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## A President and a Chief Justice: The Disparate Destinies of Abraham Lincoln and Roger B. Taney

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# A PRESIDENT AND A CHIEF JUSTICE: THE DISPARATE DESTINIES OF ABRAHAM LINCOLN AND ROGER B. TANEY

JAMES F. SIMON, LINCOLN AND CHIEF JUSTICE TANEY,  
SLAVERY, SECESSION AND THE PRESIDENT'S WAR POWERS, SIMON & SCHUSTER, 2006

REVIEWED BY ROBERT FABRIKANT\*

The title of James Simon's book tells a lot about his preferences. He introduces President Abraham Lincoln by surname only, but he seems to think readers need to be reminded that Roger B. Taney was Chief Justice.

This book presents a good overview of important events leading up to and which occurred in the midst of the Civil War. Professor Simon seeks to offer insights into complicated legal issues affecting the relationship between two lawyers who presided over different branches of the federal government during our country's most serious constitutional crisis. Simon does not cover newly unearthed materials, nor does he provide fresh perspectives on the War, or the two men who are the centerpieces of his book.

A major shortcoming is that the book lacks a thesis. At the outset, Simon tells us that Taney and Lincoln "disagreed on the three fundamental issues of slavery, secession, and Lincoln's constitutional authority during the Civil War."<sup>1</sup> But two paragraphs later, he tells us that "[b]oth men disapproved of the institution of slavery."<sup>2</sup> Of the three issues, Lincoln and Taney actually "interacted" only on the issue of Lincoln's war powers, and that was limited to their dramatic confrontation regarding Lincoln's unilateral suspension of the writ of habeas corpus.

Despite outward appearances, Taney and Lincoln are an odd couple to share a book. Taney was more than thirty-two years older than Lincoln. Apart from the fact that both of them were lawyers with a strong interest in politics, they had very little in common. Taney and Lincoln had almost no personal or political interaction. It appears they met only once, on the occasion of Lincoln's swearing-in, and then only perfunctorily.<sup>3</sup> Prior to that

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1. JAMES F. SIMON, LINCOLN AND CHIEF JUSTICE TANEY, SLAVERY, SECESSION AND THE PRESIDENT'S WAR POWERS 1 (Simon & Schuster 2006).

2. *Id.*

3. CARL BRENT SWISHER, ROGER B. TANEY 542-43 (MacMillan 1935). Taney's principal biographer, Carl Brent Swisher, reports a pre-inaugural meeting between Lincoln and Taney,

meeting, Lincoln, along with countless others, had been highly critical of Taney's opinion in *Dred Scott*,<sup>4</sup> which would go down as one of the most notorious cases in American constitutional history. After that meeting, their principle interaction came in the habeas corpus controversy.

Taney rose quickly from a patrician, slave-holding family in Maryland to become Attorney General, then Secretary of the Treasury, under President Andrew Jackson. Taney led Jackson's fight against the Second Bank of the United States, and was rewarded by being named Chief Justice in 1836 when he was fifty-nine. At the time Taney ascended to the Court, Lincoln had emerged from lowly birth in Kentucky to become a lawyer and a state legislator in Illinois. Lincoln won a seat in Congress in 1846, but his tenure was unexceptional. He served only a single term before returning to the private practice of law in Illinois.

When Lincoln seemed to be backsliding, Taney was gaining bi-partisan recognition as a worthy successor to the beloved Chief Justice John Marshall. But a dramatic reversal of fortune was in the offing for both Taney and Lincoln as a result of the increasingly bitter conflict between the North and the South over slavery.

In 1854, Congress repealed the 1820 Missouri Compromise, which had barred slavery in the federal territories north of the southern boundary of Missouri. But Congress's repeal did not settle the matter. It simply ignited a sectional firestorm regarding the extent to which slavery would be permitted to extend into the western territories. This was the overarching political issue of its time because if slavery could not extend west, the slave states would eventually lose parity in the Senate. It might also signal the demise of slavery itself, assuming that slave-based economies were as much in need of territorial expansion (and new markets) as free labor economies.

The ever-growing conflict over whether slavery would be permitted to extend westward drew Lincoln back into electoral politics, and propelled him to the presidency in 1860. The sectional battle over the extension of slavery affected Taney no less than it did Lincoln, except in precisely the opposite fashion. Lincoln re-entered politics to defeat the extension of slavery. Taney, however, sought to preempt by Court opinion in *Dred Scott* the issue of slavery extension and take it out of the political realm, or so he thought.

