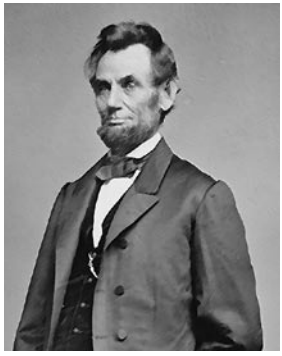
LINCOLN ON TRIAL



Southern Civilians and the Law of War

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Introduction

Crisis at Baltimore

Fort Sumter fell on April 14, 1861. Five days later, pro-Confederate mobs attacked Massachusetts infantry traveling through Baltimore en route to Washington, D.C., and the troops returned fire. To prevent further movement of U.S. troops through Baltimore, railroad bridges connecting that city to Washington and the North had been burned, not by saboteurs or guerrillas, but by organized members of the Maryland state militia acting with the approval of the mayor of Baltimore and the governor of the state. The Maryland legislature would soon assemble, perhaps to vote to secede and join the Confederacy, cutting the capital off from the rest of the United States.

On April 25, President Abraham Lincoln signed an order to General Winfield Scott, commander of the U.S. Army. If the Maryland legislature voted "to arm their people against the United States," Scott was "to adopt the most prompt, and efficient means to counteract, even, if necessary, to the bombardment of their cities."[1] The war was less than a month old, and already the president had authorized the army to turn artillery on American cities filled with unarmed men, women, and children. It was not a decision he made easily. His secretaries, John Nicolay and John Hay, recalled that the president's initial reaction was to seek conciliation. In the early morning of April 20, he assured a delegation from Baltimore that he would move future reinforcements around Baltimore, not through it. Attempting to lighten the situation with humor, Lincoln remarked: "If I grant you this, you shall come to-morrow demanding that no troops shall pass around."

The joke became a prophecy. Later that day one of Maryland's congressmen demanded that no U.S. troops travel through his state at all. The next day another delegation, led by the mayor of Baltimore, demanded that a body of Pennsylvania troops, who had reached a point fifteen miles north of Baltimore, be ordered to leave the state. "Fear-

ing that renewed hostilities between soldiers and civilians might play into the hands of Maryland's secessionists," the president ordered the troops to return to Pennsylvania. Despite this order, Maryland militia destroyed the railroad bridges leading into the city, isolating Washington from the North. On April 22, another Baltimore delegation arrived in Washington to again ask that no troops pass through the state and added a demand that the president recognize the Confederacy. Lincoln had finally reached his limit, and he warned that if future reinforcements were attacked he would "lay Baltimore in ashes." Three days later he authorized the shelling of Baltimore if necessary to save Washington.[2]

Little in his background had prepared Abraham Lincoln to issue military orders endangering civilians. Nevertheless, he would grapple with similar issues repeatedly over the next four years. His most extreme critics would argue that, notwithstanding his humanitarian reputation, the president was at heart a bloody-minded autocrat, careless of innocent life and property. Jefferson Davis saw the Emancipation Proclamation as a deliberate attempt to incite the slaughter of white women and children, and Lord Richard Lyons, the British minister in Civil War Washington, appears to have agreed.[3] Even today, Lincoln's bitterest critics have not hesitated to charge him with waging a war of terror against unarmed civilians, to the extent of resorting to the inflammatory term "war crimes," a term unknown in the nineteenth century.[4]

Even if the most extreme of these charges are rejected as absurd, how are we to reconcile Lincoln the humanitarian, who hated the "monstrous injustice" of slavery, with Lincoln the relentless commander in chief, who would bombard the citizens of Baltimore to save the government in Washington? Answering this question will give us a new vantage point on the man himself, his personality, his philosophy, and his leadership.

A serious effort to analyze Lincoln's treatment of Southern civilians must start by determining what measures President Lincoln authorized, or at least which ones he knew about and did not oppose. Waging war against civilians is a very imprecise concept and could refer to a wide spectrum of activity. At its most serious, it would involve the deliberate killing of unarmed and unresisting civilian persons. At the other end of the scale would be the destruction or seizure of civilian property. Somewhere in between would lie restraints on personal liberty, such as arrest, exile, and forcible movement of civilians, and actions that, although not deliberately targeting civilians for destruction, increased the danger of

injury to civilians. Among the latter would be destruction or seizure of crops and food, and the bombardment of fortified cities.

Determining what policies President Lincoln actually approved is important because Civil War armies on both sides were poorly disciplined and inflicted considerable hardship on civilians, both friendly and unfriendly, regardless of orders or official policy. One study of the impact of the war on civilians in Northern Virginia concluded that "hard war shocks obliterated much of Alexandria and Fairfax [counties] during the Civil War's first twelve months, a period that saw the two jurisdictions occupied by opposing, conventional armies whose top commanders espoused soft-war policies. Both consciously and unconsciously, their soldiers terrorized residents, devastated their property, and drove many from their homes."[5]

Active efforts to prevent harassment of civilians often proved futile. On the Union side, even General George B. McClellan, a stickler for respecting civilian property, could not prevent his troops from "accidentally" burning historic White House plantation (where George and Martha Washington were married) during the 1862 Peninsular Campaign.[6] Throughout the war, deserted houses tended to catch fire mysteriously whenever soldiers were around. In the summer of 1861, two frame houses belonging to Elcom G. Read in Fairfax County, Virginia, were burned down. One witness recounted that the fires were a simple act of vandalism: "They were burned by Union troops about two weeks after the first battle of Bull Run. I was standing near when they set fire to those buildings. The men belonged to the second Michigan [Volunteers] and were doing picket duty at the time. . . . I asked the soldiers why they did so and burn them buildings. They told me they were just making up a fire to roast some potatoes. I think they burned these buildings out of mischief."[7]

Abandoned houses that escaped arson were subject to another risk every fall, as both Union and Confederate armies went into winter quarters. Soldiers often dismantled houses, barns, and other sources of lumber to build winter huts, or "shebangs." After their house had been hit by eleven cannonballs during an 1861 skirmish at Dranesville, Virginia, Robert and Ann Coleman left the area for the duration of the war. Ann later told a U.S. claims commission that when they returned, they found no trace of the house: "No, not a particle of it. Not a piece of it. . . . Took the house all to pieces and built huts of it. The Union soldiers were in camp in Dranesville all that winter."[8]

During the Antietam campaign in September 1862, General Robert E. Lee wanted the people of Maryland to regard his soldiers not as invaders but rather as liberators from Lincoln's military tyranny, so he issued orders intended to minimize friction with the civilian population. Toward the end of the campaign, however, he confessed to President Jefferson Davis that these efforts had not been as successful as he had hoped:

> The presence of a large army in any country cannot but entail loss upon the inhabitants; it is necessary at times to remove fences, pass through fields on the march, and occupy them for encampments. In battles the destruction of property is also unavoidable and often very great; but, in addition to losses to individuals inseparable from a state of war, I regret to say that much unnecessary damage is done by the troops both while marching and in camp. It is impossible as the army is now organized to prevent these acts by orders. When such orders are published they are either imperfectly executed or wholly disregarded.[9]

With his subordinate commanders, Lee was more blunt: "The depredations committed by this army, its daily diminution by straggling, and the loss of arms thrown aside as too burdensome by stragglers, makes it necessary for preservation itself, aside from considerations of disgrace and injury to our cause arising from such outrages committed upon our citizens, that greater efforts be made by our officers to correct this growing evil."[10] Following the Antietam campaign, Lee's army withdrew to the Shenandoah Valley of Virginia, which had previously been occupied by an undisciplined Union force under the command of General Nathaniel Banks. As Lee's men "scoured the local countryside in search of provisions, taking anything and everything they could use," the generally pro-Confederate civilian population learned that it mattered little where their sympathies lay, since both armies seemed equally inclined to take or ruin their property.[11]

