FORTENBAUGH LECTURE

The Robert Fortenbaugh Memorial Lecture is the outgrowth of a series of Civil War Conferences held annually at Gettysburg College from 1957 to 1961. Organized by Professor Fortenbaugh and his colleagues in the Department of History, the conferences attracted some of the outstanding historians of the nation. Papers presented at these conferences appeared in various scholarly publications such as C. Vann Woodward's *The Burden of Southern History* (1960). The proceedings of two conferences were published in their entirety in book form: *Why the North Won the Civil War* (1960), edited by David Donald, and *Politics and the Crisis of 1860*, (1961), edited by Norman A. Graebner.

The Fortenbaugh Lecture is presented each year on November 19, the anniversary of the Gettysburg Address. It was sustained during its first two decades by an endowment contributed by Mr. and Mrs. Clyde B. Gerberich of Mt. Joy, Pennsylvania in honor of Professor Fortenbaugh, Mr. Gerberich's classmate (Gettysburg, 1913) and long-time friend, who taught history at their alma mater from 1923 until his death in 1959. The endowment has been substantially supplemented by the Harry D. Holloway Fund, a grant of the National Endowment for the Humanities, and benefits from the continuing contributions of friends of the Lecture and the College.

The first Fortenbaugh Lecture was delivered in 1962 by Bruce Catton; the twentieth by C. Vann Woodward in the 150th year of Gettysburg College in 1981. With the twenty-first lecture by Jacques Barzun, in 1982, the College commenced the annual publication of the lectures. The lectures published thus far are:

Jacques Barzun, *Lincoln's Philosophic Vision* (1982)
David Brion Davis, *The Emancipation Moment* (1983)
James M. McPherson, *Lincoln and the Strategy of Unconditional Surrender* (1984)
Eugene D. Genovese, *"Slavery Ordained of God": The Southern Slaveholders' View of Biblical History and Modern Politics* (1985)
Oscar Handlin, *The Road to Gettysburg* (1986).
Marcus Cunliffe, *The Doubled Images of Lincoln and Washington* (1987).
Arthur Schlesinger, Jr., *War and the Constitution: Abraham Lincoln and Franklin D. Roosevelt* (1988).

27th ANNUAL

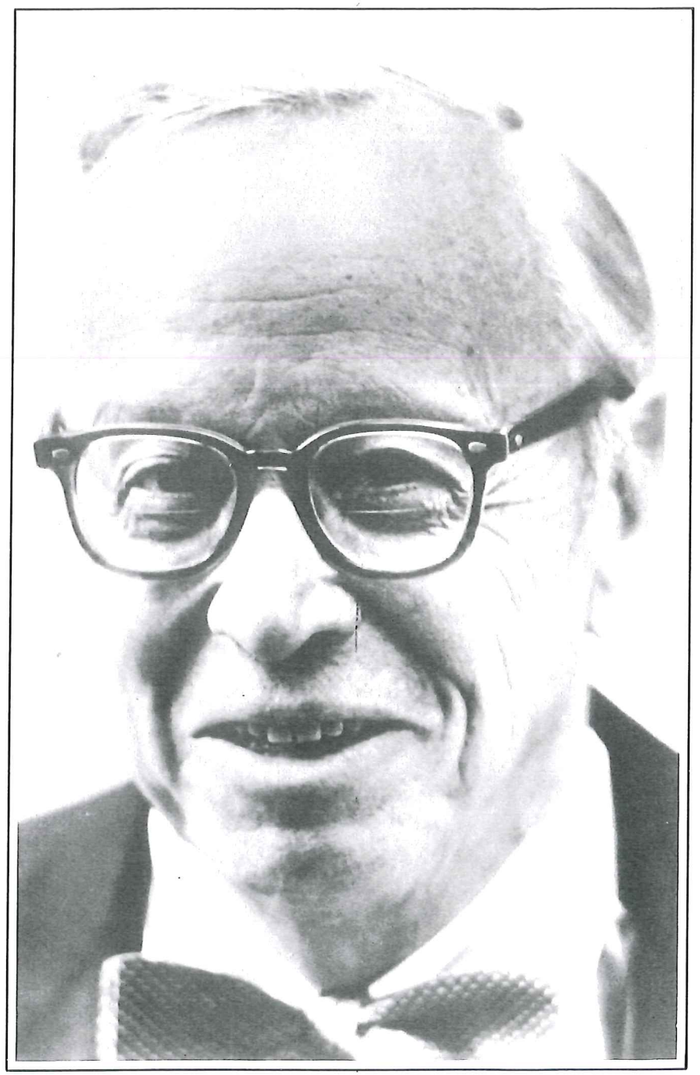
FORTENBAUGH MEMORIAL LECTURE

GETTYSBURG COLLEGE

WAR AND THE CONSTITUTION: ABRAHAM LINCOLN AND FRANKLIN D. ROOSEVELT

ARTHUR SCHLESINGER, JR.

WAR AND THE CONSTITUTION



Arthur M. Schlesinger, Jr.

WAR AND THE CONSTITUTION

ABRAHAM LINCOLN AND FRANKLIN D. ROOSEVELT

Arthur M. Schlesinger, Jr.
Albert Schweitzer Professor of Humanities
The City University of New York

27th Annual
Robert Fortenbaugh Memorial Lecture
Gettysburg College
1988

The watercolor painting on the cover, titled "Abraham Lincoln: the Legend and the Man," is by Rea Redifer of Chadds Ford, Pennsylvania.

Preface

In the 1960s when the cover of *Time* magazine was devoted to Arthur M. Schlesinger, Jr., students of history could sigh with momentary relief: at last scholars, *historians*, were receiving their proper recognition. For if history is important, its students ought to play a large role in American life and culture.

Much has happened since Camelot, to many still "one brief shining moment." Among other things, most of the practitioners of the historian's craft learned to detach themselves ever more from the larger society. In sharp contrast, Professor Schlesinger remains a notable intellectual force on the American scene. Indeed, perhaps no historian consistently reaches the general public with greater success. In doing so he follows in the footsteps of the nineteenth century's George Bancroft, who happens to be the collateral ancestor of Mr. Schlesinger. He is thus an ideal choice to deliver a lecture intended for the literate public but one anchored to solid scholarly moorings.

In this 125th year after the Battle of Gettysburg and Lincoln's Address, Mr. Schlesinger points out that twice in the history of the American Republic, during the Civil War and World War II, the very life of the nation was at stake. He looks at the paradox of how the presidents at those times, though devoted to the Constitution, moved beyond it—while making war and protecting internal security. The trials were fiery; the triumphs all the greater. The lecture reaches a crescendo with criteria suggested by the experiences of Lincoln and FDR, under which a chief magistrate may resort to emergency powers seemingly outside of the Constitution.

Once before Mr. Schlesinger took a comparative look at the Civil War and World War II, though his focus then was on the former while the inspiration came from the latter. In a 1949 essay he challenged the then dominant notion (which historians still mislabel as Revisionism) that the Civil War was a useless conflict.[1] With World War II and a revived understanding of the weight of moral judgments in history behind him, and the Civil Rights era just ahead, Mr. Schlesinger's challenge carried the day. And now, looking at those two fateful war-periods again, he suggests standards for abiding—or not—by the Constitution in grave national emergencies. He thus fulfills nobly a duty of the scholar and citizen in a democracy.

