



Lincoln Lore

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"I like Mr. Whiting very much"

When Francis Bicknell Carpenter (1830-1900) showed President Abraham Lincoln his nearly completed painting of "The First Reading of the Emancipation Proclamation Before the Cabinet," the painter called particular attention "to the accessories of the picture, stating that these had been selected from the objects in the cabinet chamber with reference solely to their bearing upon the subject." Lincoln commented, "Yes, there are the war maps, the portfolios, the slave map, and all; but the book in the corner, leaning against the chair leg, — you have changed the title of that, I see." Carpenter replied that he had, having at the last moment "learned that you frequently consulted, during the period you were preparing the Proclamation, Solicitor Whiting's work on the 'War Powers of the President,' and as Emancipation was the result in fact of a military necessity, the book seemed to me just the thing to go in there; so I simply changed the title, leaving the old sheepskin cover as it was." Lincoln admitted that "It is all very well that it should be there," but complained that the distinctive binding made it look like "a regular law book."

William Whiting's *The War Powers of the President* was by no means "a regular law book." It was, rather, a passionately charged argument that President Abraham Lincoln's powers as President during the Civil War were as sweeping as the war powers enjoyed by any ruler whose country had been invaded by a hostile power. Carpenter's anecdote, frequently cited as evidence of Lincoln's

powers of observation, is more important as documentation of Lincoln's reliance on Whiting's book.

There is other evidence of a less specific nature. Massachusetts Senator Charles Sumner informed a correspondent at one point during the war that Whiting, who was from Sumner's home state, was "in the full confidence of the President." Gideon Welles, who did not care for Solicitor Whiting, nonetheless recorded in his diary on

July 23, 1863 that Solicitor Whiting "has for several months been an important personage here." Welles said that "even the President" had spoken highly of Whiting and that the Solicitor was "high in the good graces of the President." After the war, Indiana's George W. Julian recalled that he had seen President Lincoln on July 2, 1864 about proposals to confiscate the property "of rebel landholders." Lincoln had been prepared two years previously to veto proposals that affected the property of heirs of Confederates, but he informed Julian on this occasion that "Solicitor Whiting's law argument . . . had changed his view" and that he "would now sign a bill striking at the fee of rebel landholders, if we would send it to him." Of course, Julian's recollections may have been colored by the political demands of the years of Reconstruction that intervened since his meeting with the President. But as late as March 25, 1865, Lincoln wrote Secretary of War Edwin Stanton in reply to Stanton's permission to accept Whiting's resignation, "I like Mr. Whiting very much, and hence would wish him to remain or re-



KEY TO THE PICTURE

THE MEN

1. PRESIDENT LINCOLN.
2. WILLIAM H. SEWARD, Secretary of State.
3. SALMON P. CHASE, Secretary of Treasury.
4. EDWIN M. STANTON, Secretary of War.
5. GIDEON WELLES, Secretary of Navy.
6. EDWARD BATES, Attorney-General.
7. MONTGOMERY BLAIE, Postmaster-General.
8. CALLEB B. SMITH, Secretary of Interior.

ACCESSORIES

9. Photograph of Simon Cameron, Ex-Sec. War.
10. Portrait of Andrew Jackson.
11. Parchment Copy of the Constitution.
12. Map of Seat of War in Virginia.
13. Map showing Slave Population in gradulight and shade.
14. War Department Portfolio.
15. Story's "Commentaries on the Constitution."
16. Whiting's "War Powers of the President."
17. New York Tribune.
18. Two volumes *Congressional Globe*.

The room is the Official Chamber of the White House, in which all Cabinet meetings are held, and in which the President receives calls upon official business.

