Congress in the DTA) of protecting against terrorism.[95] Note particularly that he invokes terrorist attacks rather than acts of war, thereby expanding and rendering even more vague his own grant of authority as a war leader.[96] The statement then instructs the courts that the executive branch "shall construe" the act to deny subject matter jurisdiction "over any existing or future action, including applications for writs of habeas corpus."[97] This action, of course, echoes Lincoln's suspensions of habeas, which were only critically addressed by the Supreme Court after the war had ended and he had been assassinated.[98]

Finally, the Bush Administration's argument for broad and unbounded executive authority based on emergency played a central role in a Department of Justice memorandum from 2006 supporting warrantless wiretapping by the National Security Agency ("NSA").[99] The document opened with a straightforward enough claim that the President's powers were at

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92. George W. Bush, President's Statement on Signing H.R. 2863, the Dep't of Def., Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 41 WEEKLY COMP. PRES. DOC. 1918 (Dec. 30, 2005).

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. Hafetz, *supra* note 49, at 445.

99. *See generally* UNITED STATES DEP'T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT (Jan. 19, 2006) [hereinafter LEGAL AUTHORITIES], *available at* http://www.justice.gov/opa/whitepaperonnsalegalauthorities.pdf.

their maximum level under the *Youngstown Sheet and Tube v. Sawyer*[100] framework due to the September 2001 Authorization for Use of Military Force ("AUMF").[101] It then went on to claim, breathtakingly, that *allowing* the courts to interpret the existing statutory framework for wiretapping to bar the NSA from taking matters into its own hands would be unconstitutional as a violation of the President's duty to protect the nation:

> Indeed, were FISA [Foreign Intelligence Surveillance Act] and Title III interpreted to impede the President's ability to use the traditional tool of electronic surveillance to detect and prevent future attacks by a declared enemy that has already struck at the homeland and is engaged in ongoing operations against the United States, the constitutionality of FISA, as applied to that situation, would be called into very serious doubt. In fact, if this difficult constitutional question had to be addressed, FISA would be unconstitutional as applied to this narrow context.[102]

Again, the nature of the emergency justified extraordinary action.[103] Independent executive interpretation of what was legal was, in this memo's framework, necessary and constitutionally required as a piece of the Executive's imperative duty to protect the nation.[104]

President Bush's actions provoked a debate between liberals and conservatives over whether he was, or was not, comparable to Lincoln. Various columnists and pundits from David Frum to Newt Gingrich argued for the comparison.[105] In his documentary on President Bush aired on Fox News, Bret Baier argued that President Bush was inspired by Lincoln and that their respective presidencies had many similarities.[106] University of Baltimore Law School professor Garrett Epps was provoked enough to respond acerbically that:

> George W. Bush is Lincoln the way Dan Quayle is Jack Kennedy. Bush does, however, stack up quite nicely against Andrew Johnson, one of the least successful presidents in our history.

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100. 343 U.S. 579 (1952).

101. LEGAL AUTHORITIES, *supra* note 99, at 2.

102. *Id.* at 3. *See also* David Schultz, *Killing Americans: Obama's Constitutional Arrogance*, SCHULTZ'S TAKE (Feb. 8, 2013, 10:48 AM), http://schultzstake.blogspot.com/2013/02/killing-americans-obamas-constitutional.html (describing the unsatisfactory legal justifications President Bush relied on to assert broad presidential power in combating terrorism).

103. *See* LEGAL AUTHORITIES, *supra* note 99, at 4.

104. *Id.* at 1, 6, 10, 14, 17.

105. *See supra* note 66; *see also* Garrett Epps, *You, Sir, Are No Abe Lincoln*, SALON.COM (Aug. 23, 2006, 7:00 AM), http://www.salon.com/2006/08/23/bush_lincoln/.

106. *George Bush: Fighting to the Finish* (Fox News television broadcast Feb. 19, 2008).

> That's because, even though Bush has most of Johnson's flaws, he runs almost no risk of being impeached by his own party.[107]

II. BARACK OBAMA TAKES THE STAGE

But were the comparisons with Lincoln merely a phenomenon of the controversial Bush presidency, his embrace of the unitary executive, and his own efforts to liken himself to the sixteenth President? Apparently not.