Thanksgiving Day, 1988
Farm by the Ford
Gettysburg

Gabor S. Boritt

It is a high honor to be invited to deliver the Fortenbaugh Memorial Lecture at Gettysburg on the 125th anniversary of Abraham Lincoln's address—a high honor and a hopeless responsibility. Who but can falter in face of those luminous phrases with which the greatest of our Presidents at once mourned the dead, vindicated their sacrifice and defined the abiding principles of democratic government?

Oddly the address made no great impression on the day. Lincoln's bright and devoted young secretary John Hay casually noted in his diary: "The President, in a fine, free way, with more grace than is his wont, said his half dozen words of consecration, and the music wailed, and we went home through crowded and cheering streets. And all the particulars are in the daily papers."[1] It took time for the Gettysburg Address to become a classic statement of the American creed. Today one sometimes feels that Lincoln's crystalline words have grown so familiar that they are part of the mechanical ritual of our lives—words we hear and repeat but no longer attend to.

The more venerable among us may remember *Ruggles of Red Gap*, a film of half a century ago in which Charles Laughton, playing an English butler won in a poker game by an American rancher, electrifies his new employers—and movie audiences of the 1930s sitting in darkened theaters—by remembering the Gettysburg Address when his new boss had forgotten it and delivering it as if each stunning phrase had come fresh from his mind. Laughton made us listen anew and made us think anew. For the testing of which President Lincoln so wonderfully spoke—whether a nation conceived in liberty and dedicated to the proposition that all men are created equal can long endure—was not only the aspiration of 1776 and the challenge of 1863 but must remain the unending commitment of all Americans till the end of our days.

The republic has gone through two awful times of testing since the achievement of independence—two times when the life of the nation was critically at stake, two times when the nation was led by Presidents absolutely determined that government of the people, by the people, for the people, should not perish from the earth. The two Presidents had to confront the question whether the Constitution of 1787 was equal to the cruel emergencies of 1861 and 1941. History in these periods subjected our republican institutions to their severest trials—and, with the survival of the Constitution, saw their greatest triumphs.

The two Presidents were very different men in very different situations. Abraham Lincoln striding from the backwoods of the middle border was the common man incarnate. Franklin D. Roosevelt was a Hudson River patrician.

Lincoln was self-educated. Roosevelt received the best education his country could provide. Lincoln was chosen to head a republic of thirty-four states with a population of thirty-two million; Roosevelt a republic of forty-eight states with a population four times as great. Lincoln faced a civil war within the United States; Roosevelt a foreign war threatening to engulf the planet. Lincoln operated a presidency of still largely undefined powers; Roosevelt, a presidency considerably more secure in its assertions of national leadership. Lincoln was enveloped by a tragic sense of life. Roosevelt breezed through life in confident and incurable optimism.

Yet they had many similarities. Both were men of mysterious and impenetrable reserve, concealing resolute purpose behind screens of fable, parable, and jocosity. Both had deep and irreversible moral convictions about freedom and human rights. Both were skilled, crafty, and, when necessary, ruthless politicians. Both were lawyers who, while duly respecting their profession, regarded law as secondary to political leadership. Both had faith that the Constitution, spaciously interpreted, could surmount crisis. Lincoln, following his hero Henry Clay, "my beau ideal of a statesman," in a broad reading of the national charter, said in his First Inaugural: "I take the official oath to-day, with no mental reservations, and with no purpose to construe the Constitution or laws, by any hypercritical rules." Roosevelt, following his heroes Theodore Roosevelt and Woodrow Wilson in their robust conceptions of presidential leadership, said in his First Inaugural, "Our Constitution is so simple and practical that it is possible always to meet extraordinary needs by changes in emphasis and arrangement without loss of essential form."[3]

And both Presidents confronted national emergencies that demanded bold and peremptory action. Both assumed powers that led other Americans to charge that the Constitution had been transgressed and betrayed. Both provoked cries of dictatorship. Both, in responding to what they saw as the necessities of the day, risked the creation of dangerous precedents for the future. An examination of the manner in which Lincoln and Roosevelt met their emergencies may illuminate our understanding of the potentialities, limits, and perils of presidential leadership. I propose to discuss in particular the way these two presidents handled first the war-making power and then threats to internal security once war had begun.

The men who drafted the Constitution in Philadelphia in 1787 had questions of national defense much on their minds. The remedy for the infant nation's international vulnerabilities was, they believed, a strong central government empowered to create a standing army and navy, to regulate commerce,

to enforce treaties and, when necessary, to go to war. But, given the separation of powers, how should foreign policy authority be distributed within the new national government?

Here the Framers were unambiguous in their decisions. The vital powers were to be reserved for Congress. Article I of the new Constitution gave Congress not only the exclusive appropriations power—itself a potent instrument of control—but the exclusive power to declare war, to raise and support armies, to provide and maintain a navy, to make rules for the government and regulation of the armed services, and to grant letters of marque and reprisal—the last provision representing the eighteenth-century equivalent of retaliatory strikes and enabling Congress to authorize limited as well as formal war. Even Alexander Hamilton, the convention's foremost proponent of executive energy, endorsed this allocation of powers, expressly rejecting the notion that foreign policy was the private property of the President. "The history of human conduct," Hamilton wrote in the 75th Federalist, "does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States."

No one can doubt the determination of the Framers, in the words of James Wilson, to establish a procedure that "will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress."[4] Sixty years later, during the Mexican War, Congressman Abraham Lincoln of Illinois accurately expressed original intent when he wrote that the convention "resolved so to frame the Constitution that *no one man* should hold the power of bringing this oppression upon us."[5]

While reserving decisive foreign policy powers for Congress, the Framers did assign the executive a role in the conduct of national security affairs. Instead of giving Congress the exclusive power to "make" war, as the draft under consideration stipulated, James Madison moved to replace "make" by "declare" in order to leave "to the Executive the power to repel sudden attacks."[6]

The President, moreover, was constitutionally designated commander in chief of the armed services. The Framers saw this, however, as a ministerial function, not as a grant of independent executive authority. The designation, as Hamilton wrote in the 69th Federalist, "would amount to nothing more than the supreme command and direction of the military and naval forces." It meant only that the President should have the direction of war once authorized

or begun. Hamilton contrasted this limited assignment with the power of the British king—a power that "extended to the declaring of war and to the raising and regulating of fleets and armies,—all which by the Constitution under consideration, would appertain to the legislature."

The Constitution, in short, envisaged a partnership between Congress and the President in the conduct of foreign affairs with Congress as the senior partner. Yet one may suppose that another consideration lingered in the Framers' innermost thoughts—a fallback position that, in acknowledging the hard realities of a dangerous world, justified a measure of unilateral executive initiative. This was the question of emergencies.

