Special Event

THE IMPEACHMENT TRIAL OF PRESIDENT ABRAHAM LINCOLN

I. FORWARD BY JOEL SELIGMAN[1]

In the view of historians and the public alike, Abraham Lincoln was our greatest president. He was also president during the most difficult period in our nation's history. Throughout much of the Civil War, Washington, D.C., was threatened by the forces of the Confederacy. In this context, Lincoln suspended the writ of habeas corpus (the "Writ"), reduced the freedom of the press, caused substantial numbers of civilians to be tried by military tribunals, and engaged in other conduct that would be held unconstitutional had it occurred in peacetime.

The Impeachment Trial of President Abraham Lincoln was meant to examine whether Lincoln went too far in preserving the Union. Are there limits to what even a wartime president can do during a national emergency? Few today will question the wisdom of having preserved the Union or the morality of having moved decisively to end slavery. Few today will question that certain acts of Lincoln involving the suspension of habeas corpus were justified by the wartime emergency. But the scholarship of Professor Mark E. Neely, Jr.,[2] offered to many of us a sense of how geographically widespread and sustained actions taken by Lincoln or his administration during the war were.[3] Certain of these actions were taken in places where the wartime emergency seemed remote.

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1. Dean and Samuel M. Fegtly Professor of Law, The University of Arizona College of Law

2. John Francis Bannon Professor of History and American Studies, St. Louis University, St. Louis, Missouri.

3. MARK E. NEELY, JR., THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES (1991).

Scholars examining some of the conduct taken by the Union Army during the Civil War or authorized by specific cabinet secretaries have rationalized that Lincoln either was unaware of initial decisions or, in the extraordinarily difficult political context of the times, felt limited in his ability to respond to certain of these decisions. To what extent, nonetheless, should Lincoln bear responsibility for the actions of those he selected for his administration? David Herbert Donald's recent biography of Lincoln[4] has caused many to question the extent to which Lincoln was either unaware of the conduct of those in his administration or powerless to reverse it.

To present in the most direct and succinct form the nature of this intriguing historical debate, The University of Arizona College of Law staged an impeachment trial (the "Trial") on January 29, 1998. As expert for the prosecution, Professor Neely drew on his Pulitzer Prize winning research. As expert for the defense, Professor Eric Foner,[5] author of what many believe is the most outstanding work on the Reconstruction Period,[6] placed the conduct of Lincoln within the context of the Civil War emergency. Two outstanding litigators conducted the Trial: Professor Tom Mauet,[7] a nationally recognized authority on trial practice, and Larry A. Hammond,[8] who was an assistant special prosecutor in the Watergate investigation and who combined his practice with an extraordinary interest in the history of the United States Supreme Court. The presiding judge was former Arizona Supreme Court Chief Justice Frank X. Gordon,[9] who had the experience of presiding over the impeachment trial of a former governor of this state. For the most part the nature of the proceedings are fully described within the transcript that follows.

Let me just add a few notes. The idea of this Trial originated in a conversation I had with Chief Justice Rehnquist, who in January 1997 was working on a book that in part will touch on the role of Abraham Lincoln during the Civil War. Drafting the Articles of Impeachment ("Articles") turned out to be among the most challenging aspects of this case. Since the Trial was to be presented to an audience of approximately 200 "United States Senators" (who were in fact students and alumni of this College of Law), there initially seemed wisdom in reducing the possible Articles to the fewest number and identifying one or two exemplary cases. Stacy Sulman Kahana, an *Arizona Law Review* editor, who did the actual drafting, presented me with a series of narrowly drafted Articles. While her drafting was outstanding, the persuasiveness of impeaching a president for one or two conceivably isolated incidents ultimately proved unpersuasive. So, Ms. Sulman

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4. DAVID HERBERT DONALD, LINCOLN (1995).

5. DeWitt Clinton Professor of History, Columbia University, New York, New York.

6. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877 (1988).

7. Professor of Law, University of Arizona College of Law, Tucson, Arizona.

8. Mr. Hammond is currently practicing with the law firm of Osborn Maledon in Phoenix, Arizona.

9. Former Chief Justice Gordon is currently practicing with the law firm of Roush, McCracken and Guerrero in Phoenix, Arizona.

Kahana returned to the drafting board for several more iterations to frame Articles that attempted to capture how wide scale the conflict between Lincoln and the Constitution was during the Civil War. This in turn placed the litigators in the trial strategy dilemma of how to prosecute and defend so complex a case within ninety minutes. Tom Mauet and Larry Hammond, as you will read, used a variety of techniques that skillfully captured the essence of the challenged conduct in a remarkably brief text.

Let me also recognize Krista Kauper,[10] the *Arizona Law Review*, and the 200 or so judges who ultimately offered their verdict in this most extraordinary proceeding. And finally, I wish to extend particular gratitude to Robin DeSando,[11] who skillfully transcribed the proceedings.

10. Director of Development, The University of Arizona College of Law.

11. Robin Marie Desando, RPR, CSR, CRR; Desando Court Reporting; 10115 N. Blue Bonnet Road, Tucson, AZ, 85742; (520) 572–1658 or (888) 520–1551.

BEFORE THE UNITED STATES SENATE

IN RE THE IMPEACHMENT OF PRESIDENT ABRAHAM LINCOLN	)

MOCK TRIAL
HELD IN TUCSON, ARIZONA
ON JANUARY 29, 1998

II. OPENING REMARKS

Chief Justice Gordon: We are in the last day of the impeachment trial of the President of the United States, Abraham Lincoln. We have previously heard fact witnesses present evidence before the Senate relevant to the charges brought by the House of Representatives in the four Articles of Impeachment.[12]

12.

In his conduct of the office of the President of the United States, Abraham Lincoln, in violation of his constitutional oath to faithfully execute the office of President of the United States and, to the best of his ability, preserve, protect, and defend the Constitution of the United States, has violated the First Amendment of the Constitution and exceeded the emergency powers of the Chief Executive, in that:

ARTICLE ONE

On May 10, 1861, the President suspended the writ of habeas corpus, which led to the May 25th arrest of John Merryman, a citizen said to be drilling Marylanders in a scheme to take them south and join the Confederate army.

ARTICLE TWO

In the summer of 1861, the President caused the arrest of sixteen members of the Maryland Legislature, fearing they would pass an ordinance to secede from the Union.

ARTICLE THREE

On August 8, 1862, the President, through the War Department, issued an order to suspend the writ of habeas corpus in respect to all persons arrested and detained for violating the draft and in respect to all persons arrested for disloyal practices. A further order published the same day permitted all U.S. marshals and superintendents or chiefs of police of any town, city, or district to arrest and imprison anyone engaged in discouraging volunteer enlistment. These orders led to sweeping and uncoordinated arrests. Between August 8 and September 8, at least 354 civilians in the North became prisoners as a result of such orders, including:

- Dr. Israel Blanchard of Jackson City, Illinois, arrested on the affidavit of a man who maintained that the doctor had attended a meeting of the Knights of the Golden Circle and had made disloyal remarks;
- Dr. Nathaniel Bachelder, arrested for having said at a recruiting rally that three-fourths of the men would be killed or go to hell;
- the editors of the Newark *Evening Journal*;
- Ezra B. Chase, George B. Kulp, and Ira Davenport of Wilkes-Barre, Pennsylvania, arrested for discouraging enlistment;
- Dennis A. Mahony, the editor of the Dubuque *Herald*, for publishing material to discourage enlistment;

In accordance with the rules adopted by the Senate for this trial, both the prosecution and the defense today will present summary witnesses. Thereafter, the prosecution and defense will present closing arguments, following which the members of this Senate will vote on the four charges.

