

## Was Secession Legal? The Battle Of, By, and For the Constitution

*...an essential attribute of State sovereignty [is] the right of a State to secede from the Union.*

*Senator Jefferson Davis' Farewell Address*

*Senate Chamber, U.S. Capitol, January 21, 1861*<sup>1</sup>

The nation faced a dilemma as the presidential election of 1860 approached. The states of the Deep South were organizing themselves for secession. The trigger would be Republican Abraham Lincoln's election as the sixteenth President of the United States. Seven states in succession, beginning with South Carolina, seceded beginning in December of that year. Four more states would join them. Declaring themselves independent of the United States of America, they drafted a constitution and formed the Confederate States of America. The United States did not recognize their right to secede, and the Civil War ensued—a war comprising the bloodiest and most destructive four years in American history, but which confirmed the idea of national sovereignty.

A central question was whether secession was a Constitutional right of which individual states could avail themselves. That states had that right was a determination made by leaders of the Confederate states,

*...in virtue of the power in me vested by the Constitution and the [Militia Act of 1795]...hereby do call forth, the militia of the several States of the Union, to the aggregate number of seventy-five thousand, in order to suppress said combinations, and to cause the laws to be duly executed...I appeal to all loyal citizens to favor, facilitate, and aid this effort to maintain the honor, the integrity, and the existence of our National Union, and the perpetuity of popular government; and to redress wrongs already long enough endured. [Emphasis added.]*

*Proclamation by President Abraham Lincoln  
April 15, 1861*

decisions ratified by popular votes in each of those states (no such votes were held by the states that did not secede), and which created a crisis for the new President—a crisis that he believed was an existential threat to the republic. President Lincoln was forced by circumstances to take decisive action.

Despite the United States Supreme Court ruling in *Texas v. White* (74 U.S. 700, 1868), in which it held that the United States is an “indissoluble” union from which no state can secede, this question had

yet to be definitively settled.<sup>2</sup> It came about because the Constitution is silent on the matter. Secession is not mentioned in it either as a power remaining to the states or denied to them, nor does the Constitution mention any federal government role pertaining to secession. There is no discussion of this in the Federalist Papers beyond one oblique reference to “secessions” by James Madison in Federalist No. 58. Moreover, as of 1860 there had been no laws passed by Congress nor any Supreme Court cases addressing the matter.

Insightful arguments have been made pro and con, but on balance legality seems to have come down to the Tenth Amendment: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.” Thus, it seems then-U. S. Senator Jefferson Davis was correct.

But there was more to it—much more. If states were within their rights to secede from the Union on their own volition, were not the remaining states acting within *their* Constitutional rights to actively oppose secession even to the point of using force of arms?

President Lincoln led the effort to maintain the integrity of the nation in 1861, but the states that remained in the Union decisively supported him by providing state militias when he called for them and in other ways supported armed intervention.

The US Army, little more than an armed border constabulary at the time, was too small (even before losing officers and men who resigned to join their home states in secession) and too scattered to effectively intervene without that active support.

If secession was allowable under the Constitution, that did not mean it necessarily was acceptable, particularly if it would result in harm to those states that remained or to the republic as a whole. So, it mattered how the political leadership would deal with it.

There is no power delegated to Congress or the Executive to forcibly keep states in the Union. This is the basis for the idea each state can decide for itself under the Tenth Amendment. However, the presidential oath in Article 2, Section 1, Clause 8 requires the President “to the best of my ability, preserve, protect and defend the Constitution of the United States.” While the authority to preserve the Union in the face of secession even to the point of using armed force is not expressly granted to the Executive, it is reasonable to presume it is an implied authority. Allowing the nation to be torn asunder and collapse is not preserving, protecting, or defending the Constitution. Quite the opposite. The death of the nation is the death of the Constitution.

The Preamble starts with “We the people of the United States of America,” not “We the people of the states of Georgia, North Carolina, South Carolina, and so on,” says Jeffrey Rosen of the National Constitution Center.<sup>3</sup> This was “signaling the idea that a national people were creating the Union together, and that ‘We the people’ of the entire nation have the sovereign power, not the individual

#### *Was It Treason?*

*This view leaves open the question of treason on the part of the government and the military forces of the Confederacy. Treason is defined in the Constitution, Article III, Section 3, Clause 1: “Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the testimony of two Witnesses to the same overt Act, or on Confession in open Court.”*

*The Confederacy and its military forces certainly fit this definition, but intent comes into play. The Confederates were not trying to overthrow the federal government. In their view, they were extricating themselves from the Union, and in the process, considered themselves a sovereign power. Thus, in their view they were not committing treason. The position of many in the North was that they were still part of the Union and, therefore, their actions fit the definition.*

*A key aspect of the problem is what benefit would have accrued to the nation had official charges of treason been levied and pursued through trials? The goal of the war was to facilitate reunification and bring the states and, arguably, the people of the South, back into the Union. It was a difficult process under any circumstances and ratification would have made it significantly more difficult by pursuing charges of treason against a select few of the leadership of the Confederacy. President Lincoln realized this, as did his successor, President Andrew Johnson. All Confederates were eventually pardoned by President Johnson.*

states, not a king, not any tyrant.” President George Washington seemed to hold the same view (see below).

Rosen went on to say that President Lincoln believed “‘We the people’ of the entire United States made

the Union, and the consent of the whole was needed before the Union could be changed. And then the war came, and it took the Civil War, the bloodiest in American history, to establish that idea of national sovereignty.”