The problem never completely disappeared, even after General Lee's force had been reduced to a dedicated core of seasoned veterans. In late 1864, when the Army of Northern Virginia was defending the Confederate capital at the siege of Petersburg, General Lee still needed to condemn the mistreatment of local civilians: "The General Commanding has heard with pain and mortification that outrages and

depredations amounting in some cases to flagrant robbery have been perpetrated upon citizens living within the lines, and near the camps of the army. Poor and helpless persons have been stripped of the means of subsistence and suffered violence by the hands of those upon whom they had a right to rely for protection. In one instance an atrocious murder was perpetrated upon a child by a band of ruffians whose supposed object was plunder."[12]

John Minor Botts, a prominent Virginia Unionist, also had an unfortunate opportunity to compare the behavior of the armies on both sides. In early 1864, he wrote to a friend:

> I had one of the finest farms in V[irgini]a and few persons anywhere were more comfortably fixed than I was, and I had hoped to spend the balance of my days here in comfort, and as I might have done, in luxury; but you can form no conception of the annoyances to which I have been subjected by the Confederate Army, and when the Federal Army came in, I had reason to hope for protection but so far from that, they have been equally destructive to my property as the other party, and the excuse they offer for it, is that I will be paid by the goverment for it all. . . . They have torn down and burnt my fencing in all directions, to the extent of many miles, taken away my gates, cut down my gate posts, and shade trees. . . . Out of 25 or 30 miles of fencing that I had this time last year, I haven't three left. . . . My timber is being so entirely destroyed, that I shall have none left, with which to enclose the farm again; and an estate worth all of $200,000 will by the time the Army leaves me, be nothing but a common or a waste.[13]

Botts ended with the philosophical observation that "the Officers generally are disposed to give me every protection, and so are the men, but there can be no Army without having in it many who are naturally vicious & destructive."

Not all Southern civilians found Union officers to be as sympathetic as those Botts encountered. Sometimes officers were just as vicious and destructive as the most depraved private soldier. In 1862, Colonel Carter Gazley of the 37th Indiana Volunteers was tried by court-martial and found guilty of stealing two horses from a civilian. Earlier that year, Colonel Charles A. de Villiers of the 31st Ohio Volunteers had been

convicted by a court-martial of stealing $300 in currency and divers bonds and stock certificates from the safe of a lawyer in Point Pleasant, West Virginia.[14] Judge Thomas Morgan's house in Baton Rouge, Louisiana, was vandalized and looted by a pair of junior officers in August 1862. When one of the judge's daughters protested against the slashing of her father's portrait, one of the pair placed a pistol to her head and threatened to blow her brains out. The pillaging only stopped when an African American servant located a Federal officer willing to intervene:

> Charles caught a Captain Clark in the streets, when the work [of destruction] was almost over, and begged him to put an end to it. The gentleman went readily, but though the devastation was quite evident, no one was to be seen, and he was about to leave when, insisting that there was some one there, Charles drew him into [another daughter's] room, dived under the bed, and drew from thence a Yankee captain by one leg, followed by a lieutenant, each with a bundle of the boys' clothes which they instantly dropped, protesting they were only looking around the house. The gentleman captain carried them off to their superior.[15]

John Minor Botts had arrived at an important truth when he concluded that "there can be no Army without having in it many who are naturally vicious & destructive." Most crimes are committed by males in their late teens, twenties, and early thirties, the same demographic from which armies derive most of their soldiers.[16] Historically, armies in the field have always done significant damage to surrounding civilian communities with or without the sanction of their officers.

Of course, it would be equally wrong to absolve the Union army's command structure from any responsibility for rough treatment of civilian persons and property. Harsh measures were sometimes authorized, even, as in the case of the 1861 Baltimore riots, by the commander in chief. In assessing the legality and morality of such measures, the contemporary observer runs an unusually high risk of "presentism"—the error of judging the past by the moral and legal standards of the present day.

For example, the currently popular charge that Lincoln committed violations of the laws and customs of war implies that the president

broke some rule of law that was actually in force during his term of office. Here the risk of presentism is especially high because the international standards of civilized warfare—the "laws and customs of war"—have changed radically since the time of Lincoln. The lengthy treaties and conventions reflecting these changes are written in legalistic, technical language, and even well-educated members of the public are often unaware of their significance.

Holding President Lincoln to anachronistic standards is not a practice limited to a fringe of Lincoln-haters and unreconstructed neo-Confederates. As recently as 1995, a highly distinguished professor of history wrote: "Had the Confederates somehow won, had their victory put them in position to bring their chief opponents before some sort of tribunal, they would have found themselves justified . . . in stringing up President Lincoln and the entire Union high command for violation of the laws of war, specifically for waging war against noncombatants."[17] In fact, as I discuss in the course of this book, the international standards of Lincoln's time often did not clearly distinguish between soldiers and noncombatant persons and property. More important, the concept of "command responsibility"—the legal theory that a military commander can sometimes be punished for failing to prevent war crimes committed by his subordinates—did not arise until after World War II.

Where treatment of enemy civilians is concerned, it is easy to make emotionally charged accusations against President Lincoln and his officers. Addressing such charges seriously is more difficult. As outlined above, that effort will require analysis of the numerous ways war could affect civilians, the sifting of data to determine what effects the president actually authorized, and, finally, an examination of the laws and customs of war as they then existed. This task is undertaken in the following chapters.

This study seeks an answer to the question, did President Lincoln authorize or condone violations of the laws of war, as they were understood in his time? The focus is on the words and actions of Abraham Lincoln in relation to enemy civilians. The study is not intended to present a comprehensive social, legal, or military history of the Civil War, nor is it a general biography of Lincoln. President Lincoln's policies are analyzed in order of their impact on Southern civilians, beginning, in chapter 2, with Lincoln's evolving policies on enemy private property, including the practice of "devastating" enemy territory. Chapter 3 then analyzes the president's attitude toward counter-guerrilla tactics of that

era, which could include the execution of civilian hostages in retaliation for unlawful enemy actions. Lincoln's policy toward bombardment of cities is examined in chapter 4, and chapter 5 looks at his policy toward the deliberate killing of civilians, the hallmark of twentieth-century "total war."

President Lincoln probably authorized the bombardment of Baltimore at the urging of the army's general in chief, Winfield Scott. More typically, however, issues involving treatment of enemy civilians came to the president's attention through petitions from civilians affected by policies adopted by Union officers in the field. Deciding these appeals on a case by case basis, Lincoln developed general principles that could be applied to similar cases in the future. Lincoln's generals were, for example, frequently cautioned against engaging in acts of "revenge" motivated by hatred of the enemy. As a young man, Abraham Lincoln had responded to mob violence in Mississippi, Illinois, and Missouri by denouncing passion and revenge as the enemies of free government and calling on the people to apply "cold, calculating, unimpassioned reason" to defend the future of free political institutions.[18] As president, he was convinced that if military actions were to lead to a lasting peace, they must similarly be based on reason rather than emotion.

Curiously, although President Lincoln developed important general policies on the treatment of hostile civilian populations, he rarely used his powers as commander in chief to set out these policies in orders and proclamations for the guidance of his field commanders or members of his cabinet. On one occasion, his reluctance to publish his policies for the guidance of others led to a direct conflict with Secretary of War Edwin Stanton. The concluding chapter examines the general policies Lincoln adopted on enemy civilians, analyzes possible reasons for his reluctance to widely disseminate these policies, and suggests some insights these explorations may give us into Lincoln's character.