President Obama's candidacy and election invited discussion about Lincoln due to his race. However, the relationship between Presidents Obama and Lincoln has been more than skin deep, and like his immediate predecessor, Obama has courted comparisons to Lincoln and invoked him.[108] Likewise, President Obama's supporters and allies have placed Lincoln's mantle on his shoulders.[109] Also a son of Illinois, then-Senator Obama launched his campaign from the Old Illinois State Capitol in Springfield, where Lincoln delivered his "house divided" speech in 1858.[110] And the turning point of his primary campaign was his *Perfect Union* speech at the National Constitution Center in Philadelphia, which raised interesting parallels to Lincoln's campaign speeches (historian Harold Holzer notes particularly the connections to Lincoln's *Cooper Union Address*, in which Lincoln also invoked constitutional history and situated himself as a racial moderate).[111] While some of the likening of President Obama to Lincoln is cultural, as Ron English's portrait of Obama as Lincoln illustrates,[112] President Obama consciously deployed the parallel as well. He continued to invoke Lincoln in both of his inaugurations, opting to be sworn in using the same Bible upon which Lincoln had taken his oath of office.[113]

While then-Senator Obama ran his first campaign on a note of hope—among other hopes, Lincoln's hope for peace—once in office, he faced the same conundrums that had bedeviled his predecessor in the ongoing military engagements that sought to address al Qaeda and other terrorist groups.

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107. Epps, *supra* note 105.

108. *See infra* text accompanying notes 110, 113.

109. *See infra* text accompanying note 112.

110. Mark Z. Barabak, *Obama's Run Has Begun*, MERILLVILLE POST-TRIBUNE, Feb. 11, 2007, at A13.

111. Recording: Historian Harold Holzer Compares Lincoln's Cooper Union Speech and Obama's Race Speech at the Constitution Center, (National Constitution Center 2009), *available at* http://constitutioncenter.org/amoreperfectunion/docs/Harold_Holzer_01.mp3.

112. *See Political Fusion Portraits*, TRENDHUNTER (Jun. 4, 2008), http://www.trendhunter.com/trends/political-fusion-paintings-ron-englishs-obama-lincoln-portrait (highlighting Ron English's artwork fusing a portrait of Obama over Lincoln's famous portrait).

113. *Up Close with Lincoln's Bible*, USA TODAY, Jan. 17, 2013, http://www.usatoday.com/videos/news/nation/2013/01/17/up-close-with-lincolns-bible/1842985/.

President Obama found it difficult to figure out a way to close down Guantánamo Bay, and he was unable to construct an adequate framework for treating the detainees as either accused criminals or prisoners of war.[114] While he did fulfill his campaign promises to draw down troops in Iraq—and to a lesser extent in Afghanistan—and avoided referring to the War on Terror, he made it clear that he had no intentions of ceasing the American armed forces' pursuit of alleged terrorists, and the nation remained in a state of war.[115]

President Obama began with the stated intention of restoring what scholars and pundits critical of former President Bush described as the rule of law. On January 15, 2009, the Office of Legal Counsel ("OLC") prepared the ground just prior to President Obama's inauguration by releasing a memorandum disavowing a 2001–2003 series of memoranda from the OLC "respecting the allocation of authorities between the President and Congress in matters of war and national security . . . ."[116] While the memorandum noted that the OLC had "confronted novel and complex legal questions in a time of great danger and under extraordinary time pressure," the withdrawn opinions were criticized for not following the ordinary practice of the OLC, focusing on broad statements about executive authority rather than narrow questions about specific events and scenarios.[117] While cynics might see the memo simply as an effort to curtail executive power just before it passed into the hands of a Democratic commander in chief, the stance reflected President Obama's campaign rhetoric, as well as that of Democratic critics of the Bush Administration.[118] It did not, however, stick.

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114. *See* Max Fisher, *Why Hasn't Obama Closed Guantánamo Bay?*, WASHINGTONPOST.COM, (APR. 30, 2013, 5:18 PM), http://www.washingtonpost.com/blogs/worldviews/wp/2013/04/30/obama-just-gave-a-powerful-speech-about-the-need-to-close-gitmo-so-why-hasnt-he/ (discussing the legal and political hurdles for President Obama to close Guantánamo Bay).