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“[o]ne day late in February [1862] . . . [President-elect Lincoln] accompanied by [Secretary of State William] Seward . . . visited the Supreme Court in the conference room. It is probable that he met there for the first time the Chief Justice . . . . No record remains . . . whether such a meeting occurred and what may have transpired at it.” *Id.*

4. 60 U.S. (19 How.) 393 (1857).

Taney never lost sight of his Southern roots, and was ever ready to protect slave-holding interests. The Chief Justiceship provided an excellent perch. His desire to vindicate the South intensified as the North grew in population, wealth and political power. He saw the survival of slavery as crucial to the survival of Southern mores, and he believed that the North's desire to bar the westward extension of slavery jeopardized the South's ability to survive as a countervailing force in the Union. It was for that reason that in 1857, in the midst of bitter sectional wrangling, he reached out to hold in *Dred Scott* that Congress did not have the power to ban slavery in the federal territories.<sup>5</sup>

Taney was destined to lose his prestige as a result of *Dred Scott*, and to lose his leverage as Chief Justice as a result of the habeas corpus controversy. Lincoln was destined to lose his life as a result of the Civil War and to enter the pantheon of American heroes.

This mixture of politics, law and martyrdom provides a rich tapestry to weave a great story. Simon covers the events in a helpful manner, but he offers few fresh insights into the incredibly disparate destinies of these two men.

## I. SECESSION

In light of the title of this book, it is surprising that Simon spends less than twenty pages discussing the issue of secession. Taney and Lincoln had very different views regarding secession. Taney's approval of secession reflected his Southern roots, and his pragmatic conclusion that it was best, primarily for the South, for the two sections to go their separate ways. Simon claims that in a letter to former President Franklin Pierce, Taney "made clear that the Chief Justice, unlike Lincoln, believed the South had a constitutional right to secede."<sup>6</sup> Contrary to Simon, this letter, written in the midst of Taney's habeas corpus battle with Lincoln, makes no reference to a constitutional right to secede, nor does it shed light on the substance of Taney's constitutional reasoning.<sup>7</sup>

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5. *Dred Scott*, 60 U.S. at 633. I use the word "hold" reservedly. Taney's opinion purported to be for a majority of the justices, but fewer than five of the nine justices concurred in Taney's "holding" that the Court did not have jurisdiction (because *Dred Scott* was not a "citizen"). If the Court did not have jurisdiction, than its pronouncements regarding Congress's lack of power to prohibit slavery in the federal territories would not constitute a "holding."

6. SIMON, *supra* note 1, at 194.

7. Simon describes the letter as being dated June 12, 1861, and as being part of the "Pierce Papers." SIMON, *supra* note 1, at 305 n.194. I obtained a copy of the letter from the New Hampshire Historical Society, Concord, New Hampshire—President Pierce was a son of New Hampshire. I am not aware of any document, including this letter, which contains Taney's constitutional or legal reasoning with respect to the secession issue.

Taney's true connection to the issue of secession is that his *Dred Scott* decision is often cited as a prime cause for secession. This argument follows from the holding in that case that Congress had no authority to ban slavery in the federal territories. This holding, and the gyrations leading up to it, including an alleged conspiracy between Taney, President James Buchanan and others, infuriated the North, and sharpened sectionalist antagonism. It also helped galvanize support for Lincoln in the 1860 presidential campaign. If Lincoln had not been elected, secession would not have occurred, and the war would not have been fought at that time.<sup>8</sup> This is not to say that the war would never have been fought, but only that it would not have erupted when it did.

Lincoln's approach to secession was predictably resistant. He believed that the Constitution precluded secession. Though Lincoln's predecessor, James Buchanan, was prepared to let the Union disintegrate, Lincoln was unwilling to allow that to happen on his watch.

Simon devotes only three pages to Lincoln and the issue of secession. Simon provides a superficial and incomplete discussion of Lincoln's stance. The only document Simon discusses in the context of Lincoln's views on secession is Lincoln's First Inaugural Address.<sup>9</sup> In his introduction, Simon states that in this Address, Lincoln "insisted that the South had no legal right to secede," but he never explains Lincoln's rich constitutional and geopolitical analysis against secession.<sup>10</sup> Much of Lincoln's thinking on the subject is contained in his first Annual Message to Congress in December 1862,<sup>11</sup> which is not mentioned by Simon.