From the Lincoln National Life Foundation

Francis Bicknell Carpenter made a pencil sketch with a key for his painting. The key reproduced here appeared in Fred B. Perkins, *The Picture and The Men* (New York: A. J. Johnson, 1867). There is little about the painting in Perkins's book that does not appear in Carpenter's *Six Months at the White House with Abraham Lincoln: The Story of a Picture* (New York: Hurd and Houghton, 1866). Perkins characterized himself as an "extreme Radical." He may well have liked some of the ideas expressed in item 16 of the key; that item is the subject of this *Lincoln Lore*.

sign as best suits himself." There are few letters from William Whiting in the Robert Todd Lincoln Papers, and those are of a routine nature, requesting Secretary John Nicolay to lay some matter or other before the President. Still, Whiting was the legal adviser of the War Department and could have seen Lincoln personally in Washington.

Lincoln's association with the views of William Whiting is of no small importance, though it has only recently received the attention it deserves in Herman Belz's *Reconstructing the Union: Theory and Policy during the Civil War* (Ithaca: Cornell University Press, 1969). Whiting wrote three essays, one on the President's war powers, another on the specific question of military arrests in the North, and the third on the divisive question of reconstruction. All three appear in the book in the Lincoln Library and Museum's collection. As the picture below shows, this was the eighth edition. In the decade after its original publication in 1862, Whiting's *War Powers of the President*, went through an amazing forty-three editions; its longevity and popularity no doubt stemmed from the fact that it addressed constitutional questions that remained important during the Reconstruction period. Since Whiting was still in the President's good graces as late as 1865, it seems safe to explore all the matter in the book rather than just the material that bore on the question of emancipation.

Lincoln biographer James G. Randall in his *Constitutional Problems under Lincoln* sniffed that "defective reasoning" ran "through the whole of Whiting's treatment," but Whiting's book is perhaps better characterized as a case of special pleading. Gideon Welles did not like Whiting's views any better than Randall did many years later, but he captured the flavor of Whiting's work a little better, when he wrote: "He is ready with expedients, but not profound in his opinions, is a plausible advocate rather than a correct thinker, more of a patent lawyer than a statesman."

Whiting's argument was a brief for his case and not a balanced and detached analysis of the constitutional issues provoked by the Civil War. Whether his reasoning was faulty or not, knowing what he said will be an aid to fathoming Lincoln's complex and changing attitudes towards the Civil War as a constitutional crisis.

Whiting's was the tough and simplistic reasoning of wartime mobilization. He defended "the right to appropriate private property to public use, and to provide compensation therefor . . . ; the power of Congress to confiscate enemy's property as a belligerent right; the power of the President, as commander-in-chief, as an act of war, to emancipate slaves; . . . the power of Congress to pass laws to aid the President, in executing his military duties, by abolishing slavery, or emancipating slaves, under Art. I Sect. 8, Cl. 18, as *war measures*, essential to save the country from destruction . . ." Moreover, he claimed that these powers by no means depended "upon the adoption of the most liberal construction of the constitution"; one need not rely on the broad grant of power in Article I. Section 8, Clause 1, "to provide for the common defence and general welfare." Whiting even suggested that Congress might have a peacetime right to abolish slavery: "Yet cases might arise in which, in time of peace, the abolishment of slavery might be necessary, and therefore would be lawful, in order to enable Congress to carry into effect some of the express provisions of the constitution, as for example, that contained in Art. IV. Sect. 4, Cl. 1, in which the United States guarantee to every State in the Union a republican form of government; or that contained in Art IV. Sect. 2, Cl. 1, which provides that citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." Radicals became increasingly interested during the Civil War in the guarantee of a republican form of government as a route to Congressional power over what had been thought to be domestic institutions. But this was a very liberal construction indeed, since (1) the founding fathers clearly thought slavery was no such violation of this constitutional guarantee and (2) in the eighteenth century a republican government was any government without a king. It is doubtful that Lincoln ever thought much of this argument, and Whiting himself merely mentioned it as a possibility.