115. *See The Obamameter: End the War in Afghanistan in 2014*, POLITIFACT.COM (Mar. 29, 2013), http://www.politifact.com/truth-o-meter/promises/obameter/promise/1096/end-war-afghanistan-2014/ (noting that Obama has ended the war in Iraq, has drawn down troops, and has set a timetable to remove more troops and end the war in Afghanistan by the end of 2014).

116. Memorandum from Steven Bradbury, Principal Deputy Assistant Att'y Gen. Re: Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001 1 (Jan. 15, 2009), *available at* http://www.gwu.edu/~nsarchiv/torturingdemocracy/documents/20090115.pdf.

117. *Id*. at 1.

118. *Compare id*. at 1–2 (proscribing a much more limited scope of presidential plenary power) *with* Charlie Savage, *Barack Obama* Q&A, BOSTON.COM (Dec. 20, 2007), *available at* http://www.boston.com/news/politics/2008/specials/CandidateQA/ObamaQA/ (rejecting plainly President Bush's claim that the President may detain U.S. citizens without charges as enemy combatants).

Probably the best example of President Obama's operation within the Lincolnian frame is with respect to the former constitutional law professor's attempts to deal with the legalities of killing American citizens suspected of terrorism. Despite the Supreme Court's resistance to the Bush Administration's assertion of unitary executive theories,[119] the Obama Administration has continued to rely, if less openly, on these theories. The recently revealed Department of Justice White Paper[120] outlines a provocative theory of executive power that is consistent both with the Bush Administration's approach and with a heroic Lincoln model of executive power in circumstances of crisis and legal uncertainty.[121]

The memo introduces the idea as "a legal framework," though it specifically disavows any broad intent to establish guidelines for what might make any killing of a U.S. citizen acceptable in the conduct of continued military and quasi-military engagements.[122] The memo limits its application to circumstances in which "an informed, high-level official of the U.S. government" has found that the individual "poses an imminent threat of violent attack against the United States," where capture of the individual is "infeasible," and where "the operation would be conducted in a manner consistent with applicable law of war principles."[123] The memo identifies the grounding authority for such actions in a principle of "national self defense," and while it acknowledges that under due process, individuals have an interest in their own lives, "that interest must be balanced against the United States' interest in forestalling the threat of violence and death to other Americans."[124]

The memo proceeds from the national right of self-defense to the executive branch quickly. Beyond the AUMF, the authority for the lawful use of force against terrorist forces arises from "the President's constitutional responsibility to protect the nation."[125] The argument thus circles upon itself: the President is specifically empowered to make these judgments and exercise force lawfully in this fashion because the authority for taking such action is rooted in executive power (as well as in a more broadly defined

119. Scheppele, *supra* note 88.

120. UNITED STATES DEP'T OF JUSTICE, WHITE PAPER, LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA'IDA OR AN ASSOCIATED FORCE 1, *available at* http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf [hereinafter LAWFULNESS OF A LETHAL OPERATION].

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 2.

125. *Id.*

national interest).[126] The framework goes a step further, implying that the power is not a discretionary option but rather a constitutional responsibility of the commander in chief.[127]

The memo leverages the unique circumstances of the conflict (framed as being against al-Qaeda and its associated forces, the definition of which is presumably left to the executive branch). As it notes, "[t]here is little judicial or other authoritative precedent that speaks directly to the question of the geographic scope of a non-international armed conflict in which one of the parties is a transnational, non-state actor and where the principal theater of operations is not within the territory of the nation that is a party to the conflict."[128] The key issue is that military operations fall under the law of war, while actions against domestic, civilian, or citizen suspects fall within the purview of the criminal justice system. The memo wedges open a liminal space between these options on the basis of the President's constitutional obligations to ensure national defense, and the only question remaining is "whether and what further restrictions may limit its exercise."[129]

But what, one might ask, of due process? Where might the courts play a role? While the interests of the targeted individual and the nation are admittedly "weighty," the memo proposes a balancing test based on the 1976 case of *Mathews v. Eldridge*,[130] which David Schultz identifies as "an administrative law case that defines when the government must provide hearings to individuals denied Social Security benefits."[131] Under the circumstances outlined at the outset of the memo, the balance weighs in favor of the government, in the person of the executive branch.[132] As the memo explains, "[t]he 'realities' of the conflict and the weight of the government's interest in protecting its citizens from an imminent attack are such that the Constitution would not require the government to provide further process . . . ."[133] The Fourth Amendment also provides no refuge, because according to the circumstances defined by the memo, no "appropriate" judicial forum is available for resolution, and any judicial intervention would be an improper incursion on the executive authority Congress had authorized