1

"With the Law of War in Time of War"

Applying International Law to a Civil War

At the beginning of the Civil War, Jefferson Davis and Abraham Lincoln had diametrically opposed views on the nature of the conflict and the laws that should apply to the conduct of hostilities and the treatment of enemy persons. The Confederate government argued that it represented an independent nation at war with another independent nation, and that their relations were regulated solely by international law. After secession, the Constitution of the United States was irrelevant, in the Confederate view.

In contrast, throughout the war Lincoln maintained that the Confederate states had not seceded, and could not secede, from the Union. In his view, the U.S. government was dealing not with a Confederate government, but with a group of rebellious individual citizens.[1] In principle, then, for Lincoln the Constitution, not international law, governed relations between the Federal government and its rebellious Southern citizens.

One result of this policy was that the Lincoln administration was extremely sensitive to any act that might accord a degree of legitimacy to the Confederate government, or to the rebellious state governments. The law of war applied to hostilities between independent nations, and applying it, in whole or in part, to the rebels could be another incremental step toward recognition of the Confederacy as a true government. Some of his Radical Republican critics believed President Lincoln had already stumbled in April 1861 when he declared a blockade of Southern ports, since under international law this effectively recognized the

rebels as "belligerents," allowing Britain, France, and other European powers to declare their neutrality in the conflict and maintain their trade with the Confederacy as a semi-sovereign entity.[2] The administration did not want to do anything that would inadvertently extend even more recognition to the Confederate States of America.

During the first year of the war, the president and his supporters clung to the belief that the majority of the Southern people were fundamentally loyal to the Union but had been misled by a small clique of secessionist politicians. If ordinary Southerners were handled with firmness and restraint, they believed, the "mystic chords of memory" binding all Americans together would eventually reassert their power and the insurrection would sputter out, as had the Whiskey Rebellion of 1794 and the South Carolina Nullification movement of 1833. Branding everyone in the South as public enemies of the U.S. government, subject to the law of war, would hardly advance this hoped-for process of early reconciliation.

The Federal government therefore faced an early dilemma in legal policy. Although there were good political reasons, at least at the start of the war, for the Lincoln administration to insist that the Constitution applied to its enemies, as the scope and intensity of the conflict grew the Confederate government used every means at its disposal to press Washington to apply the laws and customs of international war.

Between April and December 1861, the Lincoln administration and its military commanders in the field responded to these pressures by slowly applying more and more of the law of war to their dealings with the rebels. The process was gradual and unpublicized because of the administration's constant concern that according international rights to the Confederates would also grant them an increasing degree of international recognition. In the face of this dilemma, the Lincoln administration's initial reaction was to follow the course adopted by many other governments confronting hard choices—it tried to avoid taking a clear stand for as long as possible. Although the level of hostilities relentlessly grew in intensity throughout 1861, the Lincoln administration stubbornly refused to make a clear public choice between applying the law of war and applying peacetime Federal law to the rebels.

The administration's legal ambivalence at this early stage of the Civil War is illustrated by three issues faced by President Lincoln soon after the fall of Fort Sumter—the call for militia volunteers, the seizure

of arms on the Mississippi River, and the declaration of a blockade. On April 15, 1861, immediately after Major Robert Anderson's surrender of Fort Sumter, the president issued a proclamation, citing the same statutory authority invoked by President Washington in the Whiskey Rebellion, calling 75,000 militia into Federal service. The declared purpose of this force was to "suppress" certain "combinations" of persons in the seceded states.

What is curious in retrospect is that, following the bombardment of a U.S. Army fort by heavy artillery manned by organized and uniformed military formations, the president did not declare these sinister combinations to be "levying War against" the United States, as treason is defined in the Constitution.[3] Rather, the president's proclamation described the Confederate army as "combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the [U.S.] Marshals by law." Once these rebellious combinations had been suppressed, the president stated that the militia would "cause the laws to be duly executed" in the South. This is the language of peacetime law enforcement, not the waging of war. The reader is left with the impression that the 75,000 Federal soldiers would serve merely as an unusually large and colorfully dressed U.S. marshal's posse.[4]

The proclamation also declared that "the utmost care will be observed . . . to avoid any devastation, any destruction of, *or interference with, property,* or any disturbance of peaceful citizens in any part of the country."[5] Barely two weeks later, however, President Lincoln approved, or rather tried to approve, significant military interference with Southern property. This was an early hint that the White House knew that something more than a law enforcement approach might be needed to deal with the Confederacy and its armed forces.

On April 17, Governor Isham Harris of Tennessee refused the president's call for militia and telegraphed the secretary of war that "Tennessee will not furnish a single man for purpose of coercion, but 50,000, if necessary for the defense of our rights and those of our Southern brethren."[6] Thereafter, Governor Richard Yates of Illinois ordered his militia to seize a Mississippi riverboat, the *C. E. Hillman*, carrying munitions to pro-secession forces in Tennessee. On April 29, with an arrogant tone typical of "fire-eater" secessionists, Governor Harris wrote the president to protest that the Illinois government's "interruption of the free navigation of the Mississippi River and the seizure of property belonging to the State of Tennessee and her citizens" was "aggressive,"

"hostile," and an "outrage." He asked "by what authority the said acts were committed," and whether they were "done by or under the instructions of the Federal Government."[7]

Lincoln tried to draft a logical, lawyerly reply. While acknowledging that he had "no official information" about the incident, he nevertheless approved Governor Yates's action. Reminding Governor Harris that he had refused, "in disrespectful and malicious language," to provide Tennessee's quota of militia to the United States, the president concluded that the seizure logically followed from that refusal: "This Government therefore infers that munitions of War passing into the hands of said Governor, are intended to be used against the United States; and the government will not indulge the weakness of allowing it, so long as it is in it's power to prevent. This Government will not, at present, question, but that the State of Tennessee, by a majority of it's citizens, is loyal to the Federal Union, and the [U.S.] government holds itself responsible in damages for all injuries it may do to any who may prove to be such."[8] The president did not, however, tell Governor Harris what legal authority Governor Yates had to order the seizures. Indeed, he could not have done so without resolving the legal and political dilemma in which the administration found itself in April 1861.

Under the Constitution—the American law applicable between loyal citizens—the legality of the seizures was extremely doubtful. Governor Yates and the president had reasonable grounds for suspecting that these munitions would be used against the U.S. government, but that would not necessarily justify their seizure by the military without a warrant issued by a judge. In an 1851 opinion, *Mitchell v. Harmony*,[9] the Supreme Court had held a U.S. Army officer personally liable for the seizure and loss of a U.S. citizen's wagons and merchandise during the Mexican War, even though the officer and his superiors suspected that the property would fall into the hands of the Mexican government. Mr. Harmony was a New York merchant engaged in the overland trade between Missouri and the Mexican city of Santa Fe when war broke out between the United States and Mexico in 1846. After the capture of Santa Fe by U.S. forces, on December 14, 1846, a U.S. military expedition under the command of Colonel Alexander Doniphan set out from Santa Fe to invade northern Mexico. It was accompanied by a caravan of 300 merchants who hoped to reopen trade with southern Mexico that had been interrupted by the war.

Mr. Harmony joined this group in Santa Fe with his wagons and

merchandise, but decided to leave the military column in January 1847 to strike out on his own, even though the expedition was then in the middle of enemy territory. Concerned that Harmony's wagons would be captured by Mexican forces, and foreseeing a military need to use them himself, Colonel Doniphan ordered Lieutenant Colonel David Mitchell to seize the wagons and mules. On February 28, Doniphan used the wagons as part of a mobile fortification in a battle for the city of Chihuahua. Having seen hard service in the war, Harmony's broken down wagons were abandoned by the army when it withdrew from Chihuahua on April 23, 1847.[10]

After the war, Harmony sued Mitchell for the value of his wagons, mules, and merchandise, and the case eventually came before the U.S. Supreme Court. It might be thought that a merchant who voluntarily joined a military force invading enemy territory would assume the risk that he would not be allowed to leave the column without the commanding officer's permission, and that his property might be damaged during combat with the enemy. Whatever the merchant's reasonable expectations in this situation, it might be thought that an army officer, acting in his official capacity in enemy territory to prevent the wagons from leaving, would not be held personally liable for damage to the merchant's property.