Much of Whiting's reasoning did rely on doing what

James G. Randall claimed in *Constitutional Problems under Lincoln* "American constitutional lawyers do not, in general" do, that is, "cite the phraseology of the preamble as equivalent to a grant of power to Congress." Thus Whiting described the general situation in the Civil War this way: "A handful of slave-masters have broken up that Union, have overthrown justice, and have destroyed domestic tranquility. Instead of contributing to the common defence and public welfare, or securing the blessings of liberty to themselves and their posterity, they have waged war upon their country, and have attempted to establish, over the ruins of the Republic, an aristocratic government founded upon Slavery." Despite rather loose constructions, Whiting was careful to distinguish emancipation as a "means" of war from emancipation as an "object" of war, arguing only for the former power. Yet he did at one point admit that his was in general a liberal construction in a passage which better than any other explained the Solicitor's general view of the American Constitution:

Those who have contended for the most narrow and technical construction, having stuck to the letter of the text, and not appreciating the spirit in which it was framed, are opposed to all who view it as only a *frame of government*, a *plan-in-outline*, for regulating the affairs of an enterprising and progressive nation. Some treat that frame of government as though it were a cast-iron mould, incapable of adaptation or alteration—as one which a blow would break in pieces. Others think it a hoop placed around the trunk of a living tree, whose growth must girdle the tree, or burst the hoop. But sounder judges believe that it more resembles the tree itself,—native to the soil that bore it,— . . . putting forth branches of its own growth, and flourishing with eternal verdure . . . By a liberal construction of the constitution, our government has passed through many storms unharmed.

Whiting was only one of many in the North who were changing their views of what a constitution was during the American Civil War.

Since practically everything Whiting recommended was a war measure, his interpretation stood or fell on the complex question of whether the United States was, by the technical standards of international law, actually at war. The Lincoln administration never forthrightly claimed that it was at war, since to do so would imply that the Confederacy was a nation. On the other hand, the Lincoln administration did not treat the Civil War as merely a domestic rebellion or insurrection either. To have followed the latter course would have made the blockade illegal and would have meant hanging Confederate prisoners rather than treating them as prisoners of war. Moreover, Congress never declared war.

Such delicate complexities did not phase Solicitor Whiting in the least. He stated flatly that a declaration of war was not necessary to give the government "full belligerent powers." To him, it was all very simple: "Wars may be divided into two classes, foreign and civil. In all civil wars the government claims the belligerents, on both sides, as subjects, and has the legal right to treat the insurgents both as subjects and as belligerents; and they therefore may exercise the full and untrammelled powers of war against their subjects . . ." His case rested more on fact than on law: "The government have in fact treated the insurgents as *belligerents* on several occasions, without recognizing them in express terms as such. They have received the capitulation of rebels at Hatteras, as prisoners of war, *in express terms*, and have exchanged prisoners of war as such, and have blockaded the coast by military authority, and have officially informed other nations of such blockade, and of their intention to make it effective, under the present law of nations." Whiting concluded that, "Having thus the full powers and right of making and carrying on war against rebels, both as subjects and as belligerents, this *right* frees the President and Congress from the difficulties which might arise if rebels could be treated *only* as SUBJECTS, and if *war* could not be waged upon them."

Though Whiting's view certainly was favorable to sweeping powers for the commander-in-chief, he did not neglect to point out that these powers were not exclusively the executive's. "The right of the Executive to strike this blow against his enemy," he said, "does not

deprive Congress of the concurrent right or duty to emancipate enemy's slaves, if in *their judgment* a civil act for that purpose is required by public welfare and common defence, for the purpose of aiding and giving effect to such war measures as the commander-in-chief may adopt." Whiting's views on the suspension of the writ of *habeas corpus*, however, did redound mostly to the President's benefit and rather slighted Congress's role. In this area, Whiting was harsher, relying on the doctrine that only "Necessity arbitrates the rights and the methods of war." Therefore it did not matter how far the neighborhood of the act in question was from the actual battles or whether the party in question was engaged in any *overt* act. The only question was whether the person's being at large would "tend to *impede*, embarrass, or hinder the *bona fide* military operations in creating, organizing, maintaining, and most effectually using the military forces of the country." As for Congress, this simply was not a field in which it was adept. Said Whiting: "The facts on which public safety in time of civil war depends can be known only to the military men, and not to the legislatures in any special case. To pass a law as to each prisoner's case, whenever public safety required the privilege of the writ to be suspended, would be impracticable."