## II. SLAVERY

Simon's discussion of slavery focuses on the *Dred Scott* case. Simon's analysis here is disappointing. He portrays Taney as being driven by a deep pro-Southern bias which caused him to issue opinions which were rabidly pro-states' rights and pro-slavery opinions. Though Taney was entirely dedicated to the South, he did not always side with the states' rights and slavery interests in cases that came before the Court.<sup>12</sup> But in *Dred Scott*, Taney's sectional leanings wholly carried the day.

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8. DON FEHRENBACHER, *THE DRED SCOTT CASE* 544 (Oxford Univ. Press 1978).

9. SIMON, *supra* note 1, at 3.

10. *Id.*

11. *See* 5 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 527 (Roy P. Basler ed., Rutgers Univ. Press 1953) [hereinafter *COLLECTED WORKS*].

12. *See, e.g.*, *United States v. Amistad*, 40 U.S. (15 Peters) 518, 597 (1841) (holding slaves to be free men); *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 109-10 (1860) (holding that the governor of Ohio could not be compelled to return a slave to the state of Kentucky); *Ex Parte*

Taney's *Dred Scott* opinion contained two important holdings:<sup>13</sup> First, that blacks, whether or not slaves, were not "citizens," and therefore could not sue in federal courts; and, second, that the Missouri Compromise, which had barred slavery in certain federal territories, was unconstitutional. Simon's treatment of the first holding leaves much to be desired.<sup>14</sup>

Taney concluded that the Court did not have jurisdiction to hear the case because diversity of citizenship was lacking. This followed largely from his belief that blacks were not "citizens" of the United States. Taney supported this finding by reviewing the condition of blacks in this country and in England and other European countries. Taney's survey yielded the conclusion that blacks had "been regarded as beings of an inferior order, and altogether unfit to associate with the white race . . . and so far inferior, that they had no rights which the white man was bound to respect."<sup>15</sup> Based on this, Taney also concluded that the signers of the Declaration of Independence and the Constitution shared a similar view and did not intend to confer "citizenship" on blacks.

Simon claims that Taney's negative comments about blacks were written in a manner that purported to reflect his own views of blacks.<sup>16</sup> While Taney had a low opinion of blacks, it is unlikely he saw them in a light much different than Lincoln.<sup>17</sup> Simon, however, is considerably more charitable in discussing Lincoln's racial views than those of Taney.

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Gordon, 66 U.S. (1 Black) 503, 504-06 (1862) (refusing to overturn a conviction of the crime of piracy in the African slave trade). Moreover, in at least two opinions he issued as Attorney General, Taney dealt with slavery-related issues in an even-handed way. In the first such opinion, Taney expressed a view not supportive of slave owners. Taney opined that the government of the United States cannot be required, in the absence of a treaty, to protect the right of a British master over his slave when found in the United States. 2 Op. Att'y Gen. 475 (1831). In the second, he opined that whether slaves brought back from abroad by their masters were now free depended upon whether the slave had been domiciled abroad in a jurisdiction, which did not recognize slavery. 2 Op. Att'y Gen. 479 (1831). If not, the slave would remain in bondage. *Id.* The second opinion set forth an approach at odds with the choice of laws approach adopted by Taney in *Dred Scott* in finding that the law of Missouri, the state to which Scott had returned, determined his status.

13. A third, historically unimportant holding, was that Missouri law governed the question whether *Dred Scott* remained a slave. *Dred Scott*, 60 U.S. at 324.

14. Taney's discussion regarding the Missouri Compromise has rightly been criticized by numerous scholars. Simon adds nothing new in his critique. In *Strader v. Graham*, 51 U.S. (10 How.) 82 (1851), Taney passed on an opportunity to hold that Congress did not have authority to ban slavery in the federal territories.

15. SIMON, *supra* note 1, at 122 (quoting *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 407 (1856)).

16. *Id.* at 16, 126.