The Framers had been reared on John Locke. They were well acquainted with chapter fourteen, "Of Prerogative," in Locke's *Second Treatise on Civil Government.* While in normal times, Locke said, responsible rulers must observe the rule of law, in dire emergencies they could initiate extralegal or even illegal action. Sometimes "a strict and rigid observation of the laws may do harm." The executive, Locke contended, must have the reserve power "to act according to discretion for the public good, without the prescription of law and sometimes even against it." The test of whether prerogative was rightfully invoked, Locke said, was whether the emergency was a true one and whether the exercise of prerogatives tended "to the good or hurt of the people"—judgments to be made in the end not by the ruler but by the people.

Prerogative was the exercise of the law of national self-preservation. The doctrine was not conceded in the Constitution, except for a solitary provision permitting the suspension of the writ of habeas corpus "when in Cases of Rebellion or Invasion the public safety may require it" (Article I, Section 9). The limitation of emergency prerogative to rebellion and invasion and to the single matter of habeas corpus implied less a standard that could be extended to other issues than a rejection of any broader suspension of constitutional guarantees even in emergencies.

Yet the notion that crisis might require the executive to act outside the Constitution in order to save the Constitution still lurked in the back of the minds of the men who won American independence. Hamilton wrote in the 28th Federalist of "that original right of self-defence which is paramount to all positive forms of government" and Madison in the 41st thought it "vain to oppose constitutional barriers to the impulse of self-preservation." Even Jefferson, the apostle of strict construction, affirmed the need for emergency prerogative. "On great occasions," he wrote in 1807, "every good officer must be ready to risk himself in going beyond the strict line of the law, when the

public preservation requires it." There were, he said, "extreme cases where the laws become inadequate to their own preservation, and where the universal recourse is a dictator, or martial law."[7]

Nor was this a passing thought. Jefferson restated the point more fully after he left the White House. "A strict observance of the written laws," he wrote carefully in 1810, "is doubtless *one* of the high duties of a good citizen, but it is not *the highest.* The laws of necessity, of self-preservation, of saving our country when in danger, are of a higher obligation. . . . To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means." He understood the risks in this argument and therefore placed emergency power under the judgment of history: "The line of discrimination between cases may be difficult; but the good officer is bound to draw it at his own peril, and throw himself on the justice of his country and the rectitude of his motives."[8]

Jefferson's defense of Lockean prerogative was inspired by his passion to protect the republic against Aaron Burr. This was a doubtful case. No one can be sure what the Burr conspiracy was up to. The House of Representatives, in voting down a proposal for the suspension of habeas corpus, rejected any idea that the life of the nation was at risk. Neither Jefferson's contemporaries nor future historians have been convinced that Jefferson faced an emergency so imperative as to justify a laying aside of the law. Burr's acquittal by the courts helped limit subsequent resort to emergency prerogative.

It was not enough for a President personally to think the country was in danger. To confirm a judgment of dire emergency, a President had to have the broad agreement of Congress and public opinion. Emergencies considerably more authentic than the Burr conspiracy took place in the next thirty years. But Presidents as forceful as Jackson and Polk refrained from invoking emergency prerogative—even in face of the nullification crisis and the war with Mexico.

Jefferson himself had restricted prerogative to "great occasions." But in fact he was prepared to ignore Congress and to take unilateral action on lesser occasions as well. Thus he sent a naval squadron to the Mediterranean under secret orders to fight the Barbary pirates, applied for congressional sanction six months later, and then misled Congress as to the nature of the orders. He unilaterally authorized the seizure of armed vessels in waters extending to the Gulf Stream, engaged in rearmament without congressional appropriations, and not infrequently withheld information from Congress.

Others of our early Presidents imitated Jefferson's unilateral initiatives. As Judge A. D. Sofaer has shown in his magistral work, *War, Foreign Affairs and Constitutional Power: The Origins*, unauthorized presidential adventurism thrived in the early republic. But these Presidents did not assert it as their constitutional right to ignore Congress and strike out on their own. "At no time," Sofaer writes of the classical period, "did the executive claim 'inherent' power to initiate military action."[9] Sofaer's surmise is that our early Presidents deliberately selected venturesome agents, deliberately kept their missions secret, deliberately gave them vague instructions, deliberately declined to approve or disapprove their constitutionally questionable plans, and deliberately denied Congress the information to determine whether aggressive acts were authorized—all precisely because the Presidents wanted to do things they knew lay beyond their constitutional right to command.

The partnership between Congress and the executive in the conduct of foreign affairs was thus unstable from the start. President Polk, in getting into a war with Mexico that, according to Lincoln, had been unnecessarily and unconstitutionally begun, showed both the potentialities of presidential power and the limitations of legislative control. Despite his own strong opposition to the Mexican War, Lincoln had the advantage of Polk's vigorous example when he returned to Washington a dozen years later, now President himself, facing not foreign war but domestic insurrection.

Domestic insurrection raised a different set of constitutional issues, and this simplified Lincoln's problem. He did not—or at least so he believed—need congressional recognition of a state of war, as he would have done against a foreign state (four Supreme Court justices soon opined otherwise, however, in the Prize cases). He had only, he believed, to carry out his presidential duty of enforcing domestic law against rebellious individuals.

Still even this duty implied in the circumstances a warlike course that might well call for congressional approval. And that warlike course called for auxiliary measures that certainly required congressional action. Lincoln chose nevertheless to begin by assuming power to act independently of Congress. Fort Sumter was attacked on 12 April 1861. On 15 April, Lincoln summoned Congress to meet in special session—but not till 4 July. He thereby gained ten weeks to bypass Congress, rule by decree, and set the nation irrevocably on the path to war.

On 15 April he called out state militia to the number of seventy-five thousand. Here he was acting on the basis of a statute. From then on he acted on his own. On 19 April he imposed a blockade on rebel ports, thereby assuming authority to take actions hitherto considered as requiring a declaration of war. On 3 May he called for volunteers and enlarged the army and navy, thereby usurping the power confided to Congress to raise armies and maintain navies. On 20 April he ordered the Secretary of the Treasury to spend public money for defense without congressional appropriation, thereby violating Article I, Section 9, of the Constitution. On 27 April he authorized the commanding general of the army to suspend the writ of habeas corpus—this despite the fact that the power of suspension, while not assigned explicitly to Congress, lay in that article of the Constitution devoted to the powers of Congress. Later he claimed the habeas corpus clause as a precedent for wider suspension of constitutional rights in time of rebellion or invasion—an undoubted stretching of original intent.

When Congress finally assembled on 4 July, Lincoln justified his actions. The issue, he said, embraced more than the fate of these United States. The rebellion forced "the whole family of man" to ask questions going to the roots of self-government: " 'Is there in all republics, this inherent and fatal weakness?' 'Must a Government, of necessity, be too *strong* for the liberties of its own people, or too *weak* to maintain its own existence?' " So viewing the issue, Lincoln continued, "no choice was left but to call out the war power of the Government; and so to resist force employed for its destruction, by force for its preservation."[10]

The phrase "war power" was novel in American constitutional discourse. John Quincy Adams, it is true, had contrasted in 1836 the "peace power" as something limited by the Constitution as against the "war power," limited only by the laws and usages of nations.[11] But Adams was speaking about the war power of the national government as a whole, exercised through and with Congress. He was not speaking, as Lincoln was, about the war power as a peculiar function of the executive.