Chief Justice Roger Taney, speaking for the Court, would have none of this. Harmony was a U.S. citizen, and under the Fifth Amendment to the Constitution private property could not be taken for public use without just compensation. The army had no legal right to order Lieutenant Colonel Mitchell to seize Harmony's goods, so Mitchell could not use superior orders as a defense. The Supreme Court upheld a judgment against Mitchell for more than $90,000 in damages, plus $5,000 in court costs.

The furthest Chief Justice Taney would go to acknowledge that military considerations might have some impact on the property rights of citizens was to concede that private property might be taken for public service, or to prevent it from falling into enemy hands, where "the danger is immediate, and impending; or the necessity urgent for the public service, such as will not admit of delay." In such a case, the officer would not be personally liable, but still "the government is bound to make full compensation to the owner."[11] Taney was still chief justice in 1861, and the Illinois officers who seized the *C. E. Hillman* and its cargo risked being held liable to the ship's owners and the state of Ten-

nessee, if Governor Harris and his supporters were still considered loyal American citizens.

Only under the laws of war, using their respective powers as commanders in chief of the Illinois militia and the U.S. Army, could Governor Yates and President Lincoln have justified the seizure of another state's munitions and a privately owned river boat. But invoking the law of war would have expressly labeled Governor Harris and his forces as enemies, rebels with whom the United States was at war. This would have directly contradicted the president's statement that he was not questioning the loyalty of Tennessee or its citizens. At this stage, the Lincoln administration was desperately trying to hold in the Union as many border slave states as possible. Labeling Governor Harris and his supporters as enemies might be just the act that would push Tennessee into open secession. In fact, Tennessee seceded on June 8, 1861, and Governor Harris later fled south before advancing Union armies.

Nevertheless, the draft letter reflects President Lincoln's early determination not to allow peacetime property law to impede the suppression of the rebellion, even if he could not, as yet, publicly identify a legal foundation for this decision. The armies of the Union would respect private property to the extent they could, but when there was a clear conflict between property rights and military effectiveness, the president had already made his choice.

To a limited extent, the Lincoln administration had already been forced to apply the international law of war to its dealings with the rebels. On April 19, the president declared a blockade of the ports in the Confederate states, pursuant to "the laws of the United States and the law of Nations, in such case provided."[12] The term "blockade" carried a definite burden of meaning in international law, and its use meant the United States was claiming clearly defined rights under international law, and recognizing corresponding obligations, in relations with Britain, France, and other neutral nations.

Declaring a blockade also meant, however, that the United States was acknowledging that the Confederates were "belligerents," that is, that they had at least a limited international status, short of recognition as an independent nation, so long as the war continued. This had the effect of according neutral governments both the right and the obligation to deal even-handedly with the United States and the Confederate States, giving military assistance to neither side. Under the international law of the time, "belligerency" was an intermediate status between

the total sovereignty of an independent nation and a mere insurgency, which gave a rebel group no international status at all. To be legally entitled to recognition as a belligerent power, a rebel movement had to meet certain tests—it had to have an organized government that controlled a certain territory of its own, and its armed forces had themselves to comply with the international laws of war.[13] By declaring a blockade of the Confederate coast, and demanding that neutral nations respect that blockade, the Lincoln administration was in effect recognizing that the rebels were a belligerent power. Neutral countries could accord the Confederacy, as a belligerent power, all the rights and privileges of a sovereign nation at war, so long as the conflict lasted, such as allowing Confederate warships to use a neutral's seaports.

As a practical matter, recognition of belligerency for a rebel group was often only a step toward recognizing the independence of a new nation. For that reason, the Lincoln administration naturally shied away from accepting the full implications of its blockade declaration. When England and France accepted that the Confederacy was a belligerent power by issuing declarations of neutrality, the reaction of the Lincoln administration was hostile.

To avoid recognizing the Confederates as belligerents, the administration had considered the alternative of ordering the closure to international commerce of all ports in the seceded states. Every nation has the sovereign right to establish commercial ports of entry into its territory and to close those ports at will. Since the Federal government viewed secession as illegal and without effect, commerce with Confederate ports was, so the argument ran, still under the sovereign control of the United States. In other words, the administration would have preferred closing Southern ports by using internal U.S. customs laws, not the international law of war.[14]

The problem with this course of action was that whatever the policy was called, as a practical matter it would have to be enforced by U.S. Navy warships operating in international waters (the "high seas") outside the three-mile territorial limit claimed by the United States. Under international law, on the high seas warships enforcing a blockade had the right to stop and search merchant vessels from neutral nations, and even to seize those that had already violated the blockade or had cargo destined for a blockaded port. No similar rights were recognized to enforce a nation's closure of its own ports. If a warship stopped another country's merchant ships on the high seas to determine whether they

were going to or coming from a closed port, it would be violating the internationally recognized freedom of the seas. If the United States tried to implement the closure of Southern ports by forcibly stopping and inspecting British and French shipping on the high seas, those countries would almost certainly go to war to defend their rights. Like it or not, then, the closure of Confederate ports had to be accomplished through a blockade—that is, by applying the international law of war to seaports under Confederate control.

Reflecting the reluctance of the Lincoln administration to accord any legitimacy to the Confederate government, another part of the blockade proclamation rejected international law as the basis for other relations with rebel forces. In its preamble, the proclamation noted that the Confederate government (referred to as "a combination of persons, engaged in . . . insurrection") had "threatened to grant pretended letters of marque to authorize the bearers thereof to commit assaults on the lives, vessels, and property of good citizens of the country lawfully engaged in commerce on the high seas and in waters of the United States." Under nineteenth-century international law, a letter of marque was a government license authorizing a privately owned warship, referred to as a "privateer," to prey on enemy merchant vessels, or even on neutral vessels carrying military supplies ("contraband") to the enemy.

Captured merchant ships were to be brought before the courts of the government that had issued the letter of marque for a determination as to whether the capture was proper under international law. The issues before a prize court might include, for example, whether the cargo of a neutral vessel was truly contraband (legal opinions varied widely on the proper definition), or whether a ship flying a neutral flag was in fact an enemy merchant ship carrying false papers (sham transactions "transferring" a ship to a neutral owner were common). If the courts approved the capture, the ship was said to be "condemned as a prize" and sold. The proceeds of sale were divided between the government, the owners of the privateer, and its crew according to a formula set by the government issuing the letter of marque. In effect, privateering was a legalized form of piracy. Profit was the motive for privateers.[15]

The Confederate government had announced that it would issue letters of marque for privateers to prey on Union merchant shipping.[16] Since the Lincoln administration did not recognize the legitimacy of the Confederate government, it was determined not to recognize the legality of any privateering under Confederate authority. In its April 19

blockade proclamation, the Lincoln administration announced that it would refuse to recognize the legitimacy of letters of marque issued by the Confederate government. If any Confederate privateers were captured by U.S. forces, the crew members would be treated as criminals, not prisoners of war: "And I hereby proclaim and declare that if any person under the pretended authority of the said States, or under any other pretense, shall molest a vessel of the United States, or the persons or cargo on board of her, such persons will be held amenable to the laws of the United States for the prevention and punishment of piracy."