17. Taney, while a member of the Maryland State Senate, "supported both state legislation and extra-governmental attempts to protect free negroes from abuses which were growing more and more evident." SWISHER, *supra* note 3, at 93. According to Swisher, Taney's principal biographer, Taney manumitted his own slaves and was generally humane in his attitudes towards and dealings with blacks. *Id.* at 13, 92-94.

More importantly, Simon is wrong to demonize Taney by arguing that Taney's statements in his *Dred Scott* opinion purported to reflect his personal views of blacks. Though this portion might well have coincided with his personal (low) view of blacks, the opinion did not purport to reflect Taney's personal views of blacks. Rather, Taney reached his conclusions by drawing on what he understood to be the widespread, long-standing view of society at large regarding blacks.<sup>18</sup> Indeed, Taney states explicitly that the "opinion [regarding blacks] was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics."<sup>19</sup>

Simon does not take issue with the results of Taney's historical survey because Simon does not acknowledge it as a survey. Rather, he claims Taney's denial of citizenship to blacks reflected "the same conclusion twenty-five years before he delivered his *Dred Scott* opinion . . . [when he authored an opinion as Attorney General] which concluded that the Constitution condemned African Americans to an inferior status in the United States."<sup>20</sup> But the fact that Taney held the same view for twenty-five years does not make that view erroneous. Indeed, though not mentioned by Simon, Lincoln *agreed* with Taney's conclusion that blacks were not citizens.<sup>21</sup>

Though Simon ignores Taney's historical survey, it is regrettably true that virtually all of what Taney said was an accurate rendition of the condition of blacks throughout the Western world. Though we may wish it were otherwise, it cannot be denied that Taney correctly stated that in the Western world blacks *had* "been regarded as beings of an inferior order, and altogether unfit to associate with the white race . . . and so far inferior that they had no rights which the white man was bound to respect?"<sup>22</sup> Slavery was the product *in extremis* of these deep-seated racist attitudes. Taney was not saying that things *should* be that way (though he may have believed it); he was saying, instead, that they *were* that way.

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18. "Notice that Chief Justice Taney [in his *Dred Scott* opinion] does not claim that blacks are 'a subordinate and inferior class of beings,' but only that they were so viewed by the authors of the Constitution." G. STONE ET AL., *CONSTITUTIONAL LAW* 456-57 (2005) (citing C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 303 (1922)).

19. *Dred Scott*, 60 U.S. at 407.

20. SIMON, *supra* note 1, at 126. Simon erroneously cites the opinion as appearing at 2 Official Opinions of the Attorney General 475 (1831). *Id.* at 292 n.15. The opinion there, dated December 6, 1831, dealt with slavery related issues, but it did not contain the analysis or language about which Simon complains. Rather, the offending analysis and language are contained in a June 9, 1832 opinion. SWISHER, *supra* note 3, at 152 & n.76. This opinion was never officially published. *Id.*

21. DAVID HERBERT DONALD, *LINCOLN* 200 (1995).

22. SIMON, *supra* note 1, at 122 (quoting *Dred Scott*, 60 U.S. at 407) (emphasis added).

Abolitionists might oppose slavery, but even many of them had an exceedingly negative view of blacks. And not even the abolitionists could deny that blacks had long been viewed with disdain by the bulk of the Western world for many centuries. What else could account for their long history of bondage?

Ironically, Taney's description of how whites viewed blacks was exemplified by Lincoln. In August 1862, shortly before issuing the Preliminary Emancipation Proclamation, Lincoln met at the White House with a small delegation of free blacks. Lincoln held that meeting in order to encourage black leaders to support colonization of blacks outside the United States. Lincoln proposed that the assembled blacks set an example for all blacks by volunteering to start a colony. As a (perverse) inducement, Lincoln told them:

[y]ou and we are different race. We have between us a broader difference than exists between almost any other two races. . . . [T]his physical difference is a great disadvantage to us both, as I think your race suffers very greatly . . . by living among us, while ours suffer from your presence . . . . [O]n this broad continent, not a single man of our race is made equal of a single man of ours. . . . It is better for us both, therefore to be separated.<sup>23</sup>

This is as stiff a tongue-lashing ever dealt by a president to fellow Americans. It is as if Lincoln was trying to inflict emotional pain as he spoke to the black attendees, perhaps to better motivate them to depart the country.<sup>24</sup> Lincoln had thus described, in considerably few words, but no less explosive language than Taney, the degraded condition of blacks in the United States, and why their ineluctably bleak future required separation from whites and colonization abroad. His remarks were unquestionably "a clear and unvarnished statement of the racial facts of life in mid-nineteenth-century United States."<sup>25</sup>

But Lincoln, in contrast to Taney, spoke for himself, and did not purport to speak for others. Lincoln added insult to injury by accusing blacks of being responsible for causing the Civil War by allowing themselves to become and remain enslaved.<sup>26</sup> It has never been suggested that Taney ever

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23. COLLECTED WORKS, *supra* note 11, at 371-72.