Are the parties ready to proceed?

Mr. Mauet: Defense is ready, Your Honor.

Mr. Hammond: We are ready, Your Honor.

Chief Justice Gordon: All right. I will now ask the members of the Senate to stand and raise your right hands, and I will administer the oath to you.

Do you, and each of you as senators, solemnly swear or affirm that you will well and truly try the impeachment case involving Abraham Lincoln, the President of the United States, and return true verdicts on the four charges against him in accordance with the law and the evidence? If so, say I do.

The Senate: I do.

- Charles Anderson, for giving a cheer for Jefferson Davis in Buffalo, New York;
- Bently J. Goheen, for telling a recruiting officer that he would rather take an oath to Jefferson Davis than to Lincoln;
- Samuel Strantzenheimer, for giving a hurrah for Jefferson Davis;
- Lewis Bobson, for saying that Lincoln was a damn fool and the South's cause was just;
- Charles J. Bush of Wisconsin, for telling someone that if he were drafted, he would fight for the South;
- George Slagel, an unnaturalized German, for saying that he wished all German and Irish soldiers in the U.S. Army had their throats cut.

ARTICLE FOUR

On May 5, 1863, the President, through General Ambrose Burnside, had Representative Clement L. Vallandigham arrested, tried, and sentenced to close confinement in a United States fortress for publicly expressing disloyalties toward the government of the United States, for expressing sympathies for those in arms against the government of the United States, and for aiding and abetting the insurgents who gave aid and comfort to rebels against the authority of the United States government.

In all this, Abraham Lincoln has acted in a manner contrary to his trust as President and subversive of constitutional government, to the great prejudice of the cause of law and justice, and to the manifest injury of the people of the United States. Wherefore, Abraham Lincoln, by such conduct, warrants impeachment, and trial, and removal from office.

Articles of Impeachment of President Abraham Lincoln [hereinafter Articles].

Chief Justice Gordon: Thank you. You may be seated. You may call your witnesses.

Mr. Hammond: Mr. Chief Justice, the government calls as its final summary witness in these proceedings Professor Mark Neely.[13]

Chief Justice Gordon: Professor Neely, if you will take the stand right here, please. And as you have already been sworn, we will not need to swear you again. Thank you, sir.

III. DIRECT EXAMINATION OF DR. NEELY BY MR. HAMMOND

Q. Would you please, for the record, give us your name again?

A. My name is Mark Neely, and I am a professor of history at St. Louis University.

Q. In connection with this proceeding, have you undertaken an investigation?

A. Yes, I have. I have examined about 14,000 records of civilians arrested by military authority during the Civil War, including records of interrogation of political prisoners by the judge advocate. I have studied the President's orders and proclamations suspending the privilege of the writ of habeas corpus. And, in the case of those prisoners who were tried by military commission, essentially court martials for civilians, I have gone into the court-martial records and read the transcripts of some of those trials.

Q. Do you feel that you have read a representative sampling, then, of the arrest records that may be pertinent to this proceeding?

A. Yes, I do. However, I think for us best to understand what occurred during the war, we must first go back to the beginning and forget one thing that we all know: that is, eleven southern states, and eleven states only, seceded from the Union in an attempt to form the Confederate States of America. Abraham Lincoln, when he was inaugurated president in March 1861, could not know that fact. What he had seen was seven states leave, or attempt to leave, the Union, beginning with South Carolina on December 20, 1860, and ending with Texas on February 1, 1861.

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13. Professor Neely notes that he appeared as an expert witness for the prosecution and tailored his testimony accordingly. His personal view, however, reflected in his professional writings, is that Abraham Lincoln should not be impeached in a proceeding such as this. Letter from Mark E. Neely, Jr., to Debra A. Gordon, Editor-in-Chief, *Arizona Law Review* (Mar. 19, 1998) (on file with the *Arizona Law Review*).

When Lincoln took office, more slave states were with the North than against it. And Lincoln's prime task, he thought, was to get or keep as many of those border states on his side as possible. With the firing on Fort Sumter on April 12, 1861, four more states seceded: North Carolina, Virginia, Arkansas, and Tennessee. That left Missouri, Kentucky, Maryland, and Delaware, and they were critical to the fate of the Union. Everybody knew that a fifteen-state Confederacy could not be defeated. As Lincoln put it, to lose Kentucky was to lose the whole game.[14]

So, this explains for us what might seem a constitutional anomaly; and that is, Lincoln's early and willing, almost eager, use of what was an untested and, in the case of the president, doubtful power to suspend the privilege of the writ of habeas corpus. He does it within two weeks of the fall of Fort Sumter, and he does it because it is a way of keeping the border states in the Union. It is a way to hold onto what he has.

Q. Professor Neely, the Lincoln presidency begins in March of 1861 and the first suspension of the writ of habeas corpus occurred in April of that year. Is that approximately correct?

A. That is right.

Q. You have studied the various suspensions. Let us now focus on the year 1861. Can you tell us the suspensions that occurred and the reasons given for them?

A. Well, there are several proclamations and orders suspending the writ of habeas corpus. The earliest order deals with the area around Washington, which was isolated by the burning of railroad bridges in Baltimore. What began as a border policy, something for Maryland, maybe for Kentucky and Missouri, very quickly spread all over the North, and by September 24, 1863, the writ of habeas corpus was suspended in all the North's states in certain kinds of cases.

Q. You said a moment ago that prior to these events in 1861 this had not been done before?

A. That is right. Further, Lincoln was uncertain of this power. So, he asked his Attorney General, on April 19, 1861, to provide an opinion on the president's power to suspend the writ of habeas corpus. A memorandum by the Assistant Attorney General, Titian Coffey, said that the president did not have such authority because the known commentaries on the Constitution and Congress' established track record demonstrated this was a congressional power.

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14. James M. McPherson has emphasized the importance of the border states. JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 276, 306–07 (1988).

Q. So, we have a written opinion from the office of the chief law enforcement officer of the United States saying that the power does not exist in the president?

A. That is correct.

Q. You said that the power was in the Congress. I have placed here on a board Article I, Section Nine.[15] Would you just refresh us by telling us why it is significant that the habeas corpus provision appears in Article I of the Constitution?

A. Article I, of course, is the part of the Constitution that deals entirely with the powers of Congress and only with those powers of Congress.

Q. Did the President take steps in 1861 to gain the approval of the Congress of the United States?

A. The President did not. He assumed the president had power to suspend the Writ, and he invoked it almost immediately after taking office on the 27th of April for the first time and several times thereafter.

Q. There are a couple of significant events that occurred shortly after the Writ was suspended in 1861. The first I would like to ask you about is the arrest of Mr. Merryman in Maryland in May of that year. Can you tell us what it was that Mr. Merryman was accused of doing?

A. John Merryman was arrested by federal military authorities in Maryland for drilling troops allegedly to take them south to join the Confederacy, and for aiding and abetting in burning the Baltimore bridges. His lawyer sought a writ of habeas corpus from the Chief Justice of the United States Supreme Court, Roger B. Taney. Taney, sitting in the Baltimore District Court, held that the president had no power to suspend the Writ and that Merryman's was an unconstitutional arrest.

Q. This was an opinion by Chief Justice Taney?

A. Yes.

Q. And was the President of the United States, Abraham Lincoln, made aware of that opinion?

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15. The provision provides, in part: "The privilege of the writ of habeas corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9.

