



THE ODD COUPLE OF AMERICAN LEGAL HISTORY

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Reviewing

JAMES F. SIMON, *LINCOLN AND CHIEF JUSTICE TANEY:
SLAVERY, SECESSION, AND THE PRESIDENT'S WAR POWERS*
(Simon & Schuster 2006)

WHEN INAUGURATION DAY, March 4, 1861 dawned, the ominous storm clouds on the horizon were as literal as they were metaphorical. There on the East Portico of the unfinished Capitol the two men stood facing each other. Both could be considered homely men, tall, gaunt, virtually cadaverous in appearance, dressed in dull, ill-fitting clothes. One had to wonder what the two men were thinking about as Chief Justice Roger Taney, in his eighty-fourth year, delivered the oath of office to Abraham Lincoln, the new sixteenth president of the United States. Lincoln, the standard bearer of a political party whose antislavery ideology Taney despised, was moving into the White House, and Taney could not hide his contempt. Taney was the first to shake Lincoln's hand after the swearing-in ceremony and, according to one observer, "the Chief Justice

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seemed very agitated, and his hands shook perceptibly with emotion” as Lincoln spoke. Indeed, one reporter wrote that Chief Justice Taney “did not remove his eyes from Mr. Lincoln during the entire delivery and listened with the utmost attention to every word” of the inaugural address.¹

At the time of Lincoln’s inauguration, Taney’s most notorious court opinion, *Dred Scott v. Sandford*, was only four years old and the law of the land. During the late 1850s as he rose to notoriety, Lincoln had repeatedly railed against the racist content of the decision, referring at one point to “Dred Scottism” as a “burlesque on judicial decisions” and a “slander and profanation upon the honored names and sacred history of republican America.”²

If ever there were an odd couple in American legal history, then, it would have to be Lincoln and Taney. Born in 1777 into an Annapolis family that had held slaves and land since the 1660s, Taney had what one fellow lawyer, William Pinckney, snidely called the “infernal apostolic manner” of a man born with a silver spoon in his mouth. But the scion Taney was also a talented lawyer, rising to become attorney general of Maryland in 1827 and three years later to be named Attorney General of the United States by Andrew Jackson. In comparison to Taney’s connections and privileges, Lincoln was a self-made man. But, eventually he became a highly successful railroad and corporate lawyer at the time of his election to the presidency.³

At first glance, there are probably few men in nineteenth century America more antithetical and unlikely as the subject of a dual biography than Lincoln and Taney. Yet, that is precisely what James F. Simon has sought to do in *Lincoln and Chief Justice Taney: Slavery, Secession, and the President’s War Powers*. Indeed, Simon believes that

¹ *New York Times*, March 5, 1861.

² Roy P. Basler, ed., *The Collected Works of Abraham Lincoln* (New Brunswick, NJ, 1953-55), vol. 2: 454. Hereafter referred to as *CWAL*.

³ Two new books on Lincoln’s legal career shed some interesting light on this aspect of his pre-presidential life. See Brian Dirck, *Lincoln the Lawyer* (Urbana, IL, 2007); and Mark E. Steiner, *An Honest Calling: The Law Practice of Abraham Lincoln* (Dekalb, IL, 2006).

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the two iconic figures had much in common and had they known each other in “less perilous times,” they might have become friends, or perhaps at the very least, mutually respected adversaries.

“In their prime,” writes Simon, “Taney and Lincoln were among the best litigators in their respective states of Maryland and Illinois. Without flourish, Taney demonstrated the extraordinary ability to lay the facts and law of a case bare before a judge or jury. Lincoln often embroidered his major legal points with folksy stories, but he never lost sight of an argument that would win the case for his client.” (p. 1)

Simon finds the roots of Taney’s opinions as chief justice in his passionate embrace of Jacksonian democracy. It might seem perhaps odd that the patrician Taney would ally himself so fiercely to the paladin of the common man, but Jacksonian democracy was delivered to the masses by the sons of America’s planter aristocracy, which, of course, included Taney. When Jackson declared war on the Second Bank of the United States in his erstwhile attempt to stave off the Industrial Revolution in America, Taney was the only Cabinet member to support him.