The specific argument concerning emancipation as a right of war rested heavily on arguments former President John Quincy Adams had used when he returned to Washington to be a Representative in the House. Over twenty years before the Civil War, Adams had argued that the law of nations sanctioned emancipation of the enemy's slaves as a legitimate act of war. A particularly powerful example of this had been the actions of three British commanders in the American Revolution. They

had offered freedom to slaves who would join them against the colonists. In the War of 1812, Great Britain used the same tactic again, and the liberated slaves were carried away to Britain in violation of the express terms of the Treaty of Ghent. France had exercised the same power in Santo Domingo, and in Colombia, slavery had been abolished by the military command of General Bolivar. Moreover, the United States itself had in 1814 used slaves as laborers in the Battle of New Orleans without compensating the masters for the slaves who were killed as a result of this action. In the Seminole wars, the United States Army had rewarded slaves who acted as spies and scouts with their freedom and treated captured slaves who were fighting with the Indians as prisoners of war and not as property to be returned to their masters. Here Whiting was at his lawyerly best, citing precedents for Lincoln's actions, but the ground had already been well laid out by John Quincy Adams years earlier.

By January 1, 1863, of course, almost all of Solicitor Whiting's arguments had become apologies rather than suggestions for the future. With the exception of Congress's acting to abolish slavery, the rest had become history. The Lincoln administration had emancipated slaves by exercise of the President's war powers, and there had been so many arrests in the North without charges that Lincoln was accused in some (Democratic) circles of becoming a dictator. But what Whiting chose to write about in July of 1863 would remain a hotly contested issue for years to come. In his letter on the "Return of Rebellious States to the Union," Whiting informed the Union League of Philadelphia about his views on reconstruction.

The message of Whiting's letter was, as usual, simple: "Beware of committing yourselves to the fatal doctrine of recognizing the existence in the Union, of States which have been declared by the President's Proclamation to be in rebellion. For, by this new device of the enemy, this new version of the poisonous State rights doctrine, the secessionists will be able to get back by fraud what they failed to get by fighting." In this area, perhaps even more than the others, the constitutional questions were confusing in the extreme, but Solicitor Whiting simplified them. According to Whiting, the Supreme Court decision in the case of the *Hiawatha* (March 9, 1863) determined in effect that at least since July 13, 1861, the United States had been involved in a "territorial war" against the Confederate States, and that the laws of war thus converted all citizens of a hostile State into a public enemy. As a result, said Whiting, "every citizen residing in the belligerent districts became a public enemy irrespective of his private sentiments, whether loyal or disloyal, friendly or hostile, Unionist or secessionist, guilty or innocent."

The practical effect of this constitutional argument was to make it possible for the United States to demand that the seceded States meet certain conditions before they could become states of the United States again. If the war were seen merely as a rebellion of certain disaffected citizens, then when the rebellion was quelled the seceded States immediately became States again, with all the legal privileges and immunities from federal action that Massachusetts or Illinois enjoyed. If the war was in some sense a war against a hostile territory, on the other hand, then the status of the territory once the war was over was much less clear, and Congress or the President could perhaps exert powers over the area which they certainly could not exert if the area had become immediately States of the Union again. Significantly, Whiting showed no interest in saying which — the President or Congress — had the powers.

Uppermost in Whiting's mind, of course, was the question that had interested him all along: "If you concede State rights to your enemies, what security can you have that traitors will not pass State laws which will render the position of the blacks intolerable, or *reduce them all to slavery?*" He ended the letter with this policy recommendation:

One of two things should be done in order to keep faith with the country and save us from obvious peril. Allow the inhabitants of conquered territory to form themselves into States, only by adopting constitutions such as will forever remove all cause of collision with the United States, by excluding slavery therefrom,

THE

WAR POWERS OF THE PRESIDENT, MILITARY ARRESTS, AND Reconstruction of the Union.

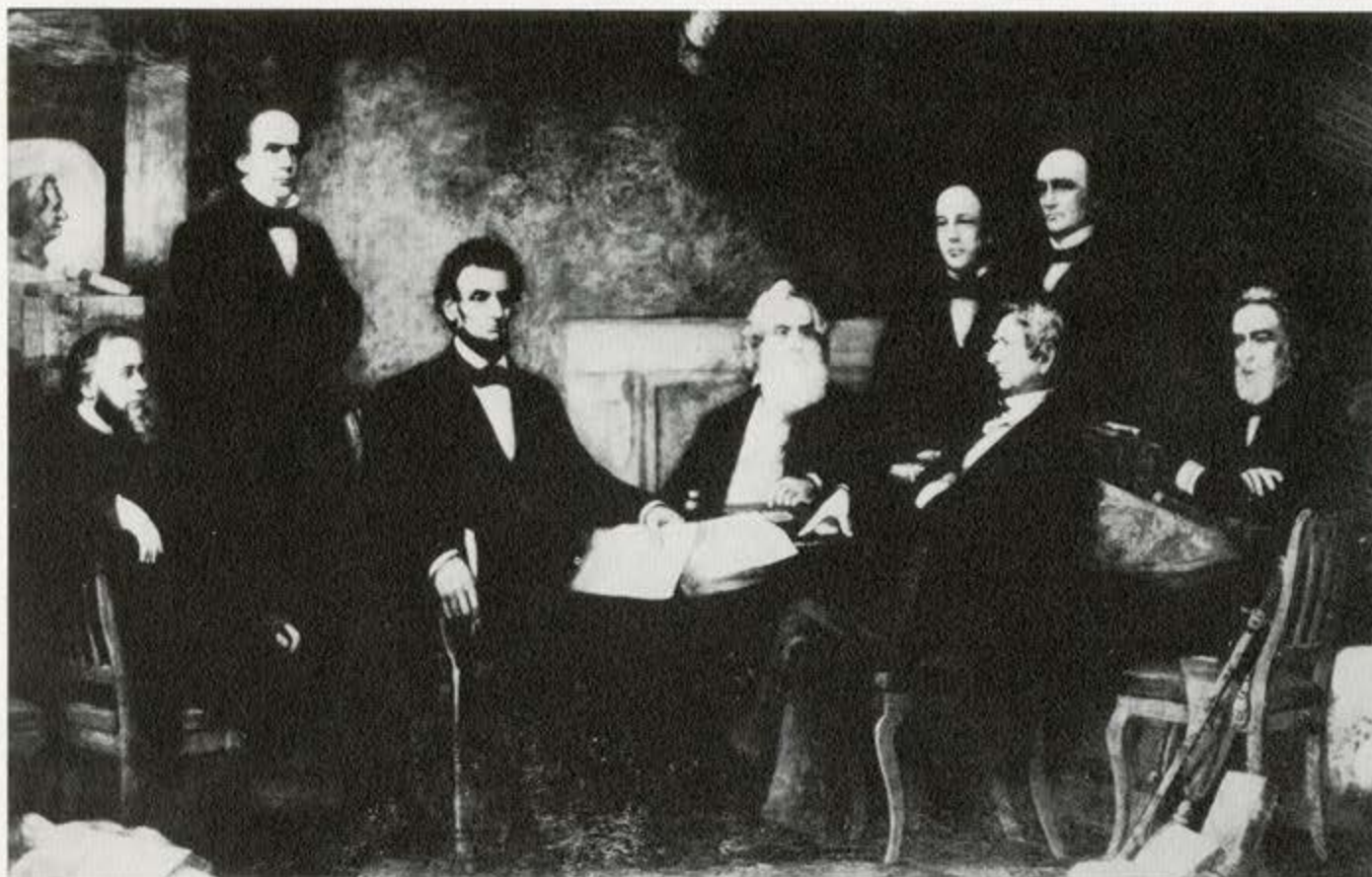
BY
WILLIAM WHITING.

Eighth Edition.

BOSTON:
JOHN L. SHOREY,
11 WASHINGTON SQUARE.
1864.

From the Lincoln National Life Foundation

This is the title page of William Whiting's book. The Lincoln Library and Museum owns a copy of the eighth edition in its special collection of books that Lincoln read. This collection is currently undergoing an evaluation to determine as nearly as possible what evidence historians have that Lincoln read the books on social and political topics.



From the Lincoln National Life Foundation

Carpenter's painting shows more clearly than the later engravings of it Lincoln's placement with what the painter called the "radical" faction of the cabinet. Lincoln is grouped with Stanton and Chase; Welles, Seward, Bates, Blair, and Smith form the "conservative" group. The portrait of Simon Cameron, Stanton's predecessor as Secretary of War, appears with the "radical" group because he was, according to Fred B. Perkins, "the first member of the Cabinet to avow the radical belief as to what should be done with the negro in the war." On the other hand, Andrew Jackson's portrait appears above Welles's head. Jackson's opposition to Nullification earned him a place in the picture, but his views on slavery necessarily separated him from the Chase and Stanton group.

or continue military government over the conquered district, until there shall appear therein a sufficient number of loyal inhabitants to form a republican government, which, by guaranteeing freedom to all, shall be in accordance with the true spirit of the constitution of the United States.

To say that Lincoln liked William Whiting, of course, is not to say that he endorsed all of Whiting's ideas. Some of those ideas Lincoln surely did not like. Lincoln never thought Congress could in peacetime touch slavery in the States where it already existed. Lincoln also clung in certain specific instances to the view that reconstruction was a question of individual loyalties to be restored. Thus his famous "ten-per cent plan" envisioned a nucleus of loyal individuals who would bring the seceded State quickly back into its normal relations to the United States government. Lincoln's Proclamation of Amnesty and Reconstruction of December 8, 1863, issued less than six months after Whiting had made his views on reconstruction known, rested not on any belligerent rights over conquered hostile territory or public enemies but on the President's pardoning power — that is, on his own power to judge when the disloyal individuals had ceased disloyalty and become *ipso facto* normal United States citizens. But, as Herman Belz points out, Lincoln came closer to Whiting's views than one might imagine from reading Randall's *Constitutional Problems under Lincoln* or T. Harry William's *Lincoln and the Radicals*. On the most important substantive point, the Proclamation of Amnesty and Reconstruction agreed with Whiting's "Return of Rebellious States to the Union": both thought emancipation had to be a condition of reconstruction. Lincoln's proclamation required those seeking amnesty to "abide by and faithfully support all acts of Congress . . . and proclamations of the President made during the existing rebellion having

reference to slaves." To allow anything else, Lincoln thought, would be "a cruel and astonishing breach of faith." Moreover, Lincoln indicated only that it was "not improper" that previous state boundaries and state constitutional and legal provisions and customs be retained by reconstructed states. Nor did he rule out plans of reconstruction other than the one he announced in the Proclamation of Amnesty and Reconstruction as live possibilities.

Historians and Lincoln biographers have been too quick to draw members of the Republican party as divided into distinct factions with clearly delineated policies of reconstruction during the Civil War. Ideas were in a state of flux throughout the period, and that goes for Abraham Lincoln's ideas as well. Whatever their policy differences, Lincoln still liked Solicitor Whiting "very much" as late as 1865. Moreover, their policy differences were not as extreme as one might think. When Francis Bicknell Carpenter painted "The First Reading of the Emancipation Proclamation Before the Cabinet," he not only included Whiting's *War Powers of the President* as an important "accessory" to that momentous historical event, but he also included this symbolic message which he described in his book *Six Months at the White House with Abraham Lincoln: The Story of a Picture* (New York: Hurd and Houghton, 1866):

There was a curious mingling of fact and allegory in my mind, as I assigned to each his place on the canvas. There were two elements in the Cabinet, the radical and the conservative. Mr. Lincoln was placed at the head of the official table, between two groups, nearest that representing the radical, but the uniting point of both.

Editor's Note: I am much indebted to Herman Belz's *Reconstructing the Union: Theory and Policy during the Civil War* (Ithaca: Cornell University Press, 1969). M. E. N., Jr.