24. Lincoln's indifference to "black pain" has frequently been acknowledged by scholars. See generally Phillip Shaw Paladuan, *Lincoln and Negro Slavery: I Haven't Got Time for the Pain*, 27 J. ABRAHAM LINCOLN ASS'N 1 (2006), available at <http://www.historycooperative.org/journals/jala/27.2/paludan.html> (discussing Lincoln's views on slavery).

25. *Id.* at 19.

26. Lincoln stated: "But for your race among us there could not be war . . . . [W]ithout the institution of slavery and the colored race as a basis, the war could not have had an existence."



communicated with or about blacks in the personal, *ad hominem* manner which infected Lincoln's behavior at the August 1862 meeting.

Though Simon reproduces much of Lincoln's offensive language,<sup>27</sup> he does not condemn it. Instead, he palms it off to Lincoln's desire to reach "for a frictionless solution to the nation's race problem."<sup>28</sup> One might well ask: "Frictionless to whom?" Certainly not blacks.

The parallel between Lincoln's comments and those contained in Taney's *Dred Scott* opinion eludes Simon. But it did not escape the watchful eye of Frederick Douglass, who believed that Lincoln's comments showed "his pride of race and blood," and his "contempt for Negroes."<sup>29</sup>

Taney's conclusion that blacks were not "citizens" was also based on his understanding of the intent of the framers of both the Declaration of Independence and the Constitution. Simon is on firmer ground in challenging Taney's conclusions here than with respect to the historical condition of blacks.

There continues to be serious scholarly debate as to the extent to which the Constitution protected slavery. But, it cannot reasonably be denied that, on balance, the Constitution was more protective of, than hostile to, slavery and the slave owning interests. Simon makes plausible, but stale, arguments that the framers did not intend to deny "citizenship" to blacks, though there is a wealth of evidence pointing in the other direction. In reality, there is no conclusive answer as to the intent of the Framers on this important, now moot, issue.

Just as Simon paints an excessively negative picture of Taney, Simon is less than diligent in his effort to paint a positive picture of Lincoln. Though the reader would hardly know it from Simon, Lincoln was no less a racist than Taney.<sup>30</sup> Both men thought slavery was immoral.<sup>31</sup> The only difference was that Taney was a creature of the South and a defender of its way of life, and Lincoln was not. Taney's support of slavery appears to

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COLLECTED WORKS, *supra* note 11, at 372. Frederick Douglass rightly commented that Lincoln's remarks were akin to a "horse thief pleading that the existence of the horse is the apology for his theft or a highway man contending that the money in the traveler's pocket is the sole first cause of his robbery." FREDERICK DOUGLASS, 3 THE LIFE AND WRITING OF FREDERICK DOUGLASS 268 (Phillip S. Foner ed., 1975).

27. SIMON, *supra* note 1, at 217.

28. *Id.*

29. DOUGLASS, *supra* note 26, at 268.

30. See Robert Fabrikant, *Emancipation and the Proclamation: Of Contrabands, Congress, and Lincoln*, 49 HOW. L.J. 313, 358-65 (2006) (discussing Lincoln's views on race and slavery); Paluduan, *supra* note 23, at 3.

31. SIMON, *supra* note 1, at 271. Taney had manumitted his slaves, and had done much while in the private practice of law to alleviate the burdens of slavery. *Id.* He believed, however, that blacks were better off being in bondage, rather than being free. *Id.* He also thought that Southerners treated slaves more humanely than did Northerners. *Id.*

have been incidental to his allegiance to southern mores, rather than an endorsement of the “peculiar institution” per se.