A. He was not present in the courtroom, of course, but Taney wrote in the opinion itself that he was providing for a copy of it to be sent to the President so that the laws would be upheld.

Q. Did he, in his opinion, then, remind the President of his duty under Article II, Section Three, of the Constitution?[16]

A. Yes, he did remind him that the president shall take care that the laws be faithfully executed. And Lincoln received the opinion and answered it in veiled language, not specifically mentioning it, in his July 4th special message to Congress.[17]

Q. And what did he say?

A. He said that although the Constitution says the privilege of the writ of habeas corpus cannot be suspended except during rebellion and invasion, it does not say who has the authority to suspend it and that in an emergency the president could.

Q. The next matter that I'd like to briefly talk with you about is a matter involving the Maryland Legislature. Are you familiar with that matter?

A. Yes, I am.

Q. This also occurred in 1861?

A. Yes.

Q. Could you tell us about it?

A. Federal troops arrested approximately sixteen members of the Maryland State Legislature on their way to open the Legislature.[18] It was feared that they were going to vote to take Maryland out of the Union—to secede along with the other Confederate states. The arrests were thought to be necessary to prevent the state from seceding. This reflected the general concern during the first two years of war about keeping the border states on the North's side.

Q. And did the arrests have the effect of terminating the Maryland State Legislature?

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16. The provision provides, in part: "he shall take Care that the Laws be faithfully executed." *Id.* art. II, § 3; *see also* CARL BRENT SWISHER, ROGER B. TANEY 553 (1935).

17. *See* 4 ABRAHAM LINCOLN, COLLECTED WORKS OF ABRAHAM LINCOLN 429–31 (Roy P. Basler ed., 1953); JAMES G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 120–24 (1951).

18. It is not clear who initiated the arrests of the Maryland legislators or exactly why. *See* NEELY, *supra* note 3, at 14–18 (discussing the conflicting sources).

A. Maryland did not secede.

Q. Did the President explain his reasons for taking this action?

A. Meeting with a delegation from Baltimore, while newspaper reporters were present, he explained that he would not have ordered the arrests except for grave reasons related to the rebellion, which he could not at that time reveal, but that at some future time he would.

Q. And did that future time arise?

A. Never.

Q. He never explained it?

A. No.

Q. Let's move forward now to the next year, to 1862, the time that the conscription laws were passed. Was there a further suspension of the writ of habeas corpus in that year?

A. Yes, and with very dramatic results. In the last three weeks of August and the first week of September, there were literally hundreds of people arrested in the North.[19]

You can recognize some important patterns from these arrests. First, they occurred in Illinois, New Hampshire, Pennsylvania, New Jersey, Iowa, and Indiana—these were not states threatened with invasion by Confederate troops, as Missouri and Kentucky admittedly were. These were not states where there were secession movements or parties. And, furthermore, the behaviors for which the arrests were made were, in many cases, what we would ordinarily call exercises of freedom of speech or freedom of the press.

Q. Can you give us a couple examples?

A. Well, I'd like to focus on just one, Dr. Israel Blanchard, who was from Lincoln's home state, Illinois. He was arrested on the affidavit of a person who alleged that Blanchard had attended a meeting of a disloyal organization. Dr. Blanchard was whisked out of Illinois to a military prison in Washington, D.C., Old Capitol Prison. He would have languished there probably longer than he did had he not been the brother-in-law of a very influential politician, John A. Logan. John Logan intervened, writing a letter to the President explaining that his brother-in-law was not disloyal. And in October, after an August arrest, Lincoln released Dr. Blanchard from prison.

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19. *See, e.g.*, Articles, *supra* note 12.

Q. Did President Lincoln at that time indicate that the arrest had been unlawful or improper in the first instance?

A. No, he did not.

Q. Do we know whether the President was at least generally aware of the arrests that were occurring in August and September?

A. Oh, he was generally aware. In addition, he was directly involved in many of the arrests. There is, for example, occasional evidence of his intervention, like in the Blanchard case. He also personally signed an order in 1861 to suspend a writ of habeas corpus in the case of a Major Chase, of the Engineering Corps of the United States Army. That order was an invitation to wrongful arrest because it did not even provide the first name and middle initial of Major Chase.

These examples demonstrate a general pattern. That is, in Lincoln's concern to keep the border safe in the Union, he neglected his duty as a steward of the Constitution.

Q. Professor, you say you have looked at a lot of these arrest records. Would it be accurate to say that there were literally hundreds of people arrested?

A. Yes. And, of course, those who, like Lewis Bobson,[20] probably under the influence of drink, went out into the streets in the night in a far northern city and hurrahed for Jefferson Davis did not benefit from having a brother-in-law who was an influential politician, as Dr. Blanchard did, and they might remain a long time in prison for a small cause.

Q. Mr. Bobson's crime was that, among other things, he called the President, and I am reluctant to use the words, but—"a damned fool?"

A. Yes.

Q. He, along with at least 364 others?

A. 354.

Q. In that one month alone?

A. Yes.

Q. Now, you pointed out that such events occurred all over the North?

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20. *See id.*

A. Yes.

Q. Were the gentlemen in these cases taken before a civil court?

A. No.

Q. Were the courts sitting?

A. Yes. Courts in most of the northern states were uninterrupted in their sessions, and these prisoners were not brought before them.

Q. Let's move forward now to 1863. As we know, the Emancipation Proclamation was issued at the beginning of that year. Does there come a time early in the year when Congress took a position with respect to habeas corpus?

A. Yes. Congress, dominated by Lincoln's own party, the Republicans, were nevertheless uneasy about the pattern of arrests and about the president's authority to suspend the writ of habeas corpus. So, by March 3, 1863, Congress passed a Habeas Corpus Act,[21] which authorized the president to suspend the privilege of the writ of habeas corpus.

One of the interesting things about this law is that it authorized the president to suspend the writ of habeas corpus, but also provided for certain limitations on his power. The statute required the arresting authority to supply the circuit or district judge in the area where the prisoner resided with a list of the names of persons arrested by military authority. If, during the term of the court, a grand jury met and did not indict those prisoners, the judge was to release them. If the military authorities failed to send the list of names within twenty days, and a grand jury met and no indictment came down, then any person or the prisoner may apply for release and be released by the judge.

Q. Professor, in the years after the issuance of that legislation by Congress, did President Lincoln conform the conduct of the executive branch to the limitations in that statute?

A. No. I looked high and low, and could find only one list supplied to a circuit or district judge.

Q. So, in all the arrests that occurred after March 1863, the limitations Congress imposed were not followed?

A. I could not find records of it. And, of course, the most important limitation that was not followed was that these people be given their day in court. In the case of Clement L. Vallandigham, a Democrat and former congressman from Ohio who was arrested in Dayton in May 1863, we have a political prisoner who

21. Habeas Corpus Act, 12 Stat. 755 (1863).

was fated to be tried by military commission. Pursuant to that proceeding, Vallandigham was sentenced to confinement for the duration of the war. Lincoln commuted that sentence to one of being banished into Confederate lines, which he thought suitable for someone alleged to be disloyal.

The point of the limitations in the Habeas Corpus Act was that prisoners should either be released or tried by a civil court—at least where those courts were in session.

Q. Did there come a time when the President took the opportunity to defend his decision with respect to Mr. Vallandigham?