As a logical matter, the declared intention to treat Confederate privateers as pirates was difficult to reconcile with the decision to impose a blockade on Confederate ports. A blockade would be legitimate, and entitled to respect from other nations, only if it had been imposed as a military measure during a war between nations, or in a civil war between a government and an insurgent group recognized as a belligerent power. However, if the Confederacy was a belligerent, then under the law of war it had the power to exercise belligerent rights, to include issuing letters of marque.

Thus, President Lincoln's April 19, 1861, blockade proclamation both claimed rights against the Confederates under the international law of war and declared that he would refuse to recognize the rights of Confederate sailors under the same body of law. Along with the April 15 proclamation calling up the militia and the May draft response to the governor of Tennessee, the blockade proclamation illustrates the ambiguous, and even confused, early policy of the Lincoln administration on the law governing its suppression of the rebellion.

By the summer of 1861, however, the Lincoln administration had come to accept that the Civil War had reached such a scale of violence that as a practical matter it would have to grant Confederate forces at least some rights under the international law of war. On July 12, Army Quartermaster General Montgomery Meigs advised Secretary of War Simon Cameron, perhaps at the secretary's request, that the army should start to plan for the reception and treatment of prisoners of war, noting that under the law of war "prisoners of war are entitled to proper accommodations, to courteous and respectful treatment, to one ration a day and to consideration according to rank."[17]

Things came to a head when U.S. forces in Ohio, under the command of General George B. McClellan, invaded the northwestern counties of Virginia. The inhabitants of this region were generally pro-

Union, and later formed the new state of West Virginia. On July 13, Lieutenant Colonel John Pegram of the Confederate army surrendered himself and more than 500 of his men to McClellan's forces. McClellan telegraphed army headquarters that as a condition of surrender he had agreed "to treat them with the kindness due prisoners of war, but stating that it was not in my power to relieve them from any liability incurred by taking arms against the United States." When Pegram's men were added to prisoners already taken, McClellan would have almost 1,000 Confederate soldiers in his custody. He asked the War Department for "immediate instructions by telegraph as to the disposition to be made of officers and men taken [as] prisoners."[18] On July 14, General Winfield Scott, commanding general of the army, wired McClellan that the surrendered Confederate soldiers were to be regarded as prisoners of war.[19] This precedent would thereafter be followed throughout the Civil War.

Communicating with the enemy under a flag of truce was an old custom under the laws of war. From the very beginning of the conflict, Federal officers in the field had communicated with their Confederate counterparts under flags of truce, ostensibly without the knowledge or authorization of their superiors in the national capital. By the end of July 1861, the passage of a flag-of-truce boat between the generals commanding Fortress Monroe and the Confederate port of Norfolk, Virginia, had become routine.

The need for quasi-official communications under a flag of truce seems to have been reluctantly accepted by the Lincoln administration in mid-August 1861. As of August 2, Secretary of State William H. Seward had no official channel to ask the Confederate authorities whether Congressman Alfred Ely of New York had been killed or taken prisoner at Bull Run; instead, he relied on a private telegram to confirm the congressman's capture. On August 22, however, Secretary of War Cameron did not hesitate to direct that twenty-three paroled Confederate prisoners be returned to the South on the flag-of-truce boat running between Norfolk and Fortress Monroe.[20]

The decision to seek formal negotiation of a prisoner exchange cartel, in accordance with the laws of war, was the most difficult for the Lincoln administration to accept. In principle, military-to-military agreements for solely military purposes had no political implications under international law. Under the laws of war, field commanders could, for example, agree to a truce or cease-fire to remove the wounded from a

battlefield, to exchange prisoners of war, or to negotiate terms of surrender for an army facing defeat, without recognizing the legitimacy of the enemy's government. The wars of the twentieth century have provided many examples of this principle. Cease-fires were negotiated between Arab and Israeli field commanders in 1948, 1956, and 1967, without compromising the refusal of Arab governments to recognize the state of Israel. The Korean War was ended by a military-to-military cease-fire in 1953 that allowed both sides to avoid recognizing the legitimacy of the Korean government on the other side.

Nevertheless, flags of truce could be exchanged, and military-to-military agreements entered into, only with enemy belligerents in a war, and not with pirates, bandits, or criminal organizations of traitors. As late as December 10, 1861, Attorney General Edward Bates objected in a cabinet meeting to regular prisoner exchanges because he believed they granted too much legitimacy to the Confederacy.[21] Bates's concerns were shared by politically sensitive Union officers in the field. In October, Ulysses S. Grant, then an obscure general in the Western theater of war, informed Confederate general Leonidas Polk that "in regard to the exchange of prisoners proposed I can of my own accord make none. I recognize no Southern Confederacy myself but will communicate with higher authority for their views."[22] Another Federal general replied to a similar request in more detail: "I am in receipt of your communication dated on the 24th instant requesting an exchange of prisoners. To do this would imply that the Government of the United States admits the existing civil war to be between independent nations. This I cannot admit and must therefore decline to make any terms or conditions in reference to those we mutually hold as prisoners taken in arms without the orders of my Government."[23] Tortuous subterfuges were adopted to avoid the appearance of negotiating with the rebels. A paroled Confederate prisoner might be sent back through his own lines to arrange the release of a Union prisoner of equal rank, after which he would be formally released from the terms of his parole.[24] Another common fiction was to arrange for parallel "humanitarian" releases of a certain number of prisoners by each side.[25]

It was, of course, in the Confederacy's interest to avoid subterfuge and insist on formal prisoner exchanges, and to institutionalize the exchanges in a formal agreement, or "exchange cartel," between the two sides. Uncertainty over the fate of Union prisoners taken at Bull Run and later Confederate victories led to increased pressure for exchanges

from the North as well as the South. Relatives of soldiers held by the Confederates urged the government to do something to secure the release of their loved ones. In turn, congressmen, loyal state governors, and influential private citizens urged Lincoln to negotiate an exchange of prisoners.[26] On December 11, 1861, the House of Representatives passed a resolution requesting the president "to inaugurate systematic measures for the exchange of prisoners in the present rebellion."[27]

In January 1862, the Confederate authorities tried to initiate negotiations for a formal prisoner exchange cartel through the channel of communications between Norfolk and Fortress Monroe. In early February, the Lincoln administration capitulated on this issue in response to domestic and Confederate pressure. On January 20, Confederate general Benjamin Huger, commanding the garrison at Norfolk, wrote to his Union counterpart that the Confederate government was "willing and anxious to exchange prisoners on fair terms, and as the authorities at Washington have permitted it in certain cases I beg your assistance in making it general and thus aid the cause of humanity and civilization."[28] Noting that the letter was "worthy of consideration," General John Wool forwarded it to army headquarters: "As the exchange of prisoners is now established would it not save you and myself a great deal of labor and trouble if the two Governments appointed agents to attend to it? It could be done with more system and regularity, and the officers and men might be kept together."[29]

On February 11, Edwin M. Stanton, the new secretary of war, directed the commanding general at Fortress Monroe to begin cartel negotiations with his counterpart at Norfolk:

> You will inform General Huger that you alone are clothed with full powers for the purpose of arranging for exchange of prisoners. . . . You may arrange for the restoration of all the prisoners to their homes on fair terms of exchange, man for man and officer for officer of equal grade, assimilating the grade of officers of the Army and Navy when necessary, and agreeing upon equitable terms for the number of men of officers of inferior grade to be exchanged for any of higher grade when the occasion shall arise. That all the surplus prisoners on either side to be discharged on parole, with the agreement that any prisoners of war taken by the other party shall be returned in exchange as fast as captured, and this system to be continued while hostili-

> ties continue so that on all occasions either party shall so hold them only on parole till exchanged, the prisoners being allowed to remain in their own region till the exchange is effected.[30]

The initial negotiations did not go well. On February 23, representatives of the two sides met and exchanged drafts for an exchange cartel. The Confederate draft agreement included a provision that the capturing party would transport paroled or exchanged prisoners to the "frontier of their own country free of expense to the prisoners and at the expense of the capturing party." This phrase was politically loaded, since it implied that the United States and the Confederacy were two different countries. General Wool sensed that there was something wrong with this provision from the Union point of view, but couldn't quite put his finger on it. He therefore objected to it for reasons of cost and requested further instructions from Washington.[31] The secretary of war saw the proposal as evidence of Confederate bad faith and told Wool to break off negotiations: "The proposition is obnoxious in its terms and import and wholly inadmissible, and as the terms you were authorized to offer have not been accepted you will make no arrangement at present except for actual exchanges."[32] Confederate commissioner Howell Cobb then offered to change the language to provide for return of prisoners to the "frontier of the line of hostilities," a politically neutral phrase.[33] By then, so much suspicion had been aroused on the Union side that the negotiations dragged on for months, and an exchange cartel was not signed until July 22, 1862. Just by entering into these negotiations, however, the Lincoln administration was conceding that Confederate soldiers and sailors would be prisoners of war, treated in accordance with the international laws of war, at least as long as the conflict continued.