“Taney became Jackson’s indispensable ally in the president’s monumental fight with the powerful Bank of the United States,” writes Simon. “But before the confrontation between Jackson and the bank erupted, Taney was asked to provide a wide range of legal opinions to the administration. Taney’s reasoning in one of these early unpublished advisory opinions, on states’ rights and slavery, would be stored like a time bomb, to be detonated more than a quarter century later in *Dred Scott v. Sanford*.” (p. 15)

Taney became the articulate voice of opposition against the moneyed interests represented by the Bank of the United States. Jackson despised the bank and held much personal animus towards its president, Nicholas Biddle, who masterminded the Whig opposition to the aging and irascible president. The bank had been declared constitutional by the revered John Marshall and his court, but Taney provided Jackson with the legal ammunition to challenge the bank’s very legal existence, and it was Taney himself who ultimately withdrew the bank’s funds for Jackson in 1833 after becoming his

Secretary of the Treasury. Taney's reward was a Supreme Court nomination in 1834 and confirmation as chief justice two years later.⁴

Lincoln rejected both Taney's and Jackson's arguments that the bank was unconstitutional. "On examination," Lincoln said, "it will be found that the absurd rule, which prescribes that before we can constitutionally adopt a National Bank as a fiscal agent, we must show an indispensable necessity for it, will exclude every sort of fiscal agent that the mind of man can conceive." Lincoln's argument rested heavily upon Chief Justice John Marshall's opinion in *McCulloch v. Maryland* that the "necessary and proper" clause of the Constitution was broad enough to provide an array of legislative choices to achieve "legitimate constitutional goals" which included the creation of the Bank of the United States.⁵

Seeing their conflict as inevitable, Simon plays Taney's career off of Lincoln. Both men possessed strong beliefs in the sanctity of the Constitution, but it was in their interpretation of the Founding Father's intent on the issue of slavery as a protected institution where they would collide. It was Lincoln's deeply held belief that slavery was a violation of natural law, an aberration that the Founders had intended to endure only long enough for it to die out peaceably. Lincoln contended that it was within the purview of the federal government to do all that it could to hasten the demise of slavery with every weapon in its arsenal short of directly interfering in the slave states. Therein, was another major point of contention between Lincoln and Taney: their diverse and incompatible perspectives on the powers of the federal government and the Presidency.

For Taney, the line between morality and constitutional law was a deeply drawn one. "On moral grounds," Simon writes, Taney "freed his slaves and hoped that slavery which he considered evil

⁴ Carl Brent Swisher, *Roger B. Taney* (Chicago, 1935) remains the standard biography; however, also see Samuel Tyler, *Memoir of Roger Brooke Taney, L.L.D.* (Baltimore, 1872); Bernard C. Steiner, *Life of Roger Brooke Taney: Chief Justice of the United States Supreme Court* (Baltimore, 1922); and Walker Lewis, *Without Fear or Favor: A Biography of Roger Brooke Taney* (Boston, 1965).

⁵ Basler, *CWAL*, 1:171-72.

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would eventually disappear from the United States. But on constitutional grounds, he was convinced that the framers had accepted slavery as a choice to be made by the individual states, and that could only be eliminated by the laws of those states.” (p. 40)

Indeed, paradoxical though it may be, to Taney it was slavery that sustained the affluent world that enabled the Jacksonian Democrats to appear to be so magnanimous and compassionate to their less aristocratic brethren. Despite manumitting his own slaves, Taney was convinced that Congress would descend into a legislative morass once they began debating the morality and the expansion of slavery. And, to a certain extent Taney was prescient in his outlook. When Congress did become paralyzed by the raging argument over whether slavery should be allowed into the western territories, Taney used the case of a Missouri slave, Dred Scott, to settle the entire issue by judicial fiat.