126. *Id.*
127. *Id.*
128. *Id.* at 4.
129. *Id.* at 5.
130. 424 U.S. 319 (1975).
131. Schultz, *supra* note 102.
132. LAWFULNESS OF A LETHAL OPERATION, *supra* note 120, at 6.
133. *Id.*

(despite any specific involvement of Congress in the development or implementation of this policy).[134]

The point about Lincoln here is not the shocking nature of the Obama Administration's admission that it was targeting American citizens, though that admission certainly provoked controversy and condemnation.[135] Rather, it is to note the flow of the argument to justify not just executive action, but executive lawmaking in the interest of preserving the nation. Behind the definitions and court cases cited, the memo places exclusive responsibility in the executive branch for determining who fits the three outlined criteria, when a proposed action under the policy is legitimate, and even what organizations and individuals can be understood to be "al-Qa'ida or an associated force."[136] The power to make these determinations and to implement the policy fall to the executive branch entirely, but the exercise of these powers is explicitly described as legal.[137] As Spielberg's *Lincoln* argues, the Obama Administration needs these powers in order for President Obama to uphold his oath of office, and to implement national self defense.[138] Because the oath of office and the responsibility to defend the nation require swift and sure action, the President must simultaneously hold law-making, law-executing, and interpretive powers. And here again, while the claim rests upon the extraordinary nature of the threat to the nation, the executive branch, resting upon the thin branch of the AUMF, is the ultimate interpreter of the nature of the threat. In this posture, the Executive is not reaching out for power, but rather is constitutionally required to exercise it as a specific and constitutional responsibility. Lincoln, ultimately, had to save the nation, just as Presidents Bush and Obama had to protect it.

The presentation of President Obama as a political master and heir to Lincoln's legacy extends beyond his continuation of the military campaign against terrorists and terrorism. One of President Obama's favorite tropes is to call for greater political consensus and collaboration across party lines by endorsing Lincoln's philosophy of government. A recent example took

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134. *Id.* at 10. The final substantive section of the memo argues that individuals who act under these circumstances are protected from future legal liability on the basis of the public authority doctrine. *Id*. at 11–14.

135. The Center for Constitutional Rights and the ACLU are collaborating in a lawsuit challenging this policy and the larger "kill list" that includes both citizens and non-citizens. *Al-Aulaqi v. Obama: Government Kill Lists Target U.S. Citizens Far from Any Armed Conflict*, CENTER FOR CONSTITUTIONAL RIGHTS, http://ccrjustice.org/learn-more/faqs/kill-lists (last visited Jul. 21, 2013).

136. LAWFULNESS OF A LETHAL OPERATION, *supra* note 120, at 1.

137. *Id.*

138. *Quotes*, *supra* note 24 and accompanying text.

place in President Obama's *State of the Union Address*.[139] After outlining a series of items on his domestic agenda, he called for a cooling of political passions, stating:

> We need to end the notion that the two parties must be locked in a perpetual campaign of mutual destruction, that politics is about clinging to rigid ideologies instead of building consensus around commonsense ideas. I'm a Democrat, but I believe what Republican Abraham Lincoln believed: That Government should do for people only what they cannot do better by themselves and no more.[140]

While President Obama cites Lincoln as a Republican, he places a set piece of modern Republican ideology in Lincoln's mouth and then endorses it himself.

And just as President Bush's conservative supporters drew the parallels, President Obama's foot soldiers play the same role. In a speech widely commented upon in right-wing media, Obama's former chief of staff, Chicago mayor Rahm Emanuel praised President Obama's perspicacity: "in the Oval Office, at the end of the day, all you have are your values, your judgment, and your ability to see a clear road where everybody just sees fog."[141] He then urged his audience to go and see the movie *Lincoln* to gain a better understanding of how a masterful politician can make sense of conflict and the need to balance competing equities.[142] Emanuel's remarks referred not to President Obama's foreign policy successes, but rather to his bailout of the auto industry in his first term.[143] Unsurprisingly, then, many pundits framed the key question about President Obama's second term as he faced deep partisan division over whether he could hew to Lincoln's masterful path.[144]

Just as the existential threat of the war justified and shored up the conception of Lincoln as a political master, President Obama's image benefits when he can inhabit the master role both domestically and with regard to foreign relations. As President Obama's second term progresses (and once

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139. Barack Obama, Address Before a Joint Session of Congress on the State of the Union, 2012 DAILY COMP. PRES. DOC. 48 (Jan. 24, 2012).