Prior to assuming the presidency, Lincoln’s views on slavery are more evident from his words than his actions. Lincoln’s opposition to slavery was considerably more nuanced than portrayed by Simon (and most others). For example, Simon notes that Lincoln represented a slave owner, Robert Matson, attempting to retrieve some slaves, an African-American woman and her four children, who had refused to return with him to Kentucky from Illinois. Simon passes this off as a representation, which came to Lincoln while he “was traveling outside his judicial district searching for additional legal business.”<sup>32</sup> Simon provides no support for this random speculation.<sup>33</sup> More importantly, Simon fails to address whether Lincoln’s representation of Matson bears on the depth and quality of his opposition to slavery. I have argued elsewhere that it does, and will not repeat those arguments here.<sup>34</sup>

Even apart from his questionable representation of Matson, there are many reasons for looking askance at Lincoln’s opposition to slavery. He did not support abolition of slavery in states where it already existed.<sup>35</sup> He expressed strong support for enforcement of the fugitive slave laws.<sup>36</sup> And, his opposition to slavery in the District of Columbia when he was a Congressman in 1847 came in the form of a proposal, which hinged on the approval of a majority of white voters in the district.<sup>37</sup> He did not forcefully push his plan, and he never formally introduced it as a bill in the House of Representatives.<sup>38</sup>

Prior to becoming President, Lincoln opposed only the extension of slavery in places where it did not already exist. Reputable scholars have pointed out that Lincoln’s stance reflected a desire to keep the territories free for whites.<sup>39</sup> If so, this would be a thin reed to rely upon in hoisting up Lincoln as the “Great Emancipator.” While Simon does not lay that accolade on Lincoln, Simon’s account gives little sense of the complicated

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32. SIMON, *supra* note 1, at 271.

33. For an excellent review of Lincoln’s representation of Matson, see MARK E. STEINER, AN HONEST CALLING: THE LAW PRACTICE OF ABRAHAM LINCOLN 103-36 (2006). There are no documents which indicate how Lincoln came to represent Matson, but Steiner points out that Matson had counsel prior to retaining Lincoln. *Id.* at 112.

34. See Fabrikant, *supra* note 30, at 360-62 (arguing Lincoln’s representation of Matson proved a willingness to protect the legal rights of slave owners). Robert Fabrikant, *Is Past Prologue?* 83 N.D. L. REV. (forthcoming Nov. 2007).

35. *Id.* at 335-37.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 364-65.

nature of Lincoln's opposition to slavery and of his checkered path to issuing the Emancipation Proclamation. At all points along the way Simon tilts the emancipation story in favor of Lincoln, and very often it is unjustified.<sup>40</sup>

Simon seems inclined to attribute more anti-slavery accomplishments to Lincoln than he deserves. For example, Simon claims that the 1862 legislation emancipating slaves in the District of Columbia was "[t]he only tangible result of" Lincoln's lobbying Congress to pass a resolution supporting voluntary, compensated, gradual emancipation by slave states.<sup>41</sup> In fact, the initiative for the legislation came from within the Congress itself, not from Lincoln. Indeed, Lincoln delayed signing the measure to accommodate slave owners.<sup>42</sup> Throughout the War, the Civil War Congress was markedly in front of Lincoln with respect to the issue of emancipation.<sup>43</sup>

Simon also errs when he characterizes the 1862 District of Columbia emancipation statute as calling for "compensating slave owners who freed their slaves—an idea that Lincoln had first advocated as a congressman from Illinois in 1849."<sup>44</sup> The 1862 statute did not give slave owners a choice as to whether to emancipate their slaves. They were compelled to do so. The 1862 statute enacted by Congress was significantly more emancipatory than Lincoln's failed proposal as a Congressman.

### III. THE PRESIDENT'S WAR POWERS

The onset of the Civil War caused President Lincoln to exert unprecedented powers as President and Commander-in-Chief. This exertion covered a broad array of areas, including emancipation, blockading southern ports, spending money, raising an army, and suspending the writ of habeas corpus. Much of Simon's discussion of this issue is confined to the latter area.

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40. Thus, for example, Simon explains that Lincoln's decision to reverse General Fremont's order emancipating slaves in Missouri was based on Lincoln's concern that Fremont's order "contradict[ed] the [First] Confiscation Act [FCA] (which required a judicial hearing before a slave could be freed)." SIMON, *supra* note 1, at 203. Though Lincoln did, in fact, request that Fremont revise his order to bring it into compliance with the FCA, it is unlikely that Fremont's order violated the FCA. As I have argued elsewhere, Lincoln's reliance on the FCA was "pretextual." Fabrikant, *supra* note 30, at 351. In any event, contrary to Simon, the FCA did *not* require a judicial hearing before a slave could be freed, nor did Lincoln rely upon this ground in revising Fremont's order. *Id.* at 321-29, 391-98.