While the Union's decision to apply the laws of war was beneficial to captured Confederate soldiers and sailors, it would have a very different effect on the treatment of Confederate civilians. If Confederate fighting men were to be accorded the privileges of lawful combatants under the laws of war, then it was only logical that secessionist civilians should suffer the disadvantages that the law of war imposed on enemy citizens in wartime. Hostile civilians would be treated not as U.S. citizens but as enemy aliens who had no rights under the U.S. Constitution or the Bill of Rights. Under international law, the freedom of enemy citizens could be sharply curtailed and their property was subject to seizure or destruction. Two nineteenth-century decisions of the U.S.

Supreme Court illustrate the importance of the distinction between enemy civilians and U.S. citizens.

The first case, *United States v. Brown*, arose out of the War of 1812 with England.[34] Just before the war, several London merchants had hired the American ship *Emulous* to take 550 tons of pine lumber from Savannah, Georgia, to Plymouth, England. On April 18, 1812, the *Emulous* sailed from Savannah to her home port at New Bedford, Massachusetts, where the lumber was unloaded while the ship underwent repairs. Thereafter, Congress declared war on Great Britain, and the owner of the *Emulous*, John Delano, seized the lumber and informed the U.S. district attorney for Massachusetts that enemy property was present in his district. The U.S. attorney filed suit on behalf of the United States and Delano, asking the court to declare the lumber forfeited to the United States as enemy property. (As an "informer," Delano could claim part of the value of the condemned lumber as a reward for having informed the U.S. authorities of the location of enemy alien property.) Armitz Brown purchased the British merchants' rights in the lumber and defended his right to it, arguing that the most modern authorities on the law of war opposed confiscating the property of enemy nationals that happened to be in a country's territory at the time its government declared war.

At that time, Supreme Court justices presided over lower Federal courts when the higher tribunal was not in session. At the trial of this case, Joseph Story upheld the seizure of the pine logs as a legitimate war measure. By declaring war on Great Britain, he reasoned, Congress had given the president all the powers necessary to win the war. These powers were defined by the law of nations, which allowed any government at war to confiscate the private property of enemy citizens.

Brown appealed Story's decision to the Supreme Court. There, Chief Justice John Marshall made it clear that he and the other justices agreed with Justice Story that the law of war allowed the seizure and forfeiture of any private property owned by persons living under the control of the enemy government: "Respecting the power of government, no doubt is entertained. *That war gives to the sovereign full right to take the persons and confiscate the property of the enemy, wherever found, is conceded.* The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself."[35]

In the end, Mr. Brown, representing the interests of the British property owners, won the suit. Without denying the sovereign power

of the United States to confiscate the property of alien enemies, Chief Justice Marshall nevertheless concluded that under the constitutional scheme of the United States, only Congress could authorize the seizure and forfeiture of enemy private property, at least the seizure of property found in American territory at the commencement of hostilities. No statute authorizing such forfeiture had been passed; indeed, the only statute dealing in any way with enemy alien property seemed to lean in favor of the owners of the pine logs. (Not surprisingly, Justice Story dissented from the Court's decision to reverse his lower court opinion.)

At the time of the Civil War, the *Brown* decision was still the leading American legal precedent on treatment of enemy private property under the laws of war. Thus, under the laws of war, the U.S. government and its military arms were not required to respect any rights of the owner of private property belonging to an enemy national. Conversely, under the *Mitchell v. Harmony* precedent, private property owned by an American citizen must be fully respected, even in wartime.[36] At the start of the Civil War, however, it was not clear which legal precedent should apply to the citizens of seceded states. The official position of the Lincoln administration was that acts of secession were void and that citizens of seceded states were still U.S. citizens. Nevertheless, the laws of war were being applied to the Confederate armies, and large-scale military operations would be impossible if every affected civilian was accorded full rights under the Constitution.

Fortunately for the Lincoln government, the opinions of Chief Justice Marshall and Justice Story in the *Brown* case provided a way out of the dilemma. Both of these leading jurists agreed that under the Constitution, the war powers of the Federal government authorized the United States to take any action authorized by the international laws of war. By their reasoning, it must be assumed that the Founders, when they granted Congress and the president the power to make war, wanted the United States to win its wars. Therefore, the Constitution must also have granted the Federal government all the legitimate powers any potential enemy nation would have had—"all the ordinary rights of belligerents." What those war-winning rights were could be determined by looking at the crystallized experiences and practices of other war-making governments—the laws and customs of war.

Justice Story extended this reasoning to the war powers of the president. He argued that as commander in chief of the army and navy, the president "must, as an incident of the office, have a right to employ all

the usual and customary means acknowledged in war, to carry it [i.e., a declaration of war] into effect."[37] Furthermore, this "power to carry war into effect gives every incidental power which the law of nations authorizes and approves in a state of war."[38] By the twentieth century, Story's theory that the president's war powers extend to any measure authorized by international law had become generally accepted by the courts and legal scholars.[39]

This was all very well for an international war declared by Congress, but it left open the question of whether the president had the belligerent rights granted by the law of war when engaged in fighting an internal rebellion. Fortunately, in 1849 the U.S. Supreme Court had addressed the issue of executive power to suppress rebels in the context of a rebellion against state authority. The case of *Luther v. Borden* arose from a minor insurrection in Rhode Island over proposals to reform the state constitution, which had not been changed since the Revolutionary War. In response, the governor called out the state militia and declared martial law. After things settled down, several persons who had been detained and whose houses had been searched by the militia sued the military officers involved. In an opinion by Chief Justice Taney, the U.S. Supreme Court ruled firmly in favor of the state government:

> Unquestionably a State may use its military power to put down an armed insurrection too strong to be controlled by the civil authority. The power is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the States of this Union as to any other government. The State itself must determine what degree of force the crisis demands. And if the government of Rhode Island deemed the armed opposition so formidable and so ramified throughout the State as to require the use of its military force and the declaration of martial law, we see no ground upon which this court can question its authority. *It was a state of war, and the established government resorted to the rights and usages of war to maintain itself, and to overcome the unlawful opposition.*[40]

This 1849 decision established the principle that to suppress an internal rebellion a state governor could take forceful measures against his state's rebellious citizens, so long as those measures were authorized by the international law of war. By analogy, the president of the United

States should have the power to use similar measures against U.S. citizens when repressing a rebellion against the United States, particularly when the rebels themselves have been accorded belligerent rights under "the rights and usages of war." In contrast, the 1851 decision in *Mitchell v. Harmony* established that, even in time of war, the executive branch had to respect constitutional rights of U.S. citizens who were not supporting the enemy.[41]