The "war power" flowed into the Presidency, as Lincoln saw it, through the presidential oath to "preserve, protect, and defend the Constitution," through the constitutional commitment to take care that the laws be faithfully executed, and through the constitutional designation of the President as commander in chief. "I think," he later said, "the Constitution invests its commander-in-chief, with the law of war, in time of war"[12]—a statement that, if not altogether clear, was certainly pregnant. It must be noted, however, that Lincoln limited that investment of power to wartime, thereby excluding twentieth-century tendencies to argue that the clause bestows powers on the Presidency in times of peace.

Still, Lincoln's reading of the clause greatly enlarged presidential power in war. His most famous action, the Emancipation Proclamation, began by invoking "the power in me vested as Commander-in-Chief of the Army and Navy" and ended by justifying emancipation as "warranted by the Constitution, upon military necessity." He later characterized the Proclamation as without "constitutional or legal justification, except as a military measure." He added: "I conceive that I may in an emergency do things on military grounds which cannot be done constitutionally by Congress." And: "As commander-in-chief of the army and navy, in time of war, I suppose I have a right to take any measure which may best subdue the enemy."[13]

Lincoln did not himself define the limits of the executive war power. An exculpatory opinion, extracted from his somewhat reluctant Attorney General, Edward Bates, contended that the national emergency justified Lincoln in suspending habeas corpus and disregarding subsequent judicial objection, even from so august a source as Chief Justice Roger Taney in ex parte Merryman. The President, Bates added, was the judge of the gravity of the emergency and was accountable only through procedures of impeachment.

But Lincoln, though he had begun by acting without congressional authorization, had no intention of ruling Congress out of the game. His actions, he told Congress when it finally assembled, "whether strictly legal or not, were ventured upon under what appeared to be a popular demand and a public necessity; trusting then as now that Congress would readily ratify them. It is believed that nothing has been done beyond the constitutional competency of Congress."

It was necessary to suspend habeas corpus, Lincoln added, in order to assure the enforcement of the rest of the law and thereby the protection of the state. "Are all the laws *but one* to go unexecuted, and the Government itself go to pieces, lest that one be violated? . . . In such a case, would not the official oath be violated if the government should be overthrown?" Would the very principles of freedom prevent free government from defending itself? As Lincoln explained his case toward the end of the war, his oath to preserve the Constitution imposed the "duty of preserving, by every indispensable means, that government—that nation—of which the constitution was the organic law. Was it possible to lose the nation, and yet preserve the Constitution?"[14]

Lincoln took that duty with utmost seriousness and assessed the internal threat behind the lines in the North with stern urgency. Rebel sympathizers, he said, "pervaded all departments of the government and nearly all communities of the people. . . . Under cover of 'Liberty of speech,' 'Liberty of the

press,' and '*habeas corpus*,' they hoped to keep on foot amongst us a most efficient corps of spies, informers, supplyers, and aiders and abettors of their cause in a thousand ways." Conspiracy-mongers like the detectives La Fayette Baker and Allan Pinkerton inflamed the official imagination. Northern opponents of the war were denounced as Copperheads. Invoking his "war power," Lincoln set in motion a series of drastic actions: martial law and military courts far from the fighting fronts; secret police and paid informers; arbitrary arrest and detention of perhaps some fourteen thousand persons; suppression of newspapers; seizure of property; denial of the mails to "treasonable correspondence"—all in the belief that "certain proceedings are constitutional when, in cases of rebellion or Invasion, the public Safety requires them, which would not be constitutional when, in absence of rebellion or invasion, the public Safety does not require them."[15]

Such actions, though tempered by Lincoln's restraint and humanity, provoked denunciations of despotism and cries of dictatorship. In 1862 the eminent lawyer Benjamin R. Curtis, who five years earlier had been a dissenting Supreme Court justice in the Dred Scott case and six years later would be Andrew Johnson's counsel in the impeachment proceedings, published a cogent pamphlet condemning Lincoln's proclamations and orders as "assertions of transcendent executive power" having the effect of placing "every citizen of the United States under the direct military command and control of the President."[16]

The exuberant Secretary of State W. H. Seward rejoiced in the situation. "We elect a king every four years," he told the *London Times* correspondent, "and give him absolute power within certain limits, which after all he can interpret for himself."[17] Even so measured a commentator as Lord Bryce could write in a few years that Lincoln was "almost a dictator . . . who wielded more authority than any single Englishman has done since Oliver Cromwell."[18] The Civil War, Henry Adams wrote five years after Appomattox, "for the time obliterated the Constitution."[19]

Of course Lincoln was far from a dictator. The mechanisms of accountability—Congress, the courts, free elections, freedoms of speech, press and assembly—all remained in place. No dictator would have tolerated such fierce opposition in Congress and such bitter criticism in the newspapers. Nor would a dictator have submitted to a presidential election in the midst of war—and made preparations, in case he lost, to cooperate with his successor. Nor would a dictator have tolerated a Copperhead as Chief Justice of the Supreme Court. Lincoln did not even seek a Sedition Act of the sort Congress had given the

executive in 1798, or an Espionage Act, as in 1917.

Still, in issuing decrees without legislative authorization, Lincoln assumed quasi-dictatorial powers. And no doubt he exaggerated the internal threat to national security. But civil wars are desperate affairs. The North did in fact swarm with persons opposed to the war. Some Copperheads were in fact Confederate agents. A responsible President could not afford to take chances. One might wish that Lincoln had acted at the time with the wisdom available to historians after the peril had passed. But Lincoln had to reckon with the gravest threat to the life of the republic, and he could not foretell the outcome. "It is very difficult to remember," wrote Maitland, "that events now in the past were once in the future."[20] We know how it all came out. Lincoln did not.

As usual, Lincoln found the homely analogy to defend his course. Human beings, he observed, wished to protect life and limb. "Yet often a limb must be amputated to save a life; but a life is never wisely given to save a limb. I felt that measures, otherwise unconstitutional, might become lawful by becoming indispensable to the preservation of the constitution, through the preservation of the nation."[21] One recalls Jefferson's point about absurdly sacrificing the end to the means; one hears the Lockean echo, even though the Locke to whom Lincoln most often referred was the lesser Locke who wrote under the name of Petroleum V. Nasby.

Lincoln secured congressional ratification of most of his unilateral actions. Such ratification might be taken as legislative obeisance to an imperial President—or as legislative affirmation that, despite the emergency, Congress retained its constitutional powers. With the war still on, a divided Supreme Court in 1863 in the Prize Cases rejected the contention that those actions Lincoln took unilaterally before Congress ratified them represented merely his "personal war against the rebellion." The majority ruled that the attack on Fort Sumter created a *de facto* state of civil war and that the President was "bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name."[22] In the stress of war the judiciary too accepted what the executive had ventured upon under a popular demand and a public necessity.

THE EMERGENCY FRANKLIN ROOSEVELT faced eighty years later assumed a different form but presented almost as mortal a threat to the life of the nation. By the summer of 1940 Great Britain stood alone against Hitler. With nearly half the British destroyer fleet sunk or damaged, with a Nazi invasion of Britain darkly in prospect, Winston Churchill, the new British prime

THE FEDERAL PHOENIX.