140. *Id.* at 9–10.

141. Patrick Burke, *Rahm Emanuel Likens Obama to Lincoln*, CNSNEWS.COM, Dec. 3, 2012, http://cnsnews.com/news/article/rahm-emanuel-likens-obama-lincoln.

142. *Id.*

143. *Id.*

144. *See, e.g.*, Doyle McManus, *What Would Lincoln Do*?, BALTIMORE SUN, Nov. 29, 2012, http://articles.baltimoresun.com/2012-11-29/news/bal-what-would-lincoln-do-20121128_1_spielberg-s-lincoln-16th-president-jay-carney (arguing that President Obama should take a cue from Lincoln and aim ambitiously during his second term).

the Academy Awards are distributed), we can look forward to increased debate over whether or not he resembles Lincoln, with his supporters arguing for the parallel and his opponents discounting it by making him look small in comparison with the mighty sixteenth President.

III. THE NEUTERED THIRTEENTH AMENDMENT

The core argument of the movie is that Lincoln's goal—the passage of the Thirteenth Amendment—justified and ennobled his political maneuvering. As the political end that granted him the power of mastery he exercised, as well as the legal construct that would legitimize the extralegal emancipation of the slaves, the Thirteenth Amendment as it appears in the movie is worthy of some attention. In the film's narrative, the epic struggle centers on the Thirteenth Amendment as a permanent institutionalization of the possibly illegal but morally justified act of wartime emancipation. As noted above, Day-Lewis's Lincoln expresses the moral righteousness of emancipation and his desire to ensure that it will survive the imminent end of the Civil War. He worries, however, that as a measure justified by the extraordinary powers of necessity, emancipation will be subject to reversal or to use as a bargaining chip to regain southern allegiance to the nation (and the concept of national unity).[145]

Lincoln's devotion to emancipation is framed as admirable, but Day-Lewis's unquestioned stature as the hero of the movie obscures the racial ideological frame that the movie presents. The vision of black equality presented as the rational political alternative, the proper compromise, and the ultimate aim of the great statesman is a fundamentally modern and startlingly conservative vision, expressed as simple legal equality. While colorblindness is not mentioned, the abolitionist movement and its culmination in the Thirteenth Amendment are reduced to a desire for the elimination of slavery as a legal status and little more.

As Sandy Levinson and Jack Balkin argue, when congressional Republicans drafted and debated the Thirteenth Amendment, they drew from the language of the Northwest Ordinance of 1787 that prohibited the establishment of slavery in the territories that would eventually become Ohio, Indiana, Illinois, Michigan, Wisconsin, and Minnesota.[146] This language, adapted for the Amendment, read: "[t]here shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted," and overriding

145. *See supra* text accompanying notes 24–30.

146. Sanford Levinson and Jack Balkin, *The Dangerous Thirteenth Amendment*, 112 COLUM. L. REV. 1459, 1462 (2012); Louise Weinberg, *Dred Scott and the Crisis of 1860*, 82 CHI.-KENT L. REV. 97, 100 (2007).

Charles Sumner's alternative proposal, which drew from the French 1791 Declaration of Rights.[147] While there was debate over what this language would mean, the Amendment's author, Senators Lyman Trumbull, Jacob Howard, and other prominent Republicans indicated that they believed that the Amendment would not only end slavery, but would also establish African American citizenship and commit the nation to enforcing equal civil rights under the law.[148] This interpretation helps to explain Congress's otherwise puzzling passage of civil rights legislation before debating and passing the Fourteenth Amendment. Clearly, some significant number of members believed that the Thirteenth Amendment had granted them broad authority to legislate and to intervene directly against public and private acts of discrimination and racial repression that erupted in the South after the end of the war.