There was another aspect to this infamous case that drew less attention than its flagrant bigotry. Taney’s majority opinion offered expansive federal protection, not just for slave owners but as an abstract right owned by all Americans. The Chief Justice gave wide berth to the Fifth Amendment, with its guarantee that the federal government could take no private property without “due process” or “just compensation.” This constitutional restriction on federal authority was, to Taney, “substantive and unassailable.” The powers to take private property “are not only not granted to Congress,” declared Taney, “but are in express terms denied, and they are forbidden to exercise them. . . . It is a total absence of power everywhere within the dominion of the United States, and . . . guards [American citizens] as firmly and as plainly against any inroads, which the General Government might attempt, under the plea of implied or incidental powers.”⁶

Taney had intended to completely demolish any arguments that territorial governments, with the support of Washington, could

⁶ *Dred Scott v. Sandford*, 60 U.S. 393 (1857); see also Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (New York, 1978), 380-82.

interfere with a slave owner's right to take a slave like Dred Scott into a western territory. In addition, Taney tacked on the gratuitous assertion that blacks were incapable of rising to the level of citizenship and therefore possessed no rights under the Constitution that could be violated by enslavement. The case was a tremendous blow to the abolitionist cause, as well as to the Republican Party in 1857, and was condemned by Lincoln, who even went so far as to question the Court's traditional role as arbiter of a law's constitutionality.

Lincoln charged that "the Dred Scott decision was based upon fallacious constitutional history," writes Simon, and that Lincoln "honed in on Taney's claim that African Americans were purposely excluded by the framers of the Constitution." Relying instead on Associate Justice Benjamin Curtis's dissent, Lincoln maintained that Curtis demonstrated "with so much particularity as to leave no doubt of its truth" that freed blacks voted in five of the original states and, in proportion to their numbers, "had the same part in making the Constitution that white people had." (p. 138)

"I think the authors of that notable instrument [the Declaration of Independence] intended to include all men," Lincoln maintained, "but they did not intend to declare all men equal in all respects. They did not mean to say all were equal in color, size, intellect, moral developments, or social capacity. They defined with tolerable distinctiveness, in what respects they did consider all men created equal – equal in 'certain inalienable rights, among which are life, liberty, and the pursuit of happiness.' This they said, and this [they] meant."⁷

Simon is on shaky ground when he portrays Taney's pro-slavery decision in Dred Scott as an exception to an overall record of moderation and restraint on the slavery question, yet he does demonstrate that many Americans at the time sought some sort of judicial resolution to the slavery problem. But, Taney's unwillingness to see anything wrong with the institution of slavery galled Lincoln, and when he was inaugurated in 1861, he made it crystal clear that his

⁷ Basler, *CWAL*, 2: 398-410.

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administration would not allow slavery into the western territories regardless of what the Supreme Court had said. "I do not forget the position assumed by some," declared the new president, "that constitutional questions are to be decided by the Supreme Court. ... [But] the candid citizen must confess that if the policy of the government ... is to be irrevocably fixed by the decisions of the Supreme Court ... the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal."⁸

The personal and ideological battle between Lincoln and Taney quickly faded behind the hostilities that would consume the nation for the next four years. As chief justice, Taney's perspective on the war was peculiar indeed. Believing that a peaceful separation of the North and South was preferable to a Union maintained by military force and coercion, Taney "denied to the Federal government the power to sustain itself and the power to save itself from destruction. He maintained that the Constitution bestows no greater power upon the Federal government in war than in peace." In fact, Taney's "devotion to a government of laws was so great, so forceful, so complete, that he denied the right to suspend temporarily a part of the government of laws for the very purpose of restoring and securing a future for the unchallenged rule of law." By so doing, he used every legal tool in his kit as chief justice to try and obstruct, if not outright cripple, the Union war effort.⁹

President Lincoln soon received a sharp reminder of this as well as how powerful an adversary the old chief justice could be when Taney issued his ruling in *ex parte Merryman*, a federal circuit court case involving the president's right to suspend the writ of habeas corpus and impose martial law on rebellious Confederate sympathizers in neighboring Maryland. Reacting to the military arrest of John Merryman, a Maryland citizen and Confederate recruiter, Taney angrily denounced Lincoln as a military despot who had vio-

⁸ Ibid. 4: 268. See also David M. Silver, *Lincoln's Supreme Court* (Urbana, IL, 1956, reprt., 1998), 7.