Like the fabled bird of ancient Egyptian mythology, the reelected Lincoln rises from the ashes of American liberties: free press, state rights, *habeas corpus*, and more. The cartoon by John Tenniel appeared in the London *Punch* on December 3, 1864. Special Collections, Gettysburg College Library.

minister, asked Roosevelt for the loan of American destroyers "as a matter of life and death."[23] Weighing this anguished request, Roosevelt, for all his desire to aid Britain, was acutely mindful of the constitutional role of Congress.

When the French prime minister had asked earlier that spring for American assistance against the Nazi blitzkrieg, Roosevelt had replied that, while the United States would continue supplies so long as the French continued resistance, "I know that you will understand that these statements carry with them no implications of military commitments. Only the Congress can make such commitments."[24] To Churchill's plea for the loan of destroyers, Roosevelt initially responded that "a step of this kind could not be taken except with the specific authorization of the Congress, and I am not certain that it would be wise for that suggestion to be made to the Congress at this moment."[25] Not only would such a step enrage the isolationist opposition in Congress but it was also an explosive issue to throw into the 1940 presidential campaign. As late as August of this dangerous year Roosevelt continued to believe that a transfer of destroyers would require congressional action.

In the meantime, able New Deal lawyers, notably Benjamin V. Cohen and Dean Acheson, construed the applicable statutes to mean that unilateral executive action would be legal if the transfer of destroyers could be shown to strengthen rather than to weaken American defenses. At first the President heard the new argument with skepticism. But the British plight grew more desperate and Churchill's pleas more urgent. Roosevelt now moved with careful, if informal, concern for the disciplines of consent. He consulted his cabinet. He consulted congressional leaders. Through intermediaries he consulted the Republican candidates for President and Vice President, Wendell Willkie and Senator Charles McNary. McNary, a public-spirited man, was also the Republican leader of the Senate, and he soon passed word to the White House that, while it would be hard for him to vote for a statute authorizing the transfer of destroyers, he would make no objection if persuasive grounds could be found for going ahead without resort to Congress.

Roosevelt then extracted from his somewhat reluctant Attorney General, Robert H. Jackson, an opinion telling him that he could by executive agreement exchange destroyers for bases in British possessions in the Western Hemisphere. Jackson mentioned the commander in chief clause only to note, "Happily, there has been little occasion in our history for the interpretation of the powers of the President as Commander in Chief." Instead of relying upon the "constitutional power" of the Presidency, Jackson found "ample statutory authority to support the acquisition of these bases." His opinion rested basically on a construction of laws passed by Congress, not on theories of inherent executive authority. Later Jackson observed that Roosevelt "did not presume to rely upon any claims of constitutional power as Commander-in-Chief" but made the transfer because, as he read the law, "Congress so authorized him."[26]

Critics thought the Attorney General's opinion strained, and Jackson himself years later made a semi-disclaimer. The great constitutional scholar E. S. Corwin called the opinion at the time "an endorsement of unrestrained autocracy in the field of our foreign relations," adding hyperbolically that "no such dangerous opinion was ever before penned by an Attorney General of the United States."[27]

Even great constitutional scholars can overreact, and in this case Corwin surely overreacted. The Jackson opinion was a response to a unique emergency; it received tacit congressional ratification when Congress appropriated money to build the bases; and to my knowledge it has never since been cited as justification for solo executive exploits in foreign affairs. The destroyer deal was compelled by a threat to the republic surpassed only by the emergency Lincoln faced after Sumter. It seems less a flagrant exercise in presidential usurpation than a defensible application of the Locke-Jefferson-Lincoln doctrine of emergency prerogative.

The destroyer deal was an unneutral act. Still, as international lawyers pointed out at the time, Hitler's own scorn for neutral rights weakened any claim he might make for the neutral rights of Nazi Germany. The deal did not (as some have said in recent years) violate domestic neutrality legislation. That legislation governed economic, not political, relations between the United States and belligerent states. It prohibited loans, credits, arms sale, and travel under specified conditions; it did not prohibit choosing sides.

The really decisive step away from neutrality, however, was not taken unilaterally by the President. It was taken with due solemnity by the President and Congress together in March 1941. Instead of relying on inherent presidential power, Roosevelt asked Congress to enact the Lend-Lease bill, a bill that, if it became law, would align the United States in the most unequivocal manner with Britain in its war against the Axis states. After two months of vigorous debate, Congress passed Lend-Lease by comfortable margins in both houses.

The Lend-Lease Act set the course for the months that followed. As Cordell Hull, the Secretary of State, told the American Society of International Law in April, the declared policy of the legislative and executive branches to give aid to Britain "means in practical application that such aid must reach its

destination in the shortest of time and in maximum quantity. So ways must be found to do this."[28]

Once Congress had authorized the lending and leasing of goods to keep Britain in the war, did this authorization not imply an effort to make sure that the goods arrived? So Roosevelt assumed, trusting that a murky proclamation of "unlimited national emergency" in May and the impact of Nazi aggression on public opinion would justify his policy. In protecting the British lifeline, Roosevelt in the next months undertook a series of steps that by autumn had thrust the United States into an undeclared naval war in the North Atlantic. These steps—U. S. naval patrols that soon turned into convoys halfway across the ocean; the despatch of American troops to Greenland and soon to Iceland; cooperation with the British navy in tracing and sinking German U-boats; misrepresentation of the German attack on the destroyer *Greer*; the shoot-at-sight policy in patrol zones in September—were taken on presidential orders and without congressional authorization.

The question arises: by what authority did Roosevelt thus go to quasi-war in the North Atlantic? Looking back at the fiery debates of that ancient day, one is struck by the relative absence of constitutional argument. Isolationists denounced the Lend-Lease Act as an excessive delegation of legislative power to the President. But it was, after all, a statute duly passed by Congress after full debate. It was not a unilateral assumption of power by the President.

No isolationist had paid more attention to the Constitution than the formidable historian Charles A. Beard. Beard had made his name thirty years before with *An Economic Interpretation of the Constitution*, and in 1943 he published *The Republic*, a series of dialogues on the Constitution. But the two volumes of polemic against Roosevelt's foreign policy he wrote after the war turned on presidential violations of "covenants with the American people to keep this nation out of war"—covenants made in speeches and party platforms; not, except for scattered references in the epilogue to the second volume, on presidential violations of constitutional provisions and prohibitions.[29]

In Congress isolationists tended to make substantive rather than constitutional arguments. Senator Robert A. Taft of Ohio was an exception. At one point he objected that the President had "no legal or constitutional right to send American troops to Iceland" without congressional authorization. Congressional acquiescence, Taft said, might "nullify for all time the constitutional authority distinctly reserved to Congress to declare war." But only one senator supported Taft's constitutional protest.[30] The failure to invoke the Constitution probably expressed a sense of futility about constitutional argumentation once

the passage of the Lend-Lease Act had made Congress an accomplice in Roosevelt's policy.

The constitutional question remained in abeyance. Roosevelt acted as if his policies derived from the need to execute the congressional mandate embodied in the Lend-Lease Act, not from independent presidential or commander in chief power. Why then did he not seek explicit congressional authorization?