In pointing out the origins of the Thirteenth Amendment's language, Levinson and Balkin argue that the framers of the Amendment intentionally incorporated an expansive conception of what kinds of oppressive practices qualified as slavery.[149] They therefore built into the Amendment significant proactive enforcement power attributed directly to Congress to ameliorate the effects of slavery and actively facilitate the transition of the former slaves to full citizenship and civic membership.[150] Of course, Congress debated the meaning of the Amendment, and not all members of Congress who voted for it held these expansive views; but the Amendment's meaning was clearly more complex than simply to serve as a backstop for the Emancipation Proclamation.

In the movie, audience members are encouraged to sympathize as Lincoln steers Congress toward a neutered Thirteenth Amendment that does no more than make it impossible to re-impose slavery after the war has ended. The Thirteenth Amendment's transformative potential appears only once, in a scene presenting a discussion between Representative Thaddeus Stevens and Lincoln about the fate of the emancipated slaves. Thaddeus Stevens presents his vindictive vision for Reconstruction complete with full military occupation of the South and forty acres and a mule for each freedman, but Lincoln articulates a more modest plan in which the slaves are merely released from bondage, and it is Lincoln, not Stevens, who serves as the hero of the movie. Later, in a dramatic scene in Congress, the radical promise of the Amendment is specifically disavowed by none other than Thaddeus Stevens himself, who says on the floor of the House that it means equality

147. Levinson and Balkin, *supra* note 146, at 1477.

148. *Id.* at 1478.

149. *Id.* at 1477–78.

150. *Id.* at 1479–92.

before the law and nothing more. The movie portrays Stevens as having opted to betray his own deeply held radical beliefs in public due to Lincoln's suasion. He is thus converted narratively into yet another voice in the chorus of approval for Lincoln's centrist pragmatism.[151]

By framing the battle over the Amendment solely as a location for the presentation of Lincoln's political genius in forging compromise where none was to be found, the movie presents the Amendment in a peculiarly conservative light. The Thirteenth Amendment discussed in the movie could readily have been cited in support of the outcome in *Pace v. Alabama*,[152] in which the Supreme Court determined that laws criminalizing interracial marriage were constitutional because they imposed the same penalties on whites and blacks.[153] The movie frames the Amendment as unquestionably proper, presented as an antidote to the vocal and virulent racism of slavery's supporters. Its other opponent, however, was the robust emancipatory agenda sketched briefly by the character of Thaddeus Stevens and described more fully by Levinson and Balkin.[154] The Amendment as pushed by Lincoln and passed in Congress was passive and reactive, a mere command to ensure that chattel slavery could not be re-imposed.

Furthermore, this framing of the Amendment renders emancipation itself solely as a simple elimination of the status category of slavery. "Emancipation" is an empty sign in the movie; a never-defined principle that the good characters in the movie support. The idea that emancipation could include any kind of affirmative commitment to providing freedmen and freedwomen with the capacity to act in the world as independent agents is never raised, and the Emancipation Proclamation itself is presented as a minimalist provision. Ironically, if "emancipation" under the Proclamation meant merely the shifting of a person's status from slave to free, it had a lower threshold than many southern states required for slaveowners to emancipate their slaves.[155]

Lincoln's rejection of Stevens's expansive (and probably temporally inaccurately expressed) vision for Reconstruction also provides a compact argument to support contemporary discursive compromises over race issues. The movie presents a Thirteenth Amendment with which even the

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151. LINCOLN, *supra* note 1.

152. 106 U.S. 583 (1883).

153. *See id.* at 585 ("Whatever discrimination is made in the punishment prescribed in the two sections is directed against the offense designated and not against the person of any particular color or race. The punishment of each offending person, whether white or black, is the same.").

154. *See supra* text accompanying notes 149, 150.

155. By the 1850s, slave states commonly required slaveowners to provide emancipated slaves with enough capital to leave the slave state and support themselves elsewhere.

most conservative Americans who express views on race generally accepted as legitimate political discourse can agree. And perhaps that was the point.