⁹ Silver, *Lincoln's Supreme Court*, 15-17.

lated Merryman's fundamental freedoms as an American when he was arrested by martial law. "I can only say," Taney vituperatively observed, "that the people of the United States are no longer living under a government of laws, but every citizen holds life, liberty, and property at the will and pleasure of the army officer in whose military district he may happen to be found."¹⁰

To Taney, it was not the Army officers who arrested Merryman who posed the greatest threat, but rather it was executive power run amok. "It is the second article of the constitution that provides for the organization of the executive department, enumerates the powers conferred on it, and prescribes its duties," Taney wrote, and "if the high power over the liberty of the citizen now claimed, was intended to be conferred on the president, it would undoubtedly be found in plain words in this article; but there is not a word in it that can furnish the slightest ground to justify the exercise of the power." Taney believed that the need to restrict Lincoln's authority went well beyond the specific matter of the writ of habeas corpus. Indeed, a good portion of what Taney wrote in *ex parte Merryman* included a comprehensive reading of Article II in its entirety to support Taney's claim that the Framers, by limiting the powers of the president, "showed the jealousy and apprehension of future danger which [they] felt in relation to that department of the government, and how carefully they withheld from it many of the powers belonging to the executive branch of the English government which were considered as dangerous to the liberty of the subject; and conferred (and that in clear and specific terms) those powers only which were deemed essential to secure the successful operation of the government."¹¹

¹⁰ *Ex Parte Merryman*, Fed. Cas. 9487 (1861).

¹¹ *Ibid.* See also Robert M. Spector, "Lincoln and Taney: A Study in Constitutional Polarization," *The American Journal of Legal History* 15 (July 1971): 199-214; Sherrill Halbert, "The Suspension of the Writ of Habeas Corpus by President Lincoln," *The American Journal of Legal History* 2 (April 1958): 95-116; and Jeffrey D. Jackson, "The Power to Suspend Habeas Corpus: An Answer from the Arguments Surrounding *Ex Parte Merryman*," *The University of Baltimore Law Review* 34 (Fall 2004): 11-65.

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As Simon observes, the man who armed Andrew Jackson with the legal weapons he needed to declare war against the Bank of the United States was now denying another president the authority, as commander in chief, to save and maintain the Union. “No wartime US president,” writes Simon, “has ever accepted the impotent constitutional role that Taney assigned to Lincoln.” And, as sympathetic as Simon may be to Taney as a man, he leaves little doubt that Lincoln’s “broad exercise of executive power during the Civil War” properly balanced the “legitimate security needs of the nation under siege” against the “individual rights of the citizens.” Although he commends Taney’s opinion, Simon does admit that “nowhere in his opinion did the Chief Justice suggest that Lincoln was dealing with a major insurrection in which eleven states had seceded from the Union and secessionists in other states, like Maryland, posed a significant and immediate threat to the nation’s security.” By failing to do so, Taney displayed the “artistry of a partisan trial lawyer rather than the detachment of a judge.” (pp. 193-194)

Lincoln paid no attention to Taney’s ruling save to explain to Congress in a subsequent address that he had acted in a crisis to prevent the destruction of the government. “I have been reminded from a high quarter,” Lincoln initially wrote, “that one who is sworn to ‘take care that the laws be faithfully executed’ should not himself be one to violate them.” Deciding that perhaps discretion was the better part of valor, Lincoln deleted this reference to Taney, writing instead that “the legality and propriety of what has been done [in Maryland] are questioned,” but that the Constitution supported his actions and he asked rhetorically “are all the laws, *but one* to go unexecuted, and the government itself to go to pieces, lest that one be violated?” In his address, Lincoln never made mention directly of either Taney or the Court.¹²

With civil war consuming his thoughts, Lincoln had already received two vivid reminders – *Dred Scott* and *Merryman* – that not only was he facing a rebellious South, he was staring down the gun

¹² Basler, *CWAL*, 4: 429-30.

barrel of an incredibly hostile Supreme Court. In fact, Lincoln's problems with Taney and his Court had just begun.