Unlike Lincoln, who could count on congressional ratification for his early unilateral measures, Roosevelt faced a bitterly divided Congress. He had to balance risks: the risk of arguably illegal actions that would get Lend-Lease goods to Britain against the risk, should he seek congressional authorization, of a defeat that would imply repudiation of the aid-to-Britain policy and might thereby, in Roosevelt's profound belief, mean the capitulation of Britain and deadly danger to the United States.

In April 1941, as British shipping losses grew, Henry L. Stimson, the Secretary of War, urged the President to request convoy authority from Congress. Roosevelt responded, as Stimson noted in his diary, "that it was too dangerous to ask the Congress for the power to convoy. . . . If such a resolution were pressed now it would probably be defeated."[31] In May, Stimson handed Roosevelt a draft congressional resolution authorizing the use of force to protect the delivery of supplies to Britain. The President thanked him but again judged the time ill-chosen. In June, the President's Harvard classmate Grenville Clark, now an eminent lawyer, urged Roosevelt to ask Congress for a joint resolution approving measures necessary to assure delivery. Roosevelt replied in July that the time was not "quite right."[32] The renewal of selective service in August by a single vote in the House of Representatives would seem to vindicate the presidential assessment of the political odds.

Roosevelt's actions in the autumn of 1941, like Lincoln's in the spring of 1861, were, in a strict view, unconstitutional. But, unlike later Presidents, he did not seek to justify the commitment of American forces to combat by pleas of inherent constitutional power as President or as commander in chief. He thereby proposed no constitutional departures. Nor did he move behind a veil of secrecy. The debate between the isolationists and the interventionists was the most bitter in my lifetime. Roosevelt's major decisions were argued in the open and concluded in the open. With Hitler's cooperation, he brought the country along and kept it substantially united behind his policies.

He did not assert in the later imperial style that there was no need to consider Congress because the office of commander in chief gave him all the authority he needed. Jackson's opinion on the destroyer deal shows how un-

developed commander-in-chief theory was in those innocent days. In eighty-three press conferences up to Pearl Harbor Roosevelt never once alleged special powers in foreign affairs as commander in chief. When the title occurred in his speeches and messages, it generally signified only the narrow and traditional view of the commander in chief as the fellow who gave orders to the armed forces.

Pearl Harbor soon ended the policy debate. Thereafter Roosevelt, like Lincoln, had to cope with problems of internal security. Roosevelt had much the simpler task. It was easier to protect internal security in foreign war than in civil war. Moreover, civil liberties were themselves much more precisely defined and understood in 1941 than in 1861; and, as a result of the extension of the Bill of Rights by incorporation through the Fourteenth Amendment, civil liberties were in a much stronger constitutional position.

In 1940, while protesting his sympathy with Justice Holmes's condemnation of wiretapping in the Olmstead case, Roosevelt had granted his Attorney General qualified permission to wiretap "persons suspected of subversive activities against the United States."[33] Given the conviction Roosevelt shared with most Americans that a Nazi victory endangered the United States, he would presumably have been delinquent in his duty had he not ordered precautionary measures against Nazi espionage, sabotage, and "fifth column" penetration. Though we now know that the internal Nazi menace was even more exaggerated than the Copperhead menace had been, who could have been sure of that at the time? No more than Lincoln could Roosevelt foretell the outcome. Events now safely in the past were then in the perilous future.

Roosevelt, like Lincoln, broadened his apprehensions to include Americans honestly opposed to the war. By prodding the FBI to investigate isolationists and their organizations, he blurred the line between enemy agents and political opponents. Harking back to the Civil War, Roosevelt even called his isolationist adversaries Copperheads; and in the conspiracy-obsessed J. Edgar Hoover he found an equivalent of Lincoln's La Fayette Baker and Allan Pinkerton.

There was, however, little serious government follow-up of Roosevelt's prodding. His prods were evidently taken by his subordinates as expressions of passing irritation rather than of constant purpose. In 1941 Roosevelt appointed Francis Biddle, a former Holmes law clerk and a distinguished civil libertarian, as Attorney General. "The most important job an Attorney General can do in a time of emergency," Biddle said on assuming the office, "is to protect civil liberties. . . . Civil liberties are the essence of the democracy we are pledged to

protect."[34] Roosevelt kept Biddle on the job throughout the war despite Biddle's repeated resistance to presidential importunings that threatened the Bill of Rights.

Roosevelt's preoccupation with pro-Nazi activity increased after Pearl Harbor. "He was not much interested in the theory of sedition," Biddle later recalled, "or in the constitutional right to criticize the government in wartime. He wanted this anti-war talk stopped."[35] Biddle managed to avoid most presidential suggestions regarding the prosecution or suppression of the press. But in time, Roosevelt's prods forced a reluctant Biddle to approve the indictment of twenty-six pro-fascist Americans under a dubious application of the law of criminal conspiracy. A chaotic trial ended with the death of the judge, and the case was dropped.

Biddle also opposed the most shameful abuse of power within the United States during the war—the relocation of Americans of Japanese descent. Here Roosevelt responded both to local pressure, including that of Attorney General Earl Warren of California, and to the War Department, where such respected lawyers as Henry L. Stimson and John J. McCloy argued for action. Congress ratified Roosevelt's executive order before it was put into effect, so the relocation did not represent a unilateral exercise of presidential power. The Supreme Court upheld the program in the Hirabayashi and Korematsu cases, both decided, like the Prize cases, in wartime.

The most vicious assaults on civil liberties in the Roosevelt years resulted from private, not government, action—though private action spurred on by the Supreme Court. The Gobitis decision in 1940 upholding the compulsory salute and pledge of allegiance to the flag led to persecutions of Jehovah's Witnesses who rejected flag worship as idolatry—mobs, arson, and even a case of castration.[36] Then in 1943, despite the high patriotic fervor generated by the war, the Court reversed itself and declared the compulsory pledge and salute unconstitutional. "If there be any fixed star in our constitutional constellation," Robert H. Jackson, now an associate justice, wrote on behalf of the Court, "it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[37] One would like to hope that these words still express the national view.

Despite Roosevelt's moments of impatience and exasperation, his administration's performance on civil liberties during the Second World War was conspicuously better, if also easier to accomplish, than the Lincoln administration's performance during the Civil War. In 1945 the American Civil Liberties Union saluted "the extraordinary and unexpected record . . . in freedom of

debate and dissent on all public issues and in the comparatively slight resort to war-time measures of control or repression of opinion."[38]

Most of Roosevelt's actions to protect national security—even the relocation of Japanese Americans—observed constitutional requirements of due process. His most conspicuous deviation from the Constitution during the war came in September 1942, when he told Congress that, if it did not repeal a particular provision in the Price Control Act within three weeks, he would refuse to execute it. "The President has the power, under the Constitution and under Congressional Action," he declared, "to take measures necessary to avert a disaster which would interfere with the winning of the war."[39] Congress repealed the offending provision, averting a constitutional showdown.