Which of these two precedents would apply to the president's powers to wage the Civil War? This question came before the Supreme Court as a result of the blockade of Confederate ports declared by President Lincoln in April 1861. Three ships owned by American citizens were captured by the U.S. Navy and brought into court to be condemned as prizes of war. The owners argued that declaring a blockade was beyond the president's powers as commander in chief of the navy, particularly in a civil war that had not been declared by Congress. In 1863, by a five-to-four vote, the Court held that the president had the same war powers in the Civil War as he would in an international conflict, and that the blockade runners were lawful prizes under the law of war:

> As a civil war is never publicly proclaimed . . . against insurgents, its actual existence is a fact in our domestic history which the Court is bound to notice and to know.
>
> The true test of its existence, as found in the writings of the sages of the common law, may be thus summarily stated: "When the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the Courts of Justice cannot be kept open, civil war exists and hostilities may be prosecuted on the same footing as if those opposing the Government were foreign enemies invading the land." . . .
>
> Whether the President in fulfilling his duties, as Commander-in-Chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. "He must determine what degree of force the crisis demands." The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed

> which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case. . . .
>
> We are of the opinion that the President had a right, *jure belli* [by the law of war], to institute a blockade of ports in possession of the States in rebellion, which neutrals are bound to regard.[42]

The dissenting opinion, written by Justice Samuel Nelson, conceded that the federal government could, in principle, use all powers granted by the law of nations to suppress a rebellion. However, unlike the majority, who regarded the question of whether a war existed as an issue of fact that the president could determine, the dissenters believed that only Congress could recognize the existence of a civil war:

> In the case of a rebellion or resistance of a portion of the people of a country against the established government, there is no doubt, if in its progress and enlargement the government thus sought to be overthrown sees fit, it may by the competent power recognize or declare the existence of a state of civil war, which will draw after it all the consequences and rights of war between the contending parties as in the case of a public [international] war. . . .
>
> But before this insurrection against the established Government can be dealt with on the footing of a civil war, within the meaning of the law of nations and the Constitution of the United States, and which will draw after it belligerent rights, it must be recognized or declared by the war-making power of the Government. . . .
>
> Congress alone can determine whether war exists or should be declared, and until they have acted, no citizen of the State can be punished in his person or property unless he has committed some offence against a law of Congress passed before the act was committed which made it a crime and defined the punishment. The penalty of confiscation for the acts of others with which he had no concern cannot lawfully be inflicted.[43]

In reply, the Court majority noted that Congress had, in fact, approved the president's actions, including the proclamation of blockade, retroactively:

> If it were necessary to the technical existence of a war that it should have a legislative sanction, we find it in almost every act passed at the extraordinary session of the Legislature of 1861, which was wholly employed in enacting laws to enable the Government to prosecute the war with vigor and efficiency. And finally, in 1861, we find Congress . . . in anticipation of such astute objections [as in the dissent], passing an act "approving, legalizing, and making valid all the acts, proclamations, and orders of the President, &c., as if they had been *issued and done under the previous express authority* and direction of the Congress of the United States."[44]

Chief Justice Taney was among the four dissenters. He did not write a dissent of his own and instead joined in Justice Nelson's opinion, so we do not know how or whether he was able to reconcile in his own mind Nelson's dissent and his own 1849 opinion in *Luther v. Borden*. The answer may lie in an unpublished memorandum found among Taney's papers in which he concluded that the United States could not legally use military force to prevent a state from seceding from the Union.[45] Whatever his reasoning might have been, the chief justice who administered the oath of office to Abraham Lincoln could not bring himself to grant the president of the United States the same war powers he had willingly accorded the governor of Rhode Island.

Later in 1863, President Lincoln explained his own views of presidential power under law of war when defending the legality of the Emancipation Proclamation in a public letter to James C. Conkling:

> You dislike the emancipation proclamation; and, perhaps would have it retracted. You say it is unconstitutional—I think differently. I think the constitution invests its commander-in-chief, with the law of war in time of war—The most that can be said, if so much, is that slaves are property. Is there—has there ever been—any question that by the law of war, property, both of enemies and friends, may be taken when needed? And is it not needed whenever taking it, helps us, or hurts the enemy? Armies, the world over, destroy enemies' property when they can not use it; and even destroy their own to keep it from the enemy. Civilized belligerents do all in their power to help themselves, or hurt the enemy, except a few things regarded as

> barbarous or cruel. Among the exceptions are the massacres of vanquished foes, and non-combatants, male and female.[46]

Applying the laws and customs of war to Confederate soldiers and civilians created a unique challenge for the Union high command. When the Civil War started, there were only 16,000 men in the regular army. By 1865, 2,200,000 men were still under arms or had served in the Union army.[47] To lead this mass army, large numbers of civilians were commissioned as officers of volunteers, almost all of whom were unacquainted with the international laws and customs of war.

Even many regular army officers were poorly equipped to instruct their amateur brother officers in this arcane branch of legal study. During the War with Mexico, Winfield Scott, the army's general in chief, could provide valuable guidance to his subordinates based on his legal studies as a young man and his thorough mastery of European military history and practice, but little effort was made to preserve this experience before he retired in the fall of 1861. In the 1850s, a board of officers convened by the War Department had recommended that Congress enact a statute defining the civil powers of army officers who were required to govern occupied enemy territory, but Congress had ignored the recommendation. General Scott had also proposed that Dr. Francis Lieber of Columbia College (now Columbia University) teach a course on the law of war at West Point, but this idea had also been dropped when the academy superintendent objected that the curriculum was already overcrowded.[48]

One officer who was well equipped with knowledge of the laws of war was Major General Henry Halleck. An 1831 graduate of West Point (third in a class of thirty-one cadets), Halleck left the army in 1854 to practice law in San Francisco. He wrote several books on legal and military subjects, including a respected multivolume treatise on international law. At the start of the Civil War, he returned to the army and was promoted to major general.

At the end of 1861, Halleck was appointed to command the Department of the Missouri, where he found that much of Missouri had descended to near anarchy. Sabotage, pillage, and guerrilla warfare were rife, while bands of paramilitary marauders, with only the most tenuous connection to either the U.S. or Confederate governments, preyed on the civilian population. These acts were violations of the laws of war, but General Halleck found that the regular and volunteer officers under

his command were unfamiliar with this body of law and the procedures for enforcing it. General John Pope, for example, had ordered captured guerrillas to be tried by military commissions, even though he lacked the legal authority to convene such courts.[49]

At the end of August 1861, one of Halleck's predecessors, General John Frémont, had added to the confusion when he issued a poorly worded proclamation declaring that all "persons who shall be taken with arms in their hands within [Union] lines shall be tried by court-martial and if found guilty will be shot." In addition, all "property of those who shall take up arms against the United States or who shall be directly proven to have taken an active part with their enemies in the field" was declared confiscated and any slaves they held were "hereby declared free men."[50] This premature emancipation proclamation caused a furor in the neighboring slave state of Kentucky, which had not yet decided whether to secede. To save Kentucky for the Union, President Lincoln requested, and eventually ordered, that this part of Frémont's proclamation be modified to conform to the existing acts of Congress on forfeiture of rebel property.

The sentence requiring those "taken with arms in their hands within [Union] lines" to be shot caused its own problems. One of Frémont's subordinates even asked whether he should shoot wounded Confederate soldiers left on the field of battle. Horrified, Frémont replied that he wanted it "clearly understood that the proclamation is intended distinctly to recognize all the usual rights of an open enemy in the field and to be in all respects strictly conformable to the ordinary usages of war."[51] President Lincoln also modified the order to require that all death sentences be reviewed at the White House.