Throughout 1861, the war went horribly for Lincoln and the Union. Newspapers shrieked that not only was the North *not* winning the war, they were actually *losing* it. In his frustration and concern, Lincoln took unprecedented actions that placed him squarely on a collision course with the aging and irritable chief justice. During the first few months of the war, with Congress out of session, Lincoln blockaded southern ports, censored the mail, and authorized payment of \$2 million to private citizens to expedite the recruitment of Union soldiers. When blockade runners sued the Federal government for seizing their cargoes, Taney sought to muster enough votes on the Court to declare the blockade unconstitutional.

The blockade posed problems of both constitutional and international law for Lincoln. "A naval blockade was commonly understood to be a military act against a belligerent," writes Simon. "By imposing the blockade, Lincoln was implicitly acknowledging that the Union was engaged in a civil war against the Confederate States of America." Constitutionally speaking, however, only Congress could declare war, and Taney believed that Lincoln had jumped the gun since Congress was not in session. (p. 205)

By the time the Supreme Court heard arguments in the blockade cases, Lincoln had appointed three new justices. And, for all of his machinations behind the scenes, Taney found himself on the losing end of a 5-4 vote with the Court supporting Lincoln's measures as necessary during a time of war. The opinions handed down by the majority, including Lincoln's three new appointees, clarified some basic questions concerning the President, his powers, and the conflict. The Supreme Court had reached a crisis, of sorts, in hearing these cases because upon its decision hinged the fate of Lincoln's endeavors to defeat the Confederacy. In its broadest interpretations, the Court supported Lincoln's claim of using emergency powers necessitated by the current situation. By implication, the Court recognized that Lincoln possessed vast wartime powers and that they could be legally exercised. And, by establishing precedent, the Court's decision gave promise that any future challenges to Lin-

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coln's powers would simply be disregarded. Had Taney persuaded one more member of the reconstructed Court to join him, then the Court would have "announced the Lincoln administration guilty of reckless and illegal actions. And the president himself would have been presented to the world as a grand scofflaw who flouted the Constitution and international law. The Taney Court, with the blessing of the Chief Justice would then have produced a judicial calamity from which the Union might not have recovered." (p. 232)

The press pounced on this and excoriated Taney in the process. The *New York Times* wrote, "It is our firm conviction that the Supreme Court would [now] endorse the constitutional validity of every important act of the Executive or of Congress thus far in the rebellion." Hated by the abolitionists and vilified by the northern press, "No sadder figure was to be seen in Washington . . .," writes Simon, "than the Chief Justice of the United States. Even the moderates in the Lincoln administration shunned him. Feeble and incapacitated, Taney spent much of his time in his rooms on Indiana Avenue in the company of his daughter Ellen, who was now a semi-invalid."¹³

Taney might have been down in his constitutional and personal struggle with Lincoln, but he certainly was not out. Weak in body, the Chief Justice remained sharp and alert as ever in intellect. Taney's problem was that his perspective on the war was in sharp contrast to virtually every other high-ranking member of the federal government. Put simply, he blamed the war on Lincoln and his supporters who trampled on the Constitution and the best interests of the country. All bloodshed could have been avoided had the South been allowed to secede, Taney concluded, which was its right, and the two sections would have lived peacefully, prosperously, and harmoniously as independent republics. Instead, the nation "was broken into shards of violence."

This would explain why, in the face of a changing Court, Taney wrote memoranda denouncing Lincoln's Emancipation Proclamation, the military draft, and the administration's war-finance meas-

¹³ *New York Times*, March 13, 1863; Simon, p. 220.

ures. Taney hoped for appeals to come forth which would enable him to issue these memoranda as legal opinions. The course of events, however, would in the end work to Lincoln's benefit. Taney's health began its final decline in early 1863 and by later that year, the Chief Justice ceased to pose a serious threat to Lincoln or his policies. Taney was never given the opportunity to rule on the constitutionality of emancipation though he did complain bitterly about the creation of an income tax to fund the northern war effort. In view of Taney's attitudes towards race, the war, and Lincoln, there is little doubt what that decision would have looked like had Taney been given the opportunity to stop Lincoln's attempt to turn the war from one of restoration to one of emancipation. The war and future race relations would have been decidedly different had the author of the *Dred Scott* decision had the final word on this matter. Nevertheless, Taney remained a thorn in Lincoln's side as much as he possibly could right up until the Chief Justice died on October 13, 1864.

