

# Book Review



Reviewed by Richard A. Forsten, Esquire

## Two Roads, Two Views, One Hero: *Lincoln and Chief Justice Taney, Slavery, Secession, and the President's War Powers*

by James F. Simon (Simon & Schuster, 2006)

Sometimes history is best observed through contrasts. In *Lincoln and Chief Justice Taney, Slavery, Secession, and the President's War Powers*, Professor James F. Simon tells the tales of President Abraham Lincoln and Supreme Court Chief Justice Roger Taney (pronounced "Taw-ney" incidentally), their rise to power, and their sharp disagreements over the meaning of the Constitution. In another time and place, Simon speculates, the two men might have become good friends, for while there were many differences between them, they also had much in common. Both were among the best lawyers in their states. Both were tall, gaunt men usually dressed in drab, less than stylish clothes. Both opposed slavery. Nevertheless, the crucible of the Civil War and the years leading up to that war led them to come to opposite conclusions on the burning constitutional questions of the day. Lincoln believed secession illegal, Taney did not. Lincoln believed in broad wartime powers for the president, Taney opposed Lincoln's wartime actions at every turn. And, of course, on the issue of slavery, Lincoln thought the Supreme Court's 1857 opinion in *Dred Scott v. Sandford*, authored by Taney, erroneous.

Taney's and Lincoln's early years could not be more different. Lincoln's story is, of course, nearly mythical; Taney's nearly unknown. Born in Kentucky, and of humble origins, Lincoln lived in a log cabin and had little formal education, although he read whenever he could. As a young man, he held a series of jobs (owning half a general store, which failed, postmaster, surveyor), before winning a seat in the Illinois state legislature. He was so poor, he had to borrow money to buy a tailor-made suit so as to make a decent ap-

pearance in the legislature. Shortly after being elected, Lincoln began to study the law and three years later, he was admitted to practice. He quickly became one of the leading lawyers in his state. He served one undistinguished term in Congress and then returned to Illinois resigned to rebuilding his practice (which he quickly did). But for the *Dred Scott* decision, history might have easily forgotten the name Abraham Lincoln. Instead, Lincoln rose to prominence arising from a series of debates with Stephen Douglas for one of Illinois' United States Senate seats in 1858. Although Lincoln lost the race, the debates were followed nationally and led to Lincoln's nomination for, and election to, the presidency in 1860.

Taney was born some thirty-two years before Lincoln, in 1777, into a landed, slave-owning family that was part of the Maryland aristocracy. He was well-educated (because Taney was not the eldest son, he would not inherit the family estate, and so a good education was particularly important) and began reading the law at age nineteen with a Maryland General Court judge. He won his first case, and started what would become a very successful legal practice. He served a term in the Maryland House of Delegates and later in the Maryland State Senate. In 1831, he was appointed Attorney General by President Andrew Jackson. Following a failed nomination to the Supreme Court in 1834, he was appointed Chief Justice of the United States Supreme Court in 1836 and succeeded John Marshall. Taney would serve until his death in 1864.

Lincoln's disagreements with Taney began before Lincoln became president with the *Dred Scott* decision. They also disagreed over the legality of secession.

Of course, neither of those issues would be further played out in the courts and would instead be resolved by a bloody civil war. It was in the prosecution of that war that Lincoln and Taney would again clash, this time over the scope of the president's wartime powers and this time the conflict would spill over into the courts.

In early 1861, while Congress was not in session, Lincoln issued an order suspending the writ of habeas corpus between Philadelphia and Washington following destruction of railroad bridges and telegraph lines, together with threats of further sabotage in northern Maryland. John Merryman, a suspected saboteur, was seized by military officials and imprisoned at Fort McHenry. Merryman's lawyers filed a writ of habeas corpus with the federal district court, and the army commander replied simply that the writ had been suspended and refused to produce Merryman. Chief Justice Taney, hearing the matter as part of his circuit-riding duties (Supreme Court Justices still had circuit-riding duties at that time), issued an opinion holding that suspension of the writ by the president was unlawful. The opinion provided an exceedingly cramped view of the president's powers--indeed, it conflicted with Taney's own reading of presidential powers while Attorney General--and generally refused to acknowledge the situation facing the president at the time. Article I, Section 9 of the Constitution provides the writ may be suspended in cases of rebellion or invasion. The language does not indicate who may suspend the writ. Taney argued that because Article I deals with the legislative branch, as compared to the executive branch, only Congress could

suspend the writ. In any event, Lincoln largely ignored the opinion. In an address to Congress, he did famously ask “are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?” Congress would eventually pass legislation in 1863 authorizing the president to suspend the writ. The Merryman decision was never appealed to the Supreme Court.

There would be more disagreements between Taney and Lincoln. In the Prize Cases, for example, the Court held by a vote of five to four (with Taney in the minority) that the president could order a blockade of southern ports. Taney remained convinced that Lincoln and his supporters in the north were responsible for the war and that they were acting contrary to the Constitution in prosecuting the war.

The Lincoln that emerges from Simon’s account, though, is not only a pragmatic leader, but, as to be expected with a successful lawyer, one who also focused carefully on the legalities of his actions. He always sought to ensure in his mind that his actions were authorized or otherwise permissible under the Constitution. While Taney argued in Merryman that Article I, Section 9 only permitted Congress to suspend the writ of habeas corpus, Lincoln noted that the provision itself was silent on the point and purposely so. Lincoln’s actions certainly raise questions about the limits on presidential authority during war, questions which continue to be the focus of debate today, but Simon does not believe Lincoln abused his powers. He concludes his book as follows:

“Throughout the Civil War, Lincoln’s moral compass remained steady, and so did his respect for the rule of law. As proud as he was of his Emancipation Proclamation, he only justified it constitutionally as a necessary war measure. His doubts about the proclamation’s enduring legality caused him to lobby intensely for the passage of the Thirteenth Amendment. In his prosecution of the war, he wielded his constitutional powers fearlessly, but also with restraint. His purpose was not to seize authority that was unchecked by the other co-equal branches of the federal government.

“Although Lincoln’s record on the

protection of civil liberties was not unblemished, he consciously weighed the legitimate security needs of the nation under siege against the individual rights of its citizens. That is one of the reasons that Justice Felix Frankfurter, a founding member of the American Civil Liberties Union, greatly admired Lincoln. Lincoln’s balancing of national security interests against civil liberties also impressed Justice O’Connor, the author of the Court’s Hamdi opinion. In a lecture delivered less than a year after writing that opinion, she reviewed Lincoln’s exercise of executive power, including his suspension of the writ of habeas corpus: “To his immense credit, Lincoln did not use this authority to trample on the civil liberties that the writ was meant to protect. . . . He appreciated that the strength of the Union lay not only in force of arms but in the liberties that were guaranteed by the open, and sometimes heated, exchange of ideas.”

“For Lincoln, the essential goal of the Union in the Civil War was to repair the rupture to the constitutional government established by the framers. He had anticipated that monumental task when

he told his friends at Springfield’s Great Western Railroad depot on a chilly morning in February 1861 that his presidential challenge was greater than Washington’s. He had been elected to preserve what he later described to be ‘the last best hope’ for democratic government in the world. When his body was returned to Springfield in May 1865, the entire nation knew that he had met that challenge with courage and wisdom to become the wartime president indispensable to the future of the United States.”

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