The movie also leaves no room to discuss the agency of blacks in ending slavery: the auto-emancipees who demanded to take up arms against the slaveocracy, the powerful black abolitionist community led by another great political genius, Frederick Douglass, and the tight-knit and quietly influential class of blacks in Washington who stood so close to the corridors of power.[156] Douglass is nowhere to be found, and the soldiers (who appear only momentarily at the movie's start) and free blacks are merely props to cast a brighter spotlight on Lincoln himself. Blacks are the passive beneficiaries of emancipation and simply receive the benefit of his political leadership, taking on no role in its achievement other than to watch it happening. While the movie has garnered praise for its probably honest portrayal of Thaddeus Stevens's intimate relationship with his mixed-race housekeeper,[157] Lydia Hamilton Smith, Smith is portrayed throughout the film as a feminine companion to Stevens and a witness both to Lincoln's political achievement and Stevens's betrayal of his ideals (though Stevens brings the amendment home to her after its passage and they tenderly read it together in bed).[158] The movie never hints at Smith's successful real estate business or her management of a boarding house; she is merely there to develop Stevens's character and, perhaps, to give him a set of romantic and personal reasons for supporting emancipation.[159]

This image of emancipation and representation of the agency behind it resonates with contemporary racial politics in interesting ways. The Lincolnian compromise lies between the extremes of a highly conservative position that would deny the need for any legal enforcement for principles of racial equality and a liberal position endorsing the continued necessity of race-conscious, state-enforced policies designed to generate more substantive equality, like affirmative action or the continued viability of Section 5 of the Voting Rights Act. The proper role of law is in the middle of these two extremes and consists in providing remedies for individualized racial wrongs. It is recourse for injury, not a proactive tool to be used for the dismantling of institutionalized or structural racial hierarchies. Who can

156. *See* Ashley Southall, *Statute Unveiled, Douglass Is Hailed for Equality Fight*, N.Y. TIMES, June 19, 2013, at A12 (noting Frederick Douglass's contributions in ending slavery and commemorating him with a statute for Congress).

157. Harold Holzer, *What's True and False in "Lincoln" Movie*, THE DAILY BEAST (Nov. 22, 2012, 12:25 PM), http://www.thedailybeast.com/articles/2012/11/22/what-s-true-and-false-in-lincoln-movie.html.

158. LINCOLN, *supra* note 1.

159. *Id.*

disagree with equality before the law, either as an aim for nineteenth century America or for the present day?

This vision of law replicates the perspective Reva Siegel identifies as an ideology of anti-classification.[160] In this vision, the entire body of the Reconstruction amendments functions to eliminate the subordinated legal status of slavery and thereby render race legally illegible.[161] Siegel traces the evolution of anti-classification to the period following *Brown v. Board of Education*[162] when commentators sought to preserve the legitimacy of the outcome by presenting a cautious interpretation of the core principle: "many understood the presumption against racial classification as a strategy for insulating a body of constitutional law concerned with status harm inflicted on blacks against unremitting charges of jurisprudential illegitimacy."[163] The full flowering of this ideology, however, has led to its adoption by conservative opponents of transformative interpretations of the Equal Protection Clause.

In terms of presidential performances in the mold of Lincoln, the movie places the historic Abraham Lincoln as a pragmatic centrist. It simultaneously situates him as a hero and advances a Thirteenth Amendment that would count as evidence against the legality of race-conscious or anti-subordination legal remedies. While it is a leitmotif and not the main theme, the movie can be consumed both as a national self-congratulation for eliminating slavery and as an argument against affirmative action.

The stripping of black agency is significant too, as it situates African Americans in particular as the passive and pathetic objects of assistance from the Lincolnian hero. By framing African Americans as the inert recipients of emancipation, the movie both grants credit for their freedom to Lincoln and undermines the notion that African Americans were involved in asserting and defining their liberty and civic membership. This reinforces old myths of black dependency, effectively separating blacks from immigrants, and to some extent from other racialized groups as peculiarly helpless and in need of white agents to establish and defend their rights.[164]

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160. Reva Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1472–73 (2004).

161. *Id.* at 1470–73.

162. 347 U.S. 483 (1954).

163. *Id.* at 1499.

164. *See generally* MARTIN GILENS, WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTI-POVERTY POLICY (2000) (discussing the widespread belief that most people receiving welfare are undeserving and the judgment that blacks' problems stem from their own lack of effort); ANGE-MARIE HANCOCK, THE POLITICS OF DISGUST: THE PUBLIC IDENTITY OF THE WELFARE QUEEN (2004) (discussing stereotypes regarding African American single mothers and their dependency on welfare).