Nothing that Taney did during the remainder of his life persuaded his enemies and critics to moderate the hostility they maintained toward him because of the *Dred Scott* decision. "The name Taney," sneered abolitionist Senator Charles Sumner, "is to be hooted down the page of history." Lincoln made no public statement acknowledging Taney's death or his contribution to the nation. The President attended Taney's funeral, but did not go to Frederick, Maryland, for the burial. Almost two months later, Lincoln nominated, and the Senate confirmed, Salmon P. Chase, the man who Taney had tormented about the fiscal policies of the Union, as the sixth Chief Justice of the United States. (pp. 265-268)

It is difficult to reconcile a dual biography of a man who issued the *Dred Scott* decision and another who wrote the Emancipation Proclamation. And, perhaps it is somewhat unfair even to consider this a dual biography. Two thirds of the book details the divergent paths that Lincoln and Taney took before they finally crossed swords.

Taney is humanized in this volume and therein lies a major asset of the book. The jurist's overall achievements are recounted

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throughout, and one is forced to think of Taney, not merely in monolithic terms, but rather as a complex figure whose early legal opinions were careful, reasoned, and learned. Restoring some of the humanity to Taney only makes Lincoln look that much better. But is it a stretch to find many similarities between Lincoln and Taney? It simply is not convincing to say, as Simon does, that both men “disapproved of the institution of slavery” and “agreed on the need for a strong Union.” Much of what Simon writes himself would demonstrate otherwise. The chapters on the Civil War, flawed at times by minor factual errors, clearly show that Taney’s views on race and union hardened with time. By the end of his life Taney’s political, sectional, and familial loyalties (his grandson fought for the Confederacy) increasingly determined his legal opinions.

By contrast, Lincoln became more adaptable, pragmatic, and flexible in his thinking about what it would take to win the war and restore the Union. The decision to issue the Emancipation Proclamation was borne from a military necessity and while the issue of race and slavery were always foremost in Lincoln’s mind, had he been able to avoid turning the war into one to end slavery, in all likelihood, he would. Lincoln and Taney were men of different regions, classes, political parties, and intellectual temperaments. In turn, their contrasts far outbalanced their similarities.

Whether the conflict between Taney and Lincoln offers any lessons about either judicial hubris or wartime presidential power remains unanswered. Taney’s opinion in *Dred Scott* remains one of the most reviled judicial decisions in American history and virtually all scholars have condemned it as an example of the dangers of judicial activism. On the other hand, Lincoln’s wartime decisions and the liberties he took with executive power have provided similar fodder for those arguing over the appropriate role of the government in a time of war. Simon does not offer much elaboration on either of these important issues. And, this poses a missed opportunity to ponder whether politics always trumps constitutional theory during major conflicts in our nation’s history.

We would like to expect a noble impartiality from our judiciary,

but the simple truth is that in American history we seldom have received it. “Had Taney died before he wrote his Dred Scott opinion,” Simon writes, “he would undoubtedly have secured a prominent place in our Constitutional history. . . . If Lincoln had died before Taney wrote [this] opinion, his place in American history, like the Chief Justice’s, would have been radically different.” It is not a stretch to wonder whether Lincoln would ever have become president had he not had the opportunity to rail against this partial judicial decision in the late 1850s. (pp. 272, 280)

A half century after Taney’s death, Chief Justice Charles Evans Hughes reviewed Taney’s legacy. Hughes surveyed Taney’s opinions in areas as diverse as federalism and civil liberties and concluded that he was “a great Chief Justice.” That is a bit generous. Had it not been for *Dred Scott*, Abraham Lincoln, and the Civil War, Hughes might have been correct. But, those are mighty difficult caveats to overlook.

Studying the interaction of Lincoln and Taney is a much needed reminder that the Civil War was more than battles and bullets, more than soldiers and campaigns, more than rhetoric and ranting. Rather, that under the rule of law, the decisions of the courts could make fully as much difference, and be just as much a titanic struggle, as two armies marching against one another. In the end, Lincoln and Taney will be set forever in history as worlds apart.

