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Lincoln, The Emancipation Proclamation and Executive Power

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INTRODUCTION

One hundred and fifty years after President Abraham Lincoln signed the Emancipation Proclamation, the debate regarding the President's constitutional authority to issue the Proclamation is no less interesting than it was when the Proclamation was first read.[1] Though the ratification of the Thirteenth Amendment substantially mooted the need to determine the Proclamation's constitutionality, thorny questions remain regarding President Lincoln's executive authority to issue the Proclamation.[2] Often, the debate focuses on the President's commander-in-chief power; however, a relatively broad vision of this power effectively ends the discussion.[3] In the context of the Civil War, the commander-in-chief power focuses on the President's power to act extraordinarily in extraordinary circumstances.[4] The constitutional question becomes whether the commander-in-

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1. The constitutionality of the Emancipation Proclamation remains subject to debate. *See* Sanford Levinson, *The David C. Baum Memorial Lecture: Was the Emancipation Proclamation Constitutional: Do We/Should We Care What the Answer Is?*, 2001 U. ILL. L. REV. 1135, 1148–49 (2001) (noting three options regarding the constitutionality of the Emancipation Proclamation: it was constitutional because its scope was limited; it was constitutional because Lincoln had nearly unlimited power to issue it; or it was unconstitutional).

2. By outlawing slavery in the United States, the Thirteenth Amendment rendered the constitutionality of the Emancipation Proclamation largely academic. U.S. CONST. amend. XIII; *see also* Paul Finkelman, *Lincoln, Emancipation, and the Limits of Constitutional Change*, 2008 SUP. CT. REV. 349, 349 (noting that the Civil War and Thirteenth Amendment eclipsed any legal significance the Emancipation Proclamation might have had in 1863).

3. U.S. CONST. art. II § 2 ("The President shall be Commander in Chief of the Army and Navy of the United States . . . ."). *See* John Yoo, Review, *Unitary, Executive, or Both?*, 76 U. CHI. L. REV. 1935, 2005–06 (2009) (discussing arguments supporting and criticizing President Lincoln's use of his commander-in-chief power).

4. *See id.* at 2006 (discussing President Lincoln's broad use of his commander-in-chief power to "respond[] to a crisis that threatened the very life of the nation").

chief power allowed President Lincoln to act outside of the Constitution's structure of separation of powers and checks and balances during the Civil War.[5] The issue of the Emancipation Proclamation's constitutionality can then be narrowed further, to whether the Proclamation was *calculated* to help the Union win the Civil War. Not only was the Emancipation Proclamation calculated to help the war effort, it did.[6]

Rather than consider President Lincoln's power to issue the Emancipation Proclamation as Commander in Chief, this Essay focuses on a different segment of the President's executive authority: the Take Care Clause.[7] Specifically, it considers whether President Lincoln was authorized to issue the Emancipation Proclamation based on his responsibility to "take care that the laws be faithfully executed."[8] If President Lincoln's take care duty authorized him to issue the Emancipation Proclamation, the Proclamation can be seen as a historic and momentous document issued consistent with the Executive's normal constitutional power, rather than one that was justified only by the enormous power claimed by President Lincoln as Commander in Chief in the context of the Civil War.[9]

The suggestion that the Emancipation Proclamation may have been defensible as a standard executive order runs contrary to some accepted constitutional and historical wisdom.[10] Indeed, the Emanci-

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5. *See id.* at 2005 (noting claims that Lincoln's exercise of executive power, including the commander-in-chief power, was outside of constitutional limits). Indeed, the commander-in-chief power can crowd out legislative power, though Congress attempted to keep a hand in war policy during the Civil War. *See* JOHN HOPE FRANKLIN, THE EMANCIPATION PROCLAMATION 18 (1963) ("Congress was determined to take steps to demonstrate its authority in the conflict in other ways.").

6. The Emancipation Proclamation helped the Union sustain itself domestically and internationally. *See* Jason A. Adkins, *Lincoln's Constitution Revisited*, 36 N. KY. L. REV. 211, 247 (2009) ("Lincoln believed that slave emancipation was a necessary *military* measure to deprive the South of both resources and troops."); WILLIAM O. DOUGLAS, MR. LINCOLN & THE NEGROES 54 (1963) ("He issued the Proclamation as Commander in Chief of the Army and Navy in an effort to weaken the enemy. The Commander in Chief could blockade the ports of the enemy to keep supplies from reaching him. By the same reasoning, he was entitled to weaken the South by freeing its slaves and robbing it of manpower."); *see also* DANIEL FARBER, LINCOLN'S CONSTITUTION 153 (2003) (noting the argument that emancipation might help keep European countries neutral, thereby helping the Union cause).