41. SIMON, *supra* note 1, at 215.

42. Fabrikant, *supra* note 30, at 336-37.

43. See generally *id.* at 313 (arguing that Lincoln's contribution to emancipation is overstated).

44. SIMON, *supra* note 1, at 215.

Simon's decision not to cover the Emancipation Proclamation is surprising because Lincoln's issuing that document represented perhaps the most powerful exertion of presidential war power in our history. Simon gratuitously opines that

[g]iven the opportunity, there is no doubt that Taney would have declared Lincoln's Emancipation Proclamation unconstitutional. He could have documented his conclusion by citing his own judicial opinions in [which he held that] . . . the Constitution [gave the states] exclusive control of the institution of slavery to the states where it existed.<sup>45</sup>

Undoubtedly, Taney would have ruled against the Proclamation had he been given the chance, but it is unlikely that he would have relied upon the cited cases. Those cases did not involve an exertion of presidential war powers, and are therefore entirely distinguishable from the situation presented by the Emancipation Proclamation, which had been expressly promulgated as a war measure. Moreover, the hypothetical analysis on behalf of Taney put forward by Simon was at odds with *The Prize Cases*<sup>46</sup> from which Taney dissented.<sup>47</sup> There are other grounds, however, which might have proved more fruitful in attacking the Proclamation.<sup>48</sup>

President Lincoln's decision to suspend, without Congressional authorization, the writ of habeas corpus is an often-told story, and Simon offers nothing new. The short of it is that the Constitution expressly provides that the writ of habeas corpus may be suspended during "cases of rebellion or invasion."<sup>49</sup> The Constitution does not state, however, who may suspend the writ, but since this provision appears in Article I, Section 9, it is difficult to resist the conclusion that only Congress may suspend the writ.

Lincoln's suspension of the writ was challenged in a case in which Taney sat as a circuit judge, not as Chief Justice. Taney rightly ruled that Lincoln was without authority to suspend the writ, and demanded that the

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45. SIMON, *supra* note 1, at 222 (citing *Strader v. Graham*, 51 U.S. (10 How.) 82 (1851); *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857)).

46. 67 U.S. (2 Black) 635 (1863).

47. Simon also cites *Ex Parte Merryman*, 17 Fed. Cas. 144 (C.C.D. Md. 1861) (No. 9487). *Merryman* provides better support for Simon's position than the other decisions he cites because it, as did the Emancipation Proclamation, involve an exercise of the Presidential War Power. In *Merryman*, however, a specific constitutional provision seemed to undercut the President's position, whereas the Constitution contains no provision dealing with the issue of emancipation. *Ex Parte Merryman*, 17 Fed. Cas. at 148. Moreover, emancipation of southern slaves is tantamount to confiscation of military assets in a foreign country. In contrast, the suspension of habeas at issue in *Merryman* did not occur in the theater of war, but in the domestic realm. *Id.* at 147.

48. See Fabrikant, *supra* note 30, at 370-71 (noting three constitutional concerns with the Final Proclamation).

49. U.S. CONST. art. I, § 9, cl. 2.

prisoner be released. The military, undoubtedly acting under orders from the Commander-in-Chief, refused to comply with Taney's order. Realizing that he lacked the muscle to compel the military to act, Taney caused his order to be delivered directly to Lincoln so that he could determine the appropriate course of action. The matter ended there, with no further official action being taken by either Lincoln or Taney.

The upshot of this confrontation, which was lost by Taney, is that Lincoln considered having Taney arrested, and continued to issue proclamations suspending habeas corpus until the war ended. But before he did so, he obtained advance Congressional authorization. After the war ended, the Supreme Court *sans* Taney essentially vindicated Taney's position.<sup>50</sup> Simon's recounting of this unusual series of events is even-handed, but it does not contain the rich analysis found in other works, especially Chief Justice Rehnquist's relatively recent book.<sup>51</sup>

Simon repeats the canard that Lincoln always referred to the hostilities between the North and the South as a "rebellion, not a civil war."<sup>52</sup> Simon claims that this "distinction was important to [Lincoln] because[,] . . . [among other things, it] provided Lincoln with the constitutional rationale to take extraordinary emergency measures to put down the insurrection . . ."<sup>53</sup> Simon has stood things on their head in two important respects.