A. Yes. In June 1863, he responded to a complaint about Vallandigham's arrest[22] in a long public letter, often called the Corning letter, that was published widely in the newspapers.[23]

Q. We have an excerpt from that letter. Did the President acknowledge that the arrest was inappropriate?

A. No, he did not. He defended it. At this point, I should mention Vallandigham had been arrested for giving a speech in the open air at a political rally in Mount Vernon, Ohio, at which a federal officer was present. The officer—essentially a spy—took notes, and reported the occurrence to the commander of the military district, which resulted in the arrest of Vallandigham.

Q. Professor, to end your helpful direct examination, would you read for us the excerpt that you thought relevant from this letter?

A. (Witness reads from the exhibit):

> [A]rrests are made, not so much for what has been done, as for what probably would be done.... The man who stands by and says nothing, when the peril of his government is discussed, cannot be misunderstood. If not hindered, he is sure to help the enemy much more, if he talks ambiguously—talks for his country with "buts" and "ifs" and "ands."[24]

From this excerpt, we can see the direction Lincoln's policy has taken. We have a chilling doctrine here that would make silence, the absence of cheering for the government, culpable cooperation with the country's enemies.[25]

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22. After a meeting in Albany, New York, Erastus Corning and other New York Democrats wrote President Lincoln on May 19, 1863, protesting the arrest of Vallandigham. NEELY, *supra* note 3, at 67 (citing JOHN G. NICOLAY & JOHN HAY, 4 ABRAHAM LINCOLN: A HISTORY 343 (1890)).

23. *See* LINCOLN, *supra* note 17, at 260–69.

24. *Id.* at 265.

25. *See* Phillip Shaw Paludan, 75 GA. HIST. Q. 642–44 (Fall 1991) (reviewing NEELY, *supra* note 3) (explaining the policy in more detail and placing it in its full context).

Q. And did the arrests continue throughout the remainder of that year and into the next?

A. Yes, they did.

Mr. Hammond: Mr. Chief Justice, we have no further questions in direct examination.

Chief Justice Gordon: Thank you. You may cross-examine.

Mr. Mauet: Thank you, Your Honor.

IV. CROSS-EXAMINATION OF DR. NEELY BY MR. MAUET

Q. Professor Neely, you are familiar with the War Powers Clause in the Constitution,[26] are you not?

A. Yes.

Q. It delineates the power the president has as Commander in Chief of the military forces—the Army and the Navy?

A. Yes.

Q. Would you agree that the War Powers Clause does not define what those powers are?

A. Not narrowly and definitely, no.

Q. It just says the president is the Commander in Chief and says nothing else about it, isn't that true?

A. Yes.

Q. Would you agree that under the War Powers Clause, the president ought to have enough power to win a war when we are in one?

A. Certainly.

Q. All right. Let's talk about the Habeas Corpus Clause.[27] It does not specify who shall exercise it, does it?

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26. "The President shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual Service of the United States...." U.S. CONST. art. II, § 2.

27. *Id.* art. I, § 9; *see supra* note 15.

A. No, it does not.

Q. It simply defines the circumstances under which the suspension of the writ of habeas corpus is permissible, right?

A. Well, its placement in the Constitution is significant.

Q. That is right. But, the language of that clause in Article I, Section Nine,[28] is that the Writ shall not be suspended, right?

A. Except in cases of rebellion and invasion where the public safety requires it.

Q. That is right. With no reference to who or whom or what can suspend it, right?

A. Not in that sentence.

Q. All right. In fact, the law at the time—what little there was—was quite unclear, wasn't it?

A. Yes. There was very little law since the authority had never been invoked.

Q. Right. There was some oblique reference to it in commentaries thirty or forty years earlier, right?

A. Yes.

Q. But the only case was the Merryman case, right?

A. Yes.

Q. In 1861?

A. Right.

Q. In that case, Justice Taney was sitting as a district court judge, correct?

A. Well, no, that is not correct.[29] He was sitting in a district court.

Q. That is right.

A. But the lawyer for Merryman first sought Taney in his office in Washington, in chambers. And—

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28. U.S. CONST. art. I, § 9.

29. Taney's opinion on the case is headed "Before the Chief Justice of the Supreme Court of the United States, at Chambers." *Ex parte* Merryman, 17 F. Cas. 114 (1861); *see also* SAMUEL TYLER, LL.D., MEMOIR OF ROGER BROOKE TANEY 646 (1872).

Q. But the fact remains that Justice Taney was riding circuit, as we say, when he heard this matter. Isn't that true?

A. No, actually he was not. Taney took the case because the Supreme Court has direct jurisdiction in habeas corpus cases under the 1789 Judiciary Act.[30] So, he was taking direct jurisdiction as a Supreme Court Justice in chambers. He chose to hear it in the Baltimore court and to render his decision there as a convenience to the military officer holding the prisoner—so that officer would not have to leave his military jurisdiction.[31]

Q. I guess my point is, it was Justice Taney and no one else, right?

A. Well, that is true. It was only Justice Taney.

Q. And there was no appeal from that decision, was there?

A. No, there was not.

Q. All right. So we cannot consider that some sort of precedent from the Supreme Court, can we?

A. Well, we can consider it a precedent from the Chief Justice of the Supreme Court. It was a question—

Q. That is one out of nine. Is my math correct?

A. Right. Yes.

Q. And, Professor Neely, that is the same Roger Taney, by the way, who wrote the *Dred Scott*[32] decision?

A. It is the same one.

Q. All right. That is about the extent of any guidance President Lincoln had in 1861 when the suspensions first occurred. Isn't that true?

A. Well, he did have the memo from the Attorney General's office, which suggested it was not a presidential power.

Q. Judicial guidance, that's it?

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30. Judiciary Act, 1 Stat. 73 (1789).

31. *See* CARL B. SWISHER, OLIVER WENDELL HOLMES DEVISE, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD 1836–64, at 845 (1974); TYLER, *supra* note 29, at 640–47.

32. Dred Scott v. Sandford, 60 U.S. 393 (1856).

A. It was the only judicial guidance.

Q. Well, let's talk about the suspensions between April 27, 1861, and March 3, 1863. There were approximately seven, right?

A. Yes.

Q. Now, those suspensions occurred by direct order of the President, but more commonly they were done by subordinates, right?

A. He did often delegate the power to suspend the Writ to military officers.

Q. That is right. And, in fact, that is usually what was done, most of the time?

A. He was aware of what was happening.

Q. And those suspensions were publicly known?

A. Yes, they were.

Q. And, almost two years passed from the first suspension to when Congress enacted its own suspension, correct?

A. Yes, that is true.

Q. Professor Neely, during those two years, during all those suspensions, did Congress ever protest?

A. Well, I think—

Q. Did Congress ever enact legislation repealing the President's purported suspension?

A. Well, no, they did not.

Q. Did they ever propose legislation?

A. Congress is an organization that consists of Republicans and Democrats—

Q. I am aware of that, sir.

A. It was dominated by Republicans who, naturally, were not eager to question the authority of their Republican president.

Q. So I guess the answer is, they did not object to the President's action, is that right?

A. Until March 1863, when even they—

Q. When they acted on their own, right? That is something else. On January 1, 1863, the President gave his Emancipation Proclamation, correct?

A. Yes.

Q. Did Congress ever claim that that proclamation, issued under the president's war powers, somehow invaded the legislative prerogative of Congress?

A. No.

Q. Congress could have legislated the end of slavery, could it not?

A. Well, since slavery is mentioned, albeit not by name, several times in the Constitution, it was widely thought they could not.

Q. Well, in any event, terminating slavery through a presidential proclamation is not in the war articles or anywhere in Article II, is it?