7. U.S. CONST. art. II § 3.

8. *Id.*

9. *See infra* Part III.

10. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 685 (1952) (Vinson, C.J., dissenting) ("The most striking action of President Lincoln was the Emancipation Proclamation, issued in aid of the successful prosecution of the War Between the

pation Proclamation is considered by some to be a great American document precisely because it required that President Lincoln act boldly and courageously, and possibly outside of his constitutional comfort zone.[11] That vision of the Emancipation Proclamation, however, essentially ignores legislation regarding slaves and slavery that Congress passed between the start of the Civil War and the issuance of the Emancipation Proclamation.[12] During that time, in each law that addressed slaves and slavery, Congress moved toward freeing slaves and limiting slavery.[13] Congress also indicated a willingness to emancipate various groups of slaves as war policy.[14] Indeed, those laws gave the President the power and duty to seize and liberate the property, including slaves, of those who were engaged in war against the United States or were disloyal to the United States.[15] President Lincoln issued the Emancipation Proclamation against that legislative backdrop. Given such legislation, President Lincoln may have had the constitutional authority to issue much of the Emancipation Proclamation under his take care authority.[16]

This Essay explores whether President Lincoln's Emancipation Proclamation, freeing all slaves held in areas designated by the President to be under rebellion on January 1, 1863, could be justified as an

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States, but wholly without statutory authority."); Levinson, *supra* note 1, at 1144–45 (discussing Supreme Court Justice Curtis's pamphlet entitled "Executive Power," which argued that the Emancipation Proclamation was unconstitutional).

11. *See* Finkelman, *supra* note 2, at 350 (noting Lincoln's concerns over the constitutionality of the Emancipation Proclamation); ALBERT A. WOLDMAN, LAWYER LINCOLN 333 (1936) (noting Lincoln's cautious approach to the constitutionality of emancipation). The document may have been dry and legalistic as a result. *See* Levinson, *supra* note 1, at 1140 (suggesting that the limited reach of the Emancipation Proclamation could be due to Lincoln's desire to stay loyal to the Constitution); Yoo, *supra* note 3, at 2013 ("Lincoln's dependence on his constitutional authority explains the Emancipation Proclamation's careful boundaries.").

12. *See infra* Part I. Some historians have argued that the Emancipation Proclamation had very little practical effect. *See, e.g.*, Robert Fabrikant, *Emancipation and the Proclamation: Of Contrabands, Congress, and Lincoln*, 49 HOW. L.J. 313, 314 (2006) ("As a legal matter, the Proclamation had little, if any, emancipatory value, and to the extent it had legal vitality, it was largely redundant with legislation already passed by the Civil War Congress.").

13. *See infra* Parts I.A–C.

14. *See, e.g.*, Fabrikant, *supra* note 12, at 327 ("The [First Confiscation Act] raised the specter that the federal government would destroy slavery as a means of winning the War."). Of course, Congress has the latitude to set war policy in a number of ways. *See* U.S. CONST. art. I, § 8 (providing Congress the responsibilities to declare war, raise an army and navy, and make rules and regulations for the armed forces); *Youngstown Sheet & Tube Co.*, 343 U.S. at 643–44 (Jackson, J. concurring) (discussing Congress's broad constitutional authority to set war policy).

15. *See infra* Parts I.A–C.

16. *See infra* Part III.B.

exercise of his power under the Take Care Clause. Part I of this Essay discusses the legislation that preceded the Emancipation Proclamation. Part II discusses the Emancipation Proclamation. Part III discusses the Take Care Clause and how it might authorize significant parts of the Emancipation Proclamation, if not the entire document.