First, contrary to Simon, Lincoln often referred to the hostilities as a "war," including in his Gettysburg Address, where he lamented, "we are engaged in a great civil war."<sup>54</sup> Second, characterizing the hostilities as a "rebellion," while consistent with Lincoln's view that the South had no right to secede, would result in *less*, not more, legal power to wage military campaigns against the South. If the hostilities were merely a domestic "rebellion," then the Constitution would govern the conduct of military operations. If, on the other hand, the hostilities constituted a "war," then military operations were governed by the more relaxed standards of the international law of war, not the Constitution.<sup>55</sup> As made clear by the Supreme Court in its 1863 decision in *The Prize Cases*, nomenclature standing alone would not control whether the Constitution or the international law of war governed the hostilities.

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50. *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 140 (1866).

51. See generally WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE, CIVIL LIBERTIES IN WARTIME (1988).

52. SIMON, *supra* note 1, at 196.

53. *Id.*

54. Fabrikant, *supra* note 30, at 318 n.20.

55. *Id.* at 318-19.

Simon also discusses at length *The Prize Cases*, which is the most important case decided by the Court during the War. Lincoln blockaded southern ports in April 1861, and Congress declared the existence of a state of war in July 1861 and (retroactively) validated the blockade. Four ships were seized after the blockade was imposed but before Congress acted. The ship owners and others challenged the seizures on the grounds that the blockade was illegal because Congress, not Lincoln, had the power to declare war, and that a declaration of war was a precondition to Lincoln's imposing a blockade. The Court, by a 5-4 margin, upheld Lincoln's unilateral imposition of the blockade, and found that the hostilities between the North and South were governed by the international law of war, not the Constitution.

*The Prize Cases* constituted a monumental vindication of the entirety of the war effort by the federal government, but it does not deserve nearly the attention it has received from Simon. First, unlike *Dred Scott*, Taney did not write for the Court. In fact he did not write at all. Rather, he joined a dissenting opinion written by another justice. Thus, he was no more than a second rank antagonist.

Second, Simon overstates the significance of the disagreement between the majority and the dissenters. The majority believed Lincoln did not need Congressional authorization to blockade southern ports. The dissenters believed he did, and also believed that the subsequent Congressional authorization could not retroactively validate the blockade. Thus, the dissenters believed that the North had fought the war unconstitutionally for approximately three months. The dissenters did *not* argue that Congress' declaration of war was inoperative on a prospective basis, but only on a retrospective basis. Nor did the dissenters argue that the Constitution, rather than the international law of war, governed the hostilities after Congress' declaration of war. Thus, if the dissenters had prevailed the North's ability to fight would not have been crippled.

Simon also expresses concern that if the dissenters had prevailed that "the president himself would have been presented to the world as a grand scofflaw who had flouted both the Constitution and international law."<sup>56</sup> But Taney had, in effect, branded Lincoln as a scofflaw in the habeas controversy, yet Lincoln emerged unscathed domestically and internationally. It borders on the theatrical to say that if the dissenters had prevailed they "would then have produced a judicial calamity from which the Union might not have recovered."<sup>57</sup>

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56. SIMON, *supra* note 1, at 232.

57. *Id.*

Even if the case had gone against the Union, it is unlikely that Congress or the President would have adhered to the Court's decision. Lincoln had already flouted judicial authority in the habeas corpus litigation presided over by Taney, and there is no reason to think he, or Congress, would have taken a compliant stance if the Court had ruled against it in *The Prize Cases*.

Simon's book is not likely to satisfy the serious Civil War scholar, particularly one looking for a good legal read. My advice would be to bypass this book, and read the leading biography on Lincoln, the leading one volume history of the Civil War, and Chief Justice Rehnquist's book on the habeas corpus crisis.<sup>58</sup> While this represents considerably more work than reading Simon, it is worth the effort.

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58. DONALD, *supra* note 21; JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM, THE CIVIL WAR ERA* (1988); REHNQUIST, *supra* note 51.