Although Halleck was a mediocre general, he was a very good lawyer, and in early 1862 he set about clearing up the legal mess left by his predecessors in command. On January 1, 1862, General Halleck published a general order for his department that laid out basic concepts of the laws of war as well as the proper procedures for their enforcement through trials before military commissions. In particular, he clarified the distinction between hostilities carried out by members of the regular Confederate forces in open combat and unlawful actions by both regular forces and unauthorized guerrilla bands. A soldier "duly enrolled and authorized to act in a military capacity in the enemy's service" was not to be punished "for the taking of human life in battle, siege, &c.," but could be punished for acts committed in violation of the laws of war.

"Thus he cannot be punished by a military tribunal for committing acts of hostility which are authorized by the laws of war but if he has committed murder, robbery, theft, arson, &c. the fact of his being a prisoner of war does not exempt him from trial by a military tribunal." However, "insurgents not militarily organized under the laws of the State, predatory partisans and guerrilla bands" were "in a legal sense mere freebooters and banditti" and were "liable to the same punishment which was imposed upon guerrilla bands by Napoleon in Spain, and by Scott in Mexico."[52] Napoleon and Scott had punished guerrillas with death.

Military commissions were, according to Halleck's order, the proper tribunals to punish freebooters, banditti, and guerrillas. Military commissions had to be composed of a minimum of three officers and could be convened only by orders from the commanding general of the U.S. Army or a military department. Sentences could not be carried out until they had been approved by the convening officer. When he took command of the entire U.S. Army in the summer of 1862, Halleck saw the need for similar but more extensive guidance to be available for all officers of the army, and he asked Dr. Francis Lieber to advise a board of officers who would draw up a more complete codification of the laws and customs of war. In the end, Lieber did all the writing, and the document, issued by the War Department as General Order 100 on April 24, 1863, has since been known as the Lieber Code.[53]

Born in Prussia in 1798, Francis Lieber served as a soldier in the final campaign of the Napoleonic Wars in 1815, and in 1820 he participated in the Greek war for independence. While a professor at the University of Jena, he was persecuted by the Prussian government for his democratic political opinions and fled to England. In 1827, he immigrated to America. Although he was strongly antislavery, Lieber denied being an abolitionist. He was familiar with the culture of the South, having taught at South Carolina College for several years before coming to Columbia College in New York. For Francis Lieber, the law of war was more than an academic subject, since his own family was divided by the Civil War. Two of his sons served in the Union army and one was killed fighting for the Confederacy.

General Halleck was not completely pleased with General Order 100. A month after the code was issued, Halleck gave the following guidance to General John Schofield, about to take command of U.S. forces in Missouri, a state plagued by endemic guerrilla warfare: "On this subject I commend to your careful attention the field instructions

published in General Orders, No. 100, current series. These instructions have been most carefully considered before publication. Nevertheless, they are very imperfect, and as Missouri is peculiarly situated, many questions may arise which are not here alluded to."[54] Halleck was correct. The Lieber Code did not give clear guidance on some important problems (e.g., treatment of members of the enemy's regular army caught fighting in civilian clothing), and it contained a few grandiloquent statements that, taken out of context, could be construed as rejecting all limits on the conduct of war. The last sentence of article 5, for example—"To save the country is paramount to all other considerations"—in context refers to application of lawful security measures in occupied territory. Out of context, it can be taken as a sinister suggestion that law can be disregarded to save the country.[55] Despite its shortcomings, however, the Lieber Code remains the best summary of the laws and customs of war as they existed in the middle of the nineteenth century.

The influence of the Lieber Code survived, and even expanded, after the end of the Civil War. The code remained the official guidance on the law of war in the U.S. Army well into the twentieth century. It was influential in Europe, and in the 1870s it was adopted by the Prussian government for the guidance of its soldiers during the Franco-Prussian War, a particularly ironic development since Lieber had once fled Prussia as a political refugee. In 1899, the code was a major source for the drafters of the Hague Regulations on Land Warfare, the first multilateral treaty to attempt a comprehensive codification of the laws and customs of war. The 1899 Hague Regulations, in turn, formed the basis for the current four Geneva Conventions of 1949.

President Lincoln signed the Lieber Code as commander in chief of the army, but it appears he had no role in drafting it. Although he never cited the code in any of his speeches or writings, Lincoln almost certainly read it because, as he later noted in his public letter to James C. Conkling, the law of war provided the principal legal foundation for the Emancipation Proclamation and the president's other decisions on military treatment of enemy persons and property. Whether or not there was a direct influence, Lincoln's actions closely paralleled Lieber's words in two major respects.

The adoption of the principle of military necessity as a general standard for legitimate military action was one of the main reforms espoused by Francis Lieber in his code. As Chief Justice Marshall and

Justice Story had noted in *United States v. Brown*, under the laws of war as they were understood in 1812, governments were not required to respect any rights of the owner of private property belonging to an enemy national. By midcentury, there was a growing body of scholarly opinion that even in war property and other private rights should not be interfered with unless a valid military purpose—a military necessity—would be served. In his code for the U.S. Army, Lieber adopted this view:

> Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.
>
> Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and . . . the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith.[56]

It should be noted that, both during the Civil War and in later nineteenth- and twentieth-century conflicts, the terms "necessity," "indispensable," and "unavoidable" were not taken literally by military commanders or their governments. In practice, so long as there was a rational connection, under circumstances as understood at the time, between an act of war and the defeat of the enemy's armed forces, the principle of military necessity was regarded as having been satisfied. President Lincoln expressed very similar ideas in his August 1863 letter to James C. Conkling when he wrote that "property, both of enemies and friends, may be taken when needed" and that it is needed "whenever taking it, helps us, or hurts the enemy."

A number of examples illustrate how loosely the concept of military necessity has been interpreted in practice. Shortly after the Civil War, the United States and Great Britain entered into negotiations to settle the claims of each nation against the other arising out of the war. During these negotiations, the British eventually conceded that Union destruction of cotton owned by British subjects was justified by

military necessity, since the export of cotton was a primary economic support for the Confederate war effort.[57] Again, legal experts generally agree that it is permissible to destroy enemy lighthouses, despite their semi-humanitarian function, because they also contribute to maritime commerce with an enemy's ports.[58] More recently, Ethiopia and Eritrea established an international commission to adjudicate claims arising from a border war they waged between 1998 and 2000. One of Eritrea's claims was that the Ethiopian air force had illegally attacked a partially completed electric power plant that was not a legitimate military objective. The commission, however, agreed with Ethiopia "that electric power stations are generally recognized to be of sufficient importance to a State's capacity to meet its wartime needs of communication, transport and industry so as usually to qualify as military objectives during armed conflicts," and denied the Eritrean claim.[59] The destruction of cotton exports, lighthouses, and incomplete electric power plants are rarely "unavoidable" in a strict sense or "indispensable" to the victory of one side over the other. Nevertheless, each of these acts of war has been considered justified by military necessity.

Lieber was careful to explain that military necessity only authorized actions that were otherwise "lawful according to the modern law and usages of war," that is, that were not prohibited by some specific rule. Thus military necessity allowed the "direct destruction of life or limb of armed enemies" but only the capture of unarmed enemies. Lincoln expressed the same principle to Conkling when he wrote, "Civilized belligerents do all in their power to help themselves, or hurt the enemy, except a few things regarded as barbarous or cruel," such as "massacres of vanquished foes, and non-combatants, male and female." It should also be noted that in his final Emancipation Proclamation, Lincoln specifically mentioned "military necessity" as the primary justification for recognizing the freedom of slaves in Confederate territory.[60]

"Military necessity does not," the Lieber Code emphasized, "admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions."[61] As we will see in the following chapters, throughout the war, President Lincoln was continually concerned that military actions be undertaken only for valid military reasons, and never for motives of revenge or cruelty.