I. PRE-EMANCIPATION PROCLAMATION CIVIL WAR LEGISLATION

In the antebellum era, Congress adamantly refused to legislate regarding slavery in the states.[17] The issue was deemed a state prerogative on which Congress had little or no constitutional authority.[18] The Civil War, however, triggered wartime legislation that directly and indirectly affected slaves and slavery.[19] The slavery-related legislation passed between the advent of the Civil War and the Emancipation Proclamation's issuance was wide-ranging.[20] Some legislation focused on ensuring that slaves were not used against the Union.[21] Some legislation directed the emancipation of slaves who directly supported or fought for the Union cause.[22] Some legislation outlawed slavery in certain parts of the Union.[23] Though specific laws may have applied to a discrete group of slaves or a particular swath of the United States, when taken as a whole, Civil War legislation passed before the Emancipation Proclamation was issued makes clear that Congress was will-

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17. Indeed, for a time, Congress refused to discuss slavery. *See* Michael Kent Curtis, *The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835–37*, 89 NW. U. L. REV. 785, 848–49 (1995) (discussing the antebellum "gag rule" that effectively barred discussion of slavery petitions in the House of Representatives).

18. *See* Finkelman, *supra* note 2, at 352–54 (noting the accepted limitations during the Civil War era on how the federal government could address slavery in the states); JAMES G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 350–51 (1951) (noting that Lincoln maintained "that Congress had no constitutional power to overthrow slavery in the States"); Sandra L. Rierson, *The Thirteenth Amendment as a Model for Revolution*, 35 VT. L. REV. 765, 836 (2011) (noting that even radical abolitionists did not argue that the federal government could outlaw slavery in the states).

19. *See infra* Parts I.A–C; *see also* RANDALL, *supra* note 18, at 343 ("When the Civil War came, however, it was widely believed that the Government acquired a power in this field which in peace times it did not have.").

20. *See* HENRY W. WILBUR, PRESIDENT LINCOLN'S ATTITUDE TOWARDS SLAVERY AND EMANCIPATION 54–59 (1970) (discussing the variety of legislation passed between the advent of the Civil War and the issuance of the Emancipation Proclamation); *see generally* HENRY WILSON, HISTORY OF THE ANTISLAVERY MEASURES OF THE THIRTY-SEVENTH AND THIRTY-EIGHTH UNITED STATES CONGRESSES, 1861–64 (Negro Univ. Press 1969) (1864) (discussing antislavery legislation).

21. *See infra* Part I.A.

22. *See infra* notes 86–89 and accompanying text.

23. *See infra* notes 90–91 and accompanying text.

ing to move toward emancipation as a war measure, and more generally.[24]

A. The First Confiscation Act

Passed soon after the First Battle of Bull Run, the First Confiscation Act was signed by President Lincoln on August 6, 1861.[25] The Act provided that property, including slaves, used to support "the present or any future insurrection against the Government of the United States" would be "lawful subject of prize and capture."[26] The Act had a context. In May 1861, soon after the beginning of the Civil War, General Benjamin Butler was faced with deciding what to do with runaway slaves who had appeared at Fortress Monroe, where Butler was in command.[27] After learning that the slaves had been used in service of the Confederacy—building encampments and providing other valuable labor to the rebel cause—Butler declined to return the slaves to Major M.B. Carey, the emissary who the slaves' owner, Colo-

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24. This is in marked opposition to the final efforts to avoid disunion just before the Civil War began. *See* Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 732 n.261 (2011) ("In 1861, in a last-ditch attempt to prevent more Southern states from seceding, Congress proposed, President Lincoln endorsed, and three states ratified a constitutional amendment (known as the Corwin amendment) that made explicit Congress's lack of power to interfere with or abolish slavery in any state, and that prohibited any subsequent constitutional amendment to the contrary."); Rierson, *supra* note 18, at 847 ("The efforts of the President and of Congress to entice the southern states back into the Union with promises of non-interference with slavery obviously failed. As the prospect of secession and civil war became a stark reality, the President and his party began to gradually move towards the abolition of slavery."); WILBUR, *supra* note 20, at 44–46 (discussing Congress's various attempts to placate the South and avert war beginning in December 1860). Indeed, Lincoln personally attempted to avoid disunion. *See* WOLDMAN, *supra* note 11, at 287–88 (noting that Lincoln's First Inaugural Address struck a conciliatory note with the South regarding slavery).

25. An Act to confiscate Property used for Insurrectionary Purposes, ch. 60, 12 Stat. 319 (1861) [hereinafter First Confiscation Act]. Both