The question lingers: by what authority did Roosevelt act? We are back again to Locke and emergency prerogative. Franklin Roosevelt had probably not looked at the *Second Treatise on Civil Government* since his student days at Harvard, if he had ever looked at it then. But the doctrine of emergency prerogative had endured because it expressed a real, if rare, necessity. Confronted by Hitler, Roosevelt supposed, as Jefferson and Lincoln had supposed in the crises of their presidencies, that the life of the nation was at stake and that this justified extreme measures, using "the sovereignty of Government," as Roosevelt said in 1941, "to save Government."[40] Like Jefferson and Lincoln, Roosevelt did not pretend to be exercising routine or inherent presidential power. Unlike Jefferson's case of the Burr conspiracy but like Lincoln's case of the Civil War, Roosevelt's case had substantial public backing, and the electorate (and therefore, as Mr. Dooley had predicted, the courts) sustained his use of emergency prerogative.

ROOSEVELT IN 1941, like Lincoln in 1861, did what he did under what appeared to be a popular demand and a public necessity. Both Presidents took their actions in light of day and to the accompaniment of uninhibited political debate. They did what they thought they had to do to save the republic. They threw themselves in the end on the justice of the country and the rectitude of their motives. Whatever Lincoln and Roosevelt felt compelled to do under the pressure of crisis did not corrupt their essential commitment to constitutional ways and democratic processes.

National crisis, the law of self-preservation, the life of the republic at stake, might thus justify Lockean prerogative and the consequent aggrandizement of executive power. Lincoln and Roosevelt embraced the grim necessity. But, regarding executive aggrandizement as but a means to a greater end, the

survival of liberty and law, of government by, for, and of the people, they used emergency power, on the whole, with discrimination and restraint. Nevertheless, they risked the creation of precedent. As the Supreme Court said soon after Appomattox, the nation had "no right to expect that it will always have wise and humane rulers. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln."[41] How to assure the recession of executive power when the emergency passed?

Henry Adams, reflecting on the obliteration of the Constitution during the Civil War, observed that the Framers "did not presume to prescribe or limit the powers a nation might exercise if its existence were at stake. They knew that under such an emergency paper limitations must yield; but they still hoped that the lesson they had taught would sink so deep into the popular mind as to cause a reestablishment of the system after the emergency had passed." The test, Adams wrote in 1870, was now at hand. "If the Constitutional system restored itself, America was right."[42]

Lincoln and Roosevelt, seeing the war power as a means to a higher end, understood the need to restore the constitutional regime and affirmed in the midst of the emergency that emergency prerogative must expire with the emergency. "The Executive power itself," said Lincoln, "would be greatly diminished by the cessation of actual war." "When the war is won," said Roosevelt, "the powers under which I act automatically revert to the people—to whom they belong."[43]

So indeed it happened, and the constitutional regime did reestablish itself. This was perhaps due less to renunciation by Presidents than to resistance by the people and resilience in the system. Lincoln had derided the notion that "the American people will, by means of military arrests during the rebellion lose the right of public discussion, the liberty of speech and the press, the law of evidence, trial by jury, and Habeas corpus throughout the indefinite peaceful future which I trust lies before them." He could not believe that, he said—once again the homely analogy—any more than he could believe that "a man could contract so strong an appetite for emetics during temporary illness as to persist in feeding upon them during the remainder of his healthful life."[44]

Once the crisis ended, the other two branches of government briskly reasserted themselves. The separation of powers sprang back to defiant life. A year after Lincoln's death, the Supreme Court held in ex parte Milligan that the arrest and trial under martial law behind the lines of Lambdin P. Milligan,

a venomously pro-slavery conspirator, violated the Constitution. Seward's elective kingship gave way in half a dozen years to a President at the bar of impeachment, followed by the period later famously characterized as one of "congressional government."

In the same fashion, the death of Roosevelt and the end of the Second World War were followed by a diminution of presidential power. A year after victory, Roosevelt's successor was so unpopular that voters said "To err is Truman" and elected a Republican Congress. The next year Congress gained posthumous revenge against the mighty wartime President by proposing the twenty-second Amendment and thereby limiting all future Presidents to two terms in the White House.

The instinctive dialectic of politics thus offers a measure of insurance against the possibility that emergency prerogative might lead to post-emergency despotism. Yet the danger persists that power asserted during authentic emergencies may create precedents for transcendent executive power during emergencies that exist only in the hallucinations of the oval office and that remain invisible to most of the nation. The perennial question is: how to distinguish real crises threatening the life of the republic from bad dreams conjured up by paranoid Presidents spurred on by paranoid advisers? Necessity, as Milton said, is always "the tyrant's plea."

The experience of Lincoln and Roosevelt suggests, I believe, the standards that warrant presidential resort to emergency prerogative. The fundamental point is that emergency prerogative cannot be properly invoked on presidential say-so alone but only under stringent and persuasive conditions, both of threat and of accountability, with the burden of proof resting on the President.

Let me try to define these conditions. Here, I would submit, are the standards:

1. There must be a clear, present, and indisputable danger to the life of the nation.
2. The President must define and explain to Congress and the people the nature and urgency of the threat.
3. The understanding of the emergency, the judgment that the life of the nation is truly at stake, must be broadly shared by Congress and the people.
4. Time must be of the essence; existing statutory authorizations must be inadequate; Congress must be unable or unwilling to prescribe a national course; and waiting for normal legislative action must constitute an unacceptable risk.
5. The danger must be one that can be met in no other way than by presidential initiative beyond the laws and the Constitution.
6. Secrecy must be strictly confined to the tactical requirements of the emergency. Every question of basic policy must be open to national debate.
7. The President must report what he has done to Congress, which, along with the Supreme Court, will serve as judge of his actions.
8. None of the presidential actions can be directed against the political process itself.

These standards, I believe, sufficiently distinguish what Lincoln did in the spring of 1861 and Roosevelt did in the autumn of 1941 from what Jefferson did in 1807, from what Truman did in seizing the steel mills in 1952, from what Nixon did in his use of "national security" to justify illegal acts in 1972–73, from what the Reagan administration has done recently with regard to Iran and the Contras.

Lincoln's policy after Sumter, Roosevelt's in the North Atlantic, at least in the eyes of most Americans at the time and of most scholars in retrospect, represented a necessity—but not a precedent. By declining to use claims of inherent and abiding presidential power to justify their actions, Lincoln and Roosevelt took care not to give lesser men precedents to be invoked against lesser dangers. These two Presidents remained faithful to the spirit, if not the letter, of the Constitution: acting on the spirit to save the letter.

"If the people ever let command of the war power fall into irresponsible and unscrupulous hands," Justice Jackson said in dissent in the Korematsu case, "the courts wield no power equal to its restraint. The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history."[45]

Notes

Preface

1. Arthur M. Schlesinger, Jr., ''The Course of the American Civil War: A Note on Historical Sentimentalism,'' *Partisan Review*, 16 (1949), 968-81. See also Schlesinger, *The Age of Jackson* (Boston, 1945), 432-33, 505-506.