A. No, it is not.

Q. But Congress liked that presidential act, correct?

A. Yes.

Q. So they did not protest?

A. The Democrats of Congress did.

Q. Congress did not protest?

A. (No oral response.)

Q. Congress had no contrary legislation. The matters stood as they stood, right?

A. Yes.

Q. All right. Let's talk about that March 3, 1863, statute,[33] when Congress itself suspended the writ of habeas corpus. By the way, Congress suspended it nationwide, right?

A. Yes.

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33. Habeas Corpus Act, 12 Stat. 755 (1863).

Q. For any reason? If there is some doubt in your mind, you might want to look at the statute, sir. Is there any limitation on the purpose of suspension in Congress' act on March 3, 1863?

A. Any limit on the purpose of suspension?

Q. Yes.

A. No limit on the purpose of suspension.

Q. It is without limitation, is it not?

A. That is what I understand.

Q. Yes. Now, when Congress passed that act, was there anything in that legislation that said they disapproved of the President's earlier suspensions?

A. No, but nothing in it said they approved of it either.

Q. That is right. It is silent, right? And, in fact, Lincoln, when he made the first suspension himself back in April 1861, made it very clear that he was suspending the writ of habeas corpus on behalf of Congress, isn't that right?

A. Not in the proclamation itself.

Q. Well, that is what he explained afterwards in a special message to Congress about two months later, right?

A. He explained that it seemed the president should be able to act since Congress was not in session.

Q. And, in fact, he did it because Congress was not in session and there was a dire military and political emergency, right?

A. An explanation that works better for some suspensions than for others, depending on whether the Congress was in session at the time.

Q. But he also expressed confidence that when Congress finally came back in session it would ratify his conduct, didn't he?

A. He did, yes. And he had good reason to since he knew, with the departure of the large number of Democrats with the southern rebellion, he could count on the Republicans to ratify.

Q. The fact of the matter is, sir, that during that two-year period, Congress did nothing by way of enactment to show disapproval with the President's earlier suspensions, isn't that right?

A. That is true.

Q. And, in fact, the March 3, 1863, suspension broadened it, right?

A. Also limited and made clear what the limitations should be.

Q. As to procedure. But as to what it covered and the geographical territory, it was throughout the country, wasn't it?

A. Yes.

Q. Dr. Neely, let me ask these last couple of questions. The war is over, right?

A. Yes.

Q. The North won?

A. Yes.

Q. Lincoln, as Commander in Chief, was successful, right?

A. As Commander in Chief, yes.

Q. Do you consider him a hero?

A. Certainly.

Q. Do you think history will record him as a hero?

A. I think history will record him as a very successful Commander in Chief and as a failed steward of the Constitution.

Mr. Mauet: Nothing further, Your Honor.

Chief Justice Gordon: You may step down, Professor. The defense may call its witness.

Mr. Mauet: Yes, Your Honor. On behalf of the President, we call Professor Eric Foner.

V. DIRECT EXAMINATION OF DR. FONER BY MR. MAUET

Q. Dr. Foner, you are a professor of history at Columbia University?

A. That is right.

Q. And, like Professor Neely, you have studied the Civil War period and Lincoln's conduct during that war?

A. Yes.

Q. All right. Dr. Foner, let's start off with the military situation that President Lincoln was confronted with on March 4, 1861, when he became president. What was the military and also the political situation he faced?

A. The situation was very dire. He faced the greatest political and military crisis in the history of the country. As we heard, seven states had seceded from the Union. There was grave danger of Washington, D.C., being cut off, and of Maryland seceding. He faced an unprecedented crisis, one that I think the founding fathers had never imagined in their wildest dreams might happen.

Q. What was the immediate military situation facing him that day?

A. Well, the regular army was tiny. There were bridges being burned in Maryland, or shortly would be. There would soon be riots in Baltimore to prevent federal troops from coming to defend the capital, and there was great fear of an invasion of Washington, D.C., by southern forces.

Q. Let's turn specifically to the date of April 27, 1861, the first day that President Lincoln suspended the writ of habeas corpus when Congress was not in session. What was the specific military problem he was dealing with on that date?

A. Well, the specific problem was the isolation of Washington and the difficulty of getting troops through on the rail line from the north through Baltimore to Washington.

Q. That was the so-called military line?

A. Yes. There were riots in Baltimore. The first casualties of the Civil War were soldiers killed in Baltimore trying to get to Washington. Bridges, as we heard, were being burned, and there was grave danger that Washington would be completely cut off from the rest of the country.

Q. When the President suspended the writ of habeas corpus on behalf of Congress the first time, what authority was he relying on to do so?

A. Well, one would assume he was relying on the war power of the president and his role as Commander in Chief, and the clause of the Constitution stating that in an emergency, in a rebellion, invasion, the Writ could be suspended.

Q. Did it succeed?

A. Well, it appears so, yes. Troops did get to Washington. The bridge burning stopped and the capital was defended.

Q. Absent that, was there a significant, real risk that Washington would have been surrounded and fallen in the early days of the war?

A. Well, many military leaders felt that was the case. The Union Army, as was shown when it finally did get into battle, was woefully unprepared. So there was grave danger that Washington could fall.

Q. Let's talk about the other suspensions between April 27, 1861, and the date in March 1863 when Congress finally acted.

A. Well, there were quite a few suspensions, and for very specific reasons. Professor Neely reminded us correctly, we have to forget what we know happened. We must forget that we know that the North won the war. Looking back, it's easy to say it was inevitable and there was really no military problem. But during the first couple years of the war and even into 1864, the Union was losing far more battles than it was winning. Certainly, in 1861 and 1862, the military situation was very dire, and battle after battle was being lost. There seemed to be grave danger of the failure of the war effort.

Q. Since these four Articles of Impeachment all address the President's suspension of the writ of habeas corpus and things that flowed from it, let's focus on that. Each of the approximately seven times President Lincoln suspended the Writ, did Congress complain?

A. Never.

Q. Was there any organized congressional opposition?

A. No. There were a few Democrats complaining, but the large Republican majority did not.

Q. Were there any bills proposed in either house of Congress attempting to undo the President's suspension?

A. I am not sure if any were proposed, but certainly nothing was ever passed that in any way undid them.

Q. All right. Were there any Supreme Court cases holding the president could not exercise the suspension of the Writ on behalf of Congress in Congress' absence?

A. No such case ever got to the Supreme Court during the Civil War.

Q. Okay. Were there any Supreme Court cases suggesting that the president, under his war powers as Commander in Chief, did not have authority to suspend the Writ on behalf of Congress?

A. No. There were no such cases.

Q. Let's talk about that March 3, 1863, statute.[34] Compared to the breadth and application of the President's earlier suspensions, how broad was Congress' suspension of the Writ in 1863?

A. Well, it was broader in that it covered the entire country, and it did not list any particular reasons why the writ of habeas corpus would have to be suspended.

Q. Was it directed to any particular persons?

A. No.

Q. Any particular places?

A. No.

Q. Any particular reasons?

A. No. It was broad and universal.

Q. Would it be possible for Congress to have enacted a broader suspension of the writ of habeas corpus than it did on March 3, 1863?

A. I am sure Congress could contrive some way, but it would be difficult.

Q. Now, about Mr. Vallandigham, whom the prosecution raises, he was arrested when?

A. May 1863.

Q. So, Mr. Vallandigham was arrested after Congress enacted its own suspension of the writ of habeas corpus, is that correct?

A. That is right. It is also worth noting that at the time he was arrested, there was a real danger of the invasion of Ohio. We know in retrospect it did not happen, but this was just before General Robert E. Lee was moving his army into Pennsylvania and there was supposed to be another thrust west into Ohio. Cincinnati was barricading itself. So Ohio was, in a sense, in the theater of the war in a way it had not been.

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34. *Id.*

Q. At the time, then, the risk seemed large?

A. Yes. People were very nervous in Ohio in May 1863.

Q. Okay. We have talked about the military progress of the first two years, Dr. Foner. Let's talk about how things changed in the summer of 1863. What happened to change the, what you called, desperate military situation?

A. Well, looking back, we know that the battle of Gettysburg and the fall of Vicksburg in July 1863 marked the turning point of the Civil War, and the Union's prospects became much brighter at that point, although in 1864 they did diminish again for a while.

Q. Once the military situation became brighter, let's talk about what happened politically. In 1864, what happened that has a bearing on these facts?

A. Well, a certain number of Republicans tried to dump Lincoln as a candidate for reelection and put forward John C. Fremont as a candidate.

Q. Why?

A. Because they felt Lincoln was not prosecuting the war vigorously enough and they thought his policies on reconstruction would not be to their liking.

Q. He was not tough enough?

A. They thought he was not tough enough—more vigorous, aggressive leadership was needed.

Q. And they tried to dump him?

A. Right. They nominated an alternative candidate to run as a Republican, Fremont.

Q. And Fremont was a professional military officer, is that right?

A. Yes, he was an officer of the army.

Q. And what happened to that attempt?

A. Well, it did not succeed. The bulk of the Republican party renominated Lincoln, and Fremont eventually withdrew from the race.

Q. Although it has only been a few months, Dr. Foner, let's talk about what is on the political horizon in Congress now. What is the main issue this country faces?

A. Well, with the end of the war, the issue that has come to the fore is what we call reconstruction; that is, how the nation will be brought back together, what the status of the former slaves will be, what punishment, if any, will be meted out to the rebels and leaders of the Confederacy, et cetera.

Q. And does President Lincoln appear to see eye to eye with Congress, or are there differences of opinion on how to proceed?

A. There are many in Congress who do not approve of the course President Lincoln seems to be outlining. Indeed, in 1864, Congress passed its own plan of reconstruction, the Wade-Davis Bill, which President Lincoln pocket vetoed. That was an indication there were some fairly serious differences between Congress and the President over reconstruction.

Q. Dr. Foner, I have two or three more questions. The attempt to dump Lincoln in 1864, how did that end, politically?

A. Well, it did not succeed, of course. Lincoln was renominated and reelected.

Q. So failure?

A. Right.

Q. This recent, unfortunate attempt on the President's life by one Mr. Booth, how did that end?

A. Fortunately, it did not succeed.

Q. That was a failure?

A. Yes.

Q. And now we are here facing this impeachment attempt?

A. Yes. And, of course, if the President is removed by the Senate, then Vice President Andrew Johnson will become president, and many in Congress feel that Johnson is more radical on reconstruction than Lincoln would be. As military governor of Tennessee, he committed acts far in excess of anything that has been mentioned in this trial. And he has said publicly traitors must be punished; treason must be made odious. He has indicated he wants to deprive the leading planters of much of their property, and certainly there are those in Congress who think that would be the direction to go in reconstructing the Union.

Q. And, in the end, it is all about politics?

A. That is one way of looking at it.

Mr. Mauet: Thank you, Dr. Foner.

Chief Justice Gordon: You may cross-examine.

VI. CROSS-EXAMINATION OF DR. FONER BY MR. HAMMOND

Q. Professor Foner, is it fair for us to conclude, based upon your last remark, that you see this as a political prosecution?

A. Yes, I do.

Q. You do not accept, I take it, then, the proposition that there may be merit to the claims that the President engaged in the commission of high crimes and misdemeanors?

A. That is right.

Q. You find no substance in the accusations that his conduct was in direct violation of the Constitution?

A. That is right. I think some of his subordinates were overzealous at times, but it is hard to believe that the President, while conducting the war, had an obligation to oversee every single action of every colonel and major in the Union Army. And, as we heard, in some cases when they went beyond the bounds of what was necessary, he reversed those orders.

Q. You do not dispute, do you sir, that it was the President who was responsible for the decisions that we have talked about this evening to suspend the writ of habeas corpus in 1861 and 1862?

A. I don't dispute that he was generally responsible. However, I don't think he was responsible for every single arrest that was made because, as we heard, there were quite a few of them.

Q. Are you able to point to a single case in which the President said an arrest undertaken pursuant to any suspension of the Writ was unlawful?

A. No, but he did, as we heard, release some people. And, I think it is unlikely that he knew of every single arrest as it was being made.

Q. Do you have any doubt that he knew of many arrests?

A. I am sure he did.

Q. Do you have any doubt that he knew of most of the arrests?

A. Well, I don't know if he knew of most. He certainly knew of many. He also knew, especially in 1862 after the passage of the Militia Conscription Act,[35] Democratic judges were releasing men from the army on writs of habeas corpus and that the Writ was being used to undermine recruitment into the army, which created a serious military problem in many parts of the North.

Q. You don't have any doubt, do you, sir, that the President well knew that men were being arrested either for conscription violations or for speech-related activity without presentment of cases to grand juries?

A. Well, that is what it means to suspend the writ of habeas corpus, does it not? So, yes, of course he knew that.

Q. Do you think it means that cases need not be presented to grand juries?

A. Well, I am not a lawyer, but as I understand it, if you suspend the writ of habeas corpus, it means that you can hold someone without charge.

Q. In 1863, when Congress authorized suspension of the privilege of the writ of habeas corpus, is it correct, as we were told earlier by Professor Neely, that limitations were imposed on the acts that would occur after suspension?

A. Professor Neely knows the law very well. So I have no doubt whatsoever that is true.

Q. And one of those provisions was that when someone was arrested, his name would be forwarded to lawful authorities in the judiciary so the matter could be presented to whom, sir?

A. To grand juries.

Q. To a grand jury?

A. Yes.

Q. Do you dispute that in fact the President of the United States routinely ignored that requirement?

A. I don't know how many cases there were after that, but I am sure that if Professor Neely testified to it, it happened.

Q. You based, if I heard you correctly, some of your conclusions on the presumption that the Constitution was not written by people who had this kind of conflagration in mind?

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35. Militia Conscription Act, 12 Stat. 597 (1862); *see also* NEELY, *supra* note 3, at 52.

A. Well, I don't think that the founding fathers expected eleven states to levy war against the rest of the states. I cannot believe that they imagined that was possible. But perhaps they did.

Q. Did they imagine it was possible that there would be wars in the future in the United States?

A. Of course.

Q. Indeed, they accounted for that in a number of places throughout the Constitution, did they not?

A. Yes.

Q. Indeed, the war powers provisions relate directly to the expectation that we might have wars?

A. Yes.

Q. Is it fair to say that the founders had just come through a war? The war was very fresh in their minds?

A. Yes, it was.

Q. And, indeed, among other examples, in the very amendment to the Constitution that deals with presenting cases to the grand juries,[36] the founding fathers dealt with the question of war, did they not?

A. Yes.

Q. The Fifth Amendment says:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger....[37]

Doesn't it?

A. That is correct.

Q. These are words written by people who expected there would be wars and that there would be a need for accommodation in warfare?

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36. U.S. CONST. amend. V.
37. *Id.*

A. Yes. But I don't think they expected a civil war, which creates a rather different kind of military and political situation than a war against a foreign power.

Q. Is it your position, Professor, that the unanticipated circumstance and the severity of that circumstance is itself the justification for Lincoln's actions?

A. I think that it is one justification. The War Powers Clause of the Constitution[38] is another. And the fact that there was no legal or judicial record delineating the limits of the president's war powers in a civil war. I think Lincoln, to the best of his ability, was trying to deal with an unprecedented situation where he had almost no guidance. And if he made mistakes, that was perhaps almost inevitable.

Q. You don't disagree that it is in fact true that President Lincoln, pursuant to a specific provision of the Constitution,[39] requested an opinion in writing from the Attorney General's office?

A. I know that is true, yes.

Q. And he received an opinion?

A. Yes.

Q. And the opinion said that he did not have the power unilaterally to suspend the Writ?

A. That is right.

Q. You don't dispute that Chief Justice Taney wrote an opinion coming to precisely the same conclusion?

A. That is right.

Q. You don't dispute that Chief Justice Taney sent that opinion to the President acknowledging that he, as a Justice, had no power to remove Mr. Merryman from Fort McHenry, but that the president did?

A. That is right.

Q. And that the President should be mindful of his duty faithfully to take care that the laws be executed?

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38. *Id.* art. II, § 2.
39. *Id.*

A. That is right. But I don't think the President considered that a definitive ruling by the entire Supreme Court on the matter.

Q. You would agree with me, I take it, that if a president hypothetically were to engage in an obstruction of justice, that would be an impeachable offense?

A. I cannot imagine any president doing such a thing.

Q. And, specifically, if a president were to interfere with a juror or with a jury, that, too, would be an obstruction?

A. I don't know. It would really be the job of the Senate. As you well know, the Constitution is rather vague as to what high crimes and misdemeanors justify impeachment, and it is up to the House of Representatives and the Senate to decide that.

Q. Do you think that if a president were to take a step to encourage someone to be deprived of a lawyer, a right given under the Constitution in a criminal trial, that that would be an obstruction of justice and might be a high crime and misdemeanor?

A. It might very well, but I am sure that the Congress would judge the circumstances under which these acts took place. In the middle of a civil war, acts that seem completely outrageous in peacetime might be judged by Congress to be legitimate—to be justified.

Q. Which leads me to my final question. You seem to place great reliance on the absence of opposition from the Congress of the United States. Is it your position that the failure of Congress to intercede in some way ratifies President Lincoln's conduct?

A. Not necessarily, but it does make one wonder why now Congress is declaring these acts worthy of impeachment, whereas when they took place, Congress never said a word about them.

Q. Would it be equally fair to say that when Congress raised no hand in 1861, 1862, and 1863, it might have been because it was dominated by his political allies at that time?

A. It is very possible. Nonetheless, I assume the President still has many political allies in Congress.

Mr. Hammond: I have no further questions, Mr. Chief Justice. Thank you.

Chief Justice Gordon: Thank you, Professor. You may step down.

Mr. Hammond, you, as the prosecutor, now have the opportunity to make your closing statement.

VII. PROSECUTION CLOSING ARGUMENT BY MR. HAMMOND

Mr. Hammond: Thank you, Mr. Chief Justice.

May it please this tribunal, I have but a few observations to share with you.

As in all cases, there may be things upon which we can all agree. Possibly we could all agree that the objectives of the President were noble. After all, this is a president who fought to free three million slaves. This is a president, as we heard, who risked all to secure peace through victory. Possibly we could start from the common foundation that those indeed are noble objectives. But the issue is not with the objectives. The issue is with the choice of the means to achieve those objectives.

We now know from the testimony you have heard that the means chosen here by the President included suspending the writ of habeas corpus. Both on his own, and after 1863, when he had some authority from the Congress of the United States, he continued to do so in a way not in conformance with the will of Congress.

We also know that, armed with the power of the suspension of the privilege of habeas corpus, he and those who acted at his direction, denied the citizens in this country the most basic rights under our Constitution. Freedoms of speech and press were directly curtailed in ways that most of us, I hope, would regard as unthinkable. People were arrested because they said such odious things as, I oppose the draft, and hurrah for others who oppose the draft. For that, summarily, men were sent to jail. Men were sent to jail without a trial, without the speedy and public trial afforded by our Constitution. They were sent there while the civil courts were open. They were afforded no trial of any kind before a jury, only before military tribunals created by this administration. They were not afforded the opportunity to confront their accusers, nor were they given the rights of counsel afforded under the Fifth and Sixth Amendments of the Constitution.[40]

We have heard that this must, in some way, be justified because no one complained. Well, I would ask you to think about what the Constitution tells us. On this we submit that the Constitution is absolutely clear. The president's obligation is not simply an obligation to do the things that will be tolerated by a coordinate branch. President Lincoln has, as has every president from the founding of this republic, a duty, a duty to take care that the laws be faithfully executed.[41] It is a heavy burden and it is a burden he bears alone. The Constitution gives him the

40. *Id.* amends. IV, V.
41. *Id.* art. II, § 3.

entitlement to seek the opinion of the heads of other departments.[42] He did that. He received an opinion, and he ignored it.

We do have an opinion by a court, by the Chief Justice of the United States. At no point did this president look at that opinion and say, here is why I disagree with it. There was never a debate. There was never a discussion. There was just the ex cathedra decision by this president that he was going to do what he had set out to do.

We submit, ladies and gentlemen of this Senate, that when the President took the oath of office, which appears in these precise words in the Constitution, "I will faithfully execute the Office of President of the United States, and will to the best of my Ability preserve, protect and defend the Constitution of the United States,"[43] he took on a serious—maybe the most serious—obligation any human being in this century has yet incurred.

But it is not acceptable, we submit, to say, we had big problems, we had problems that required us to do things that we thought would preserve the Union. He had guidance. And that guidance came from our Constitution. It came from the founding fathers. It came from people who said, you can manage this country through the most difficult crises with a First Amendment.[44] You can survive with free speech. You can survive with jury trials.

The fact that the President thought otherwise, we submit to you, is the worst form and the most blatant form of obstruction of justice. And it is precisely that obstruction—obstruction of the courts, obstruction of the process that should be afforded to us all, the due process of law—that must result in the finding by this tribunal that Mr. Lincoln engaged in what can only be described as a high crime.

Thank you, Mr. Chief Justice.

Chief Justice Gordon: Thank you, Mr. Hammond. Mr. Mauet, as counsel for the defendant, you may make your presentation.

VIII. DEFENSE CLOSING ARGUMENT BY MR. MAUET

Mr. Mauet: Thank you, Your Honor.

Members of the Senate, this is a case about law, it is a case about politics, and it is a case about history. We already know what history will say about these four years. History will say that Lincoln, the president, saved this Union, that his first obligation was to protect the Constitution of the United States by protecting this country from being destroyed, and he succeeded. And we know that history will

42. *Id.* art. II, § 2.
43. *Id.*
44. *Id.* amend. I.

accord him the status of a hero with the likes of Washington, and Jefferson, and the founding fathers. That is what history will say.

But, you know, there are people in this Congress, in the House of Representatives, with other thoughts. There are radicals in the House with a different mission, who believe that now the war is over, now that we no longer need the Commander in Chief to lead, we can go about business as usual. And they want to tear the President down. Why? Not because of the law. Because of politics. But we know one thing. That history will know it. History will remember it. And history will judge it, because history always does.

We said it is a case about law. In March 1861, President Lincoln had the biggest catastrophe on his hands that any president in the history of this country has ever faced. Baltimore was burning. Rail bridges were being destroyed. Draft resisters were abounding, anti-Union agitation was strong. The President suspended the writ of habeas corpus on behalf of a Congress that was not present. He expressed confidence in a message to Congress shortly afterwards that when Congress had a chance to convene and be in session, they would surely approve of his acting on their behalf when they were absent. Congress never disapproved. For two years the military situation went from precarious to worse, back to precarious. Seven times, the President suspended the writ of habeas corpus in conjunction with military concerns, protecting railroads, protecting telegraph lines, keeping draft resisters and draft riots from disrupting the defense of this country, all things done in service of his highest duty, to protect and save this country and the Constitution.

For two years, Congress never did anything to suggest that they disapproved, that they found the President's conduct improper. But then things changed. The Gettysburg battle occurred. The New York City draft riots in March of 1863 occurred, and things started to get better. And Congress enacted its own statute, as the prosecution has pointed out time and time again. But, you know what? They told you about provisions of that statute, but they failed to tell you the most important one, the most important provision in that statute, which shows you that the President, as a matter of law, cannot have been guilty of a high crime or misdemeanor.

When Congress enacted that statute on March 3, 1863, part of that statute was section four. The prosecution did not want to read that to you, and I suggest after you hear it, you will know why.

That statute, section four, says:

> *And be it further enacted*, That any order of the President, or under his authority, made at any time during the existence of the present rebellion, shall be a defence in all courts to any action or prosecution, civil or criminal, pending, or to be commenced, for

> any...arrest, or imprisonment, made...under and by virtue of such order....[45]

That statute, which you passed barely two-and-a-half years ago, confers absolute protection in civil and criminal courts to any acts carried out pursuant to Congress' statute of March 3, 1863. And the question you have to ask, the question the prosecution does not want asked but we have to ask is, if the only four Articles of Impeachment deal with the President's suspension of the writ of habeas corpus and Congress' own act two-and-a-half years ago bars any civil or criminal consequences from it to anyone, including the President, how, then, even assuming all these facts are true, can the President be guilty of a high crime or misdemeanor if the statute says he cannot be?

Well, I said this is a case not just about history or law. It is also a case about politics, because politics explain why we are here. When the House voted the Articles of Impeachment, they knew the statute they had passed two years earlier. They knew that statute barred any criminal prosecution of anyone acting under the color of Congress' suspension or at any earlier time. They knew the President could not be guilty of a high crime or misdemeanor because Congress itself had made that impossible. And yet the House still voted the Articles of Impeachment. Why did that happen? The only explanation is politics.

As Professor Foner reminded us, things changed, and they changed in 1864. When the country looked as though it was progressing satisfactorily toward winning the war, elements in the House decided to take matters into their own hands and get rid of a president who looked as though he may not be aggressive enough in dealing with a defeated South when that event occurred.

And already in 1864, there were elements trying to undo the President by running John C. Fremont against him, and that attempt failed. Fortunately, the President survived a recent assassination attempt. And now we get down to impeachment as the last recourse to eliminate a president who seems set on having reason and moderation and compromise dictate how we will reunite this country after this war of rebellion.

And because those elements in the House do not want compromise, do not want the voice of reason, do not want moderation and compromise, we are here attempting to impeach a president for high crimes and misdemeanors that this Congress has already said the president is not to answer for, either civilly or criminally. The only explanation of why we are here is not because of the law. It is because of politics.

So then we come back to what I said in the beginning. Ultimately, it is a question about history, because history always learns, and history always remembers, and history always judges. And the question you have to ask yourself is, as members of the Senate, in this matter, how do you want history to record you?

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45. Habeas Corpus Act, 12 Stat. 755, 756 (1863).

Thank you, Mr. Chief Justice.

IX. VOTE AND CLOSING REMARKS

Chief Justice Gordon: Mr. Prosecutor, before we started these proceedings, we agreed that you would be given the choice of which, if not all, of the Articles of Impeachment would be submitted to the Senate for a vote. Have you chosen them?

Mr. Hammond: Yes, Mr. Chief Justice. We believe that all four Articles should be presented, and we are comfortable that they be presented in the order in which they came.

Chief Justice Gordon: Do you wish them collectively, or individually voted upon?

Mr. Hammond: We think, under the circumstances, since a verdict on any one would spell the end of this presidency, we would just as soon do them all at one time.

Chief Justice Gordon: All right. Thank you, sir.

Now, ladies and gentlemen of the Senate, you have before you all four of the Articles of Impeachment, which were to be proven today before you by the evidence and under the law. I am now going to describe to you your duties.

Members of the Senate, Article I, Section Three of the Constitution of the United States provides that no person shall be convicted without the concurrence of two-thirds of the members present.[46] That refers to the members of the Senate that are present.

In accordance with the rules adopted by the Senate for this trial, you have heard all the evidence that will be presented, and the time is now for the senators present to vote on the Articles of Impeachment. And because the parties have agreed that if the President is found convicted of any one of those Articles of Impeachment, then that will be sufficient for conviction.

So, you are going to have to register your vote. If two-thirds of you vote for conviction, of course, the President will stand convicted of the impeachment. So, now I will ask those of you who wish to vote for conviction to stand.

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46. The provision provides, in part:

> The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice Shall preside: And no Person shall be convicted without Concurrence of two thirds of the Members present.

U.S. CONST. art I, § 3.

(The Senate registered its vote)

All right. Thank you very much. It is obvious from the polling of the Senate that the conviction is *not* confirmed and that a judgment of not guilty should be entered in the trial of the impeachment of President Abraham Lincoln.

I wish to thank counsel and the witnesses for an excellent presentation. I just hope that their fees are not paid in Confederate money.

The Senate is now adjourned.[47]

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47. Shortly after the conclusion of the trial, counsel for the unsuccessful forces favoring impeachment, Larry A. Hammond, expressed dismay that so clear a set of high crimes and misdemeanors propelled so few in the Senate to vote against President Lincoln. Now, several months since the trial, Mr. Hammond has had the occasion for reflection. Aided by the opportunities afforded by the passage of time, he wishes to share his final observations with those who may read of this trial:

> The trial focused, to a very great extent, on the question whether the President was acting in derogation of the Constitution when, on several occasions, he suspended the privilege of the writ of habeas corpus. Although mentioned in passing, relatively little attention was paid to what may have been the far greater constitutional violations. As I spoke with the prosecution's expert witness, Professor Neely, and reviewed the records of the arrests, I was surprised at the extent to which a whole host of constitutional violations seemed to have occurred almost without public objection. Whether or not one believes that President Lincoln was justified in depriving individuals of their right to seek relief by way of habeas corpus, one must wonder at the extent to which free speech and the right of free association were ignored. There probably has not been in our history a greater example of a government disregarding the First Amendment than is evident in these Civil War records.
>
> If I was able to gain an opportunity for a retrial—an opportunity plainly not afforded by our Constitution—I would pay rather less attention to the suspension of the writ of habeas corpus and pay much greater attention to the question whether, under any circumstances, a president is empowered to deprive individuals of their First Amendment rights.
>
> If there is a disturbing message in the Senate's unwillingness to vote this impeachment, it is that too few of us place sufficient premium on the prohibition against governmental interference with dissent.

Letter from Larry A. Hammond to Stacy Sulman Kahana, Executive Note Editor, *Arizona Law Review* (Mar. 2, 1998) (on file with the *Arizona Law Review*).