Even the reality of the massive auto-emancipation that occurred prior to the Emancipation Proclamation is erased. The Proclamation is presented in a traditional narrative about geopolitical factors rather than as a practical solution to the problem of what to do with the thousands of "escaped contraband" who had flooded across the combat lines to seek a new life for themselves.

IV. CONCLUSION

The Lincoln of the popular imagination is a laudable figure. Former President Bill Clinton, David Brooks, and other admirers of the movie insist that much of *Lincoln*'s genius is its portrayal of a real and complex political figure rather than an icon.[165] And they may be right that most Americans' middle-school and high-school memories of Honest Abe would have to stretch significantly to incorporate a Lincoln who endorsed the distribution of political patronage and perhaps even bribes to achieve a desired legislative outcome. Day-Lewis's performance presents a more realistic picture of what politics was like in the Antebellum Era, and the movie may even convince a few people that longing for a lost golden age of high decorum, principled argument, and bipartisan cooperation to support shared values in Congress is foolish.

But I believe that the popularity of the movie, particularly among politicians and political pundits, arises from a different source. The movie taps into a culturally resonant conception of Lincoln, portraying even the graft he authorizes as the politically farsighted and right choice. It also reinforces a particular strand of conservative racial ideology that understands the civil rights movement and legal reforms of the twentieth century to have achieved the promise of racial equality, leaving the responsibility for remaining inequalities squarely on the shoulders of those experiencing them. There's no question that we are meant to admire Lincoln as he argues to his Secretary of State, to other members of his cabinet, to his aides, and to rigidly principled foil Thaddeus Stevens that the end justifies the means.

But again, the point of the movie is not, nor does the source of its popularity lie in, the real Thirteenth Amendment. It captures and reinforces the zeitgeist of a moment when America perceives itself as embroiled in a new kind of war that demands transcendent leadership that will protect and preserve the nation above all else. The debate then shifts to what form of law-overcoming works best.

Consider, finally, John Yoo's take. The notorious author of memoranda justifying torture weighed in on the controversy over the Obama Admin-

165. *See supra* text accompanying notes 3, 58.

istration's targeted killing policy, criticizing the Administration for its attempt at legalization:

> Those of us in the Bush [A]dministration who worked on the response to 9/11 understood that the country was involved in a new kind of war, one that demanded the covert use of force abroad, detention of terrorists at Guantánamo Bay without criminal trials, tough interrogations, and broad electronic surveillance. But Mr. Obama and many of those who would become his advisers never fully accepted—or credited—the Bush [A]dministration's difficult decision to consider 9/11 an act of war.[166]

President Bush, in Yoo's view, seized the nettle firmly and framed the conflict against al Qaeda as a war that demanded new rules of engagement and an abandonment both of prior practice and international law and custom.[167] Yoo praised President Bush for rightfully relying on the precedent of the Civil War, in which "every Confederate soldier remained a U.S. citizen," but was nonetheless a legitimate target for the use of military force.[168] Neatly inverting then-Chief of Staff Rahm Emanuel's praise for President Obama, Yoo accused him of abandoning the clarity of war for the creation of a "legal fog [that] threatens to envelop U.S. soldiers and agents on the front lines."[169] President Bush's clear execution of his own executive responsibilities and values, for Yoo, rendered even waterboarding justifiable.[170]

Ultimately, do we want a president who, like Julius Caesar, "doth bestride the narrow world/Like a Colossus, and we petty men/Walk under his huge legs and peep about?"[171] And are we willing to live with a neutered Thirteenth Amendment that did nothing more than render slavery illegal? I ask these questions being well aware that Americans who criticize the hagiographic view of Lincoln are approximately as popular as Cassius. But by celebrating an image of Lincoln who uses the tools of political mastery in moments of crisis—disunion, slavery, al Qaeda, or some other threat the President alone believes is of sufficient gravity—to justify whatever the President believes is necessary, we embrace a dangerous dream.

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166. John Yoo, *The Real Problem with Obama's Drone Memo*, WALL ST. J., Feb. 7, 2013, at A13.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. WILLIAM SHAKESPEARE, JULIUS CAESAR, act 1, sc. 2.