Lecture

1. Tyler Dennett, ed., *Lincoln and the Civil War in the Diaries and Letters of John Hay* (New York, 1939), 121.
2. First Debate with Stephen A. Douglas at Ottawa, Illinois, 21 August 1858, Roy P. Basler, ed., Marion Dolores Pratt and Lloyd A. Dunlap, assoc. eds., *The Collected Works of Abraham Lincoln* (9 vols., New Brunswick, N.J., 1953-55), 3:29; *Franklin D. Roosevelt, Public Papers and Addresses . . . 1933* (New York, 1938), 14-15.
3. First Inaugural Address—Final Text, 4 March 1861, Ibid, 4:264.
4. F.D. Wormuth and E.B. Firmage, *To Chain the Dog of War: The War Power of Congress in History and Law* (Dallas, 1984), 30.
5. Lincoln to William H. Herndon, 15 February 1848, Basler, ed., *The Collected Works of Lincoln*, 1:452.
6. C.C. Tansill, ed., *Documents Illustrative of the Formation of the Union of the American States* (Washington, 1927), ll5.
7. Jefferson to W.C. Claiborne, 3 February 1807; to James Brown, 27 October 1808, Andrew A. Lipscomb, ed., Albert Ellery Bergh, managing ed., *The Writings of Thomas Jefferson* (20 vols., Washington, 1905), 11:151, 12:183.
8. Jefferson to J.B. Colvin, 20 September 1810, Ibid, 12:418-422.
9. A.D. Sofaer, *War, Foreign Affairs and Constitutional Power* (Cambridge, Mass., 1976), 377-379.
10. Message to Congress in Special Session, 4 July 1861, Basler, ed., *Collected Works of Lincoln*, 4:426.
11. Adams in the House of Representatives, 25 May 1836, quoted in C.A. Berdahl, *War Powers of the Executive in the United States* (Urbana, 1921), I5.
12. Lincoln to J.C. Conkling, 26 August 1863, Basler, ed., *Collected Works of Lincoln*, 6:408.
13. Emancipation Proclamation, 1 January 1863; Lincoln to S.P. Chase, 2 September 1863; to Chicago Church Committee, 13 September 1862, Ibid, 5:421, 6:29-30, 428; Dennett, ed., *Diaries ... of Hay*, 205.
14. Lincoln to A.G. Hodges, 4 April 1864, Basler, ed., *Collected Works of Lincoln*, 7:281.
15. Lincoln to Erastus Corning, *et al*, 12 June 1863, *Ibid*, 6:263,267.
16. B.R. Curtis, ''Executive Power'' (1862), reprinted in B.R. Curtis, ed, *Memoir of Benjamin Robbins Curtis, with Writings* (Boston, 1879), vol. II.
17. Louis J. Jennings, *Eighty Years of Republican Government in the United States* (London, 1868), 36.
18. James Bryce, *The American Commonwealth* (New York, 1888), 1:51,6l.
19. Henry Adams, ''The Sessions, 1869-1870,'' *North American Review*, (July 1870) in Henry Adams, *The Great Secession Winter of 1860-61 and other Essays*, George E.

Hochfield, ed. (New York, 1958), 195.

20. Quoted by A.J.P. Taylor, *Essays in English History* (London, 1976), 13.
21. Lincoln to A.G. Hodges, 4 April 1864, Basler, ed., *Collected Works of Lincoln*, 7:281.
22. 2 Black 635.
23. Churchill to Roosevelt, 15 June 1940, Warren F. Kimball, ed., *Churchill and Roosevelt: The Complete Correspondence* (Princeton, 1984), 1:51.
24. W.L. Langer and S.E. Gleason, *The Challenge to Isolation* (New York, 1952), 539.
25. Roosevelt to Churchill, 16 May 1940, Kimball, ed., *Churchill and Roosevelt ... Correspondence*, 1:38.
26. R.H. Jackson, "Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers," *Official Opinions of the Attorneys General of the United States* (Washington, 1941), XXXIX, 484-496; cf. also his concurring opinion in *Youngstown Co. v Sawyer* (1952).
27. E.S. Corwin, letter in *New York Times*, 13 October 1940.
28. *New York Times*, 25 April 1941.
29. See C.A. Beard, *American Foreign Policy in the Making 1932-1940* (New Haven, 1946) and *President Roosevelt and the Coming of the War 1941* (New Haven, 1948).
30. Robert A. Taft, *A Foreign Policy for Americans* (Garden City, 1951), 31.
31. Henry L. Stimson and McGeorge Bundy, *On Active Service in Peace and War* (New York, 1948), 368.
32. Roosevelt to Grenville Clark, 15 July 1941, Roosevelt Papers, Franklin D. Roosevelt Library, Hyde Park, New York.
33. Roosevelt to R.H. Jackson, 21 May 1940; to T.H. Eliot, 21 February 1941, Roosevelt Papers.
34. Cabell Phillips, "No Witch Hunts," *New York Times Magazine*, 21 September 1941.
35. Francis Biddle, *In Brief Authority* (New York, 1962), 238.
36. Archibald Cox, *The Court and the Constitution* (Boston, 1987), 194-195.
37. West Virginia Board of Education v Barnette, 319 U.S. 624.
38. American Civil Liberties Union, *Annual Report*, 1944.
39. Roosevelt, *Public Papers ... 1942* (New York, 1950), 364.
40. Annual Message, 6 January 1941, Roosevelt, *Public Papers ... 1940* (New York, 1941), 670.
41. Ex parte Milligan, 4 Wall. 2, 125 (1866).
42. Adams, "The Session, 1869-1870," 194-5.
43. Annual Message to Congress, 6 December 1864, Basler, ed., *Collected Works of Lincoln*, 8:152; Roosevelt, *Public Papers ... 1942*, 365.
44. Lincoln to Erastus Corning and others, 12 June 1863, Basler, ed., *Collected Works of Lincoln*, 6:267.
45. Korematsu v U.S., 323 U.S. 14 (1944).

Arthur Schlesinger, Jr.

Arthur M. Schlesinger, Jr., Albert Schweitzer Professor of the Humanities, the City University of New York, is probably the best known American historian of our time. Born in Ohio, reared in Massachusetts, he received part of his education at home. He carries the name of his father, the famed Harvard historian. His mother, Elizabeth, was a pioneer of women's history. Mr. Schlesinger was further educated at Phillips Exeter, Harvard, Cambridge (Peterhouse), and the Society of Fellows, Harvard. He received a Harvard A.B. degree and seventeen honorary doctorates, the most recent one from the University of Oxford, England, in 1987.

His undergraduate thesis on Orestes Brownson, a 19th century radical, was published as Mr. Schlesinger's first book. His second, *The Age of Jackson* (1945), won the Pulitzer Prize for history and, like so many of his other books, continues to influence both scholarly discourse and public opinion. Mr. Schlesinger's *The Vital Center* (1949) used to be described as a bible for American liberals. A Pulitzer for Biography was awarded for *A Thousand Days: John F. Kennedy in the White House* (1965). *Robert Kennedy and His Times* (1978) won the National Book Award. Mr. Schlesinger also coedited a work on the *History of American Presidential Elections* (1971). *The Imperial Presidency* (1973) introduced a new phrase into the language and much new debate into American culture. He is currently at work on *The Age of Roosevelt*, the first three volumes of which appeared between 1957 and 1960, winning both the Parkman Prize and the Bancroft Prize.

Professor Schlesinger has combined scholarship with service in the U.S. Army in World War II (he reached the rank of corporal), and with public service that ranged from helping to found Americans for Democratic Action to being special assistant to his friend President John F. Kennedy.