#### *What's in a Name?*

*The conflict is officially listed as the Civil War, but several other names have been applied, among them the War of Northern Aggression. Was it? Was this a war initiated and waged by one group of sovereign States (those remaining in the Union) versus other sovereign States (the states attempting to secede—the Confederacy)?*

*Consider:*

- *The Union never recognized the Confederacy as a sovereign political entity. The secessionist states were considered and treated as still being part of the United States.*
- *There was no peace treaty at the end of the war as there was no nation, no sovereign government, with which to make a formal peace.*
- *There was no formal diplomatic recognition of the Confederacy by other nations.*
- *It was a war of national self-defense. Secession was seen as an existential threat. Not everyone in the North saw it this way, of course, but the federal government did, starting with President Lincoln and echoed by the US Congress and the governors and legislatures of the states remaining in the Union, all of which supported the war effort with blood and treasure.*

*It comes down to a question of where one sat or, more to the point, whether one was on the winning side or not. If secession had been successful, the Confederacy would have officially recorded the war as caused by Northern aggression, and its history books would have been so written. Even with its loss, this is how the South portrayed the conflict, as having been victims of a rapacious North. This was part and parcel of the Lost Cause narrative.*

*But the Union prevailed, and the Civil War it is.*

This idea flows into the Tenth Amendment as well. It says “powers...are reserved to the states respectively, ***or to the people.***”

[Emphasis added.] Note the “or” in the amendment. Power is reserved to the states or to the people, meaning both entities have such power. Is either one paramount over the other? Does it come down to a matter of numbers, e.g., in this case the population of the North being significantly greater than the South?

Presumably, the Constitution is silent on secession because it was not contemplated by the Founders to be a right pertaining to any state. That means secession is outside the spirit of the Constitution if not outside its letter. And since it is silent, official reaction to secession necessarily comes down to legislative and executive judgment, which is to say political acts.

Secession itself was a political decision, as was President Lincoln’s decision to resist and as were the remaining states’ decisions to

actively support his efforts. Likewise, the decision on each side to use military force was political. Use of military force is, after all, the continuation of politics by violent means.

Secession was a breaking of the pact that states had entered into when accepting statehood.

Secessionist states repudiated federal laws by virtue of their secession manifestos, the seizing of federal property by force (arsenals and forts, for example), and setting about establishing their own relations

with foreign nations. Moreover, they strengthened their militias with the express purpose of resisting Union authority were it used against them.

President Lincoln provided his rationale in his first inaugural address on March 4, 1861, and again in his message to Congress on July 4, 1861. In the latter he explained in detail why he believed he had to oppose succession even with the use of force: "It is now for [the people] to demonstrate to the world that those who can fairly carry an election can also suppress a rebellion; that ballots are the rightful and peaceful successors of bullets, and that when ballots have fairly and constitutionally decided there can be no successful appeal back to bullets; that there can be no successful appeal except to ballots themselves at succeeding elections...The people themselves, and not their servants, can safely reverse their own deliberate decisions." President Lincoln believed "...he had no moral right to shrink, nor even to count the chances of his own life in what might follow. In full view of his great responsibility, he has so far done what he has deemed his duty..."<sup>6</sup>

President Lincoln's paramount goal was the preservation of the Union above all else. Resisting secession even if that entailed the use of military force was based on the idea that the Constitution was never intended to be a vehicle for national suicide. The question of the legality of secession simply was not an issue for debate. The Union had to be preserved. He was the President of a divided nation. Maintaining the integrity and the continued existence of the Union required strong leadership. He set the national strategy as a political decision.

The war settled the matter for the time being, reinforced by the White decision in 1868. President Lincoln's steadfastness in his determination to prevent the success of secession saw the republic through the biggest threat to its existence experienced so far in our history as a nation.

*The unity of government which constitutes you one people is also now dear to you. It is justly so, for it is a main pillar in the edifice of your real independence, the support of your tranquility at home, your peace abroad; of your safety; of your prosperity; of that very liberty which you so highly prize.*

*George Washington's Farewell Address*

*September 17, 1796*<sup>4</sup>

*The Constitution...forms a government, not a league, and whether it be formed by compact between the States, or in any other manner, its character is the same. It is a government in which all the people are represented, which operates directly on the people individually, not upon the States--they retained all the power they did not grant. But each State having expressly parted with so many powers as to constitute jointly with the other States a single Nation, cannot from that period possess any right to secede, because each secession does not break a league, but destroys the unity of a Nation, and any injury to that unity is not only a breach which would result from the contravention of a compact, but it is an offence against the whole Union...*

*Proclamation by Andrew Jackson, President of the United States*

*December 10, 1832*<sup>5</sup>

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*Notes:*

<sup>1</sup> “The Papers of Jefferson Davis,” Rice University, <https://jeffersondavis.rice.edu/archives/documents/jefferson-davis-farewell-address>

<sup>2</sup> Cornell Law School, Legal Information Institute, <https://www.law.cornell.edu/supremecourt/text/74/700>.

<sup>3</sup> C-SPAN Washington Journal, September 17, 2023.

<sup>4</sup> National Constitution Center, <https://constitutioncenter.org/the-constitution/historic-document-library/detail/george-washington-farewell-address-1796>.

<sup>5</sup> The Library of Congress, *A Century of Lawmaking for a new Nation: U.S. Congressional Documents and Debates, 1774-1875*, pp. 771-781.

<sup>6</sup> President Lincoln’s predecessor, President James Buchanan, denied the legal right of states to secede but held that the Federal Government legally could not prevent them. He hoped for compromise, but secessionist leaders *did not want compromise*. <https://www.whitehouse.gov/about-the-white-house/presidents/james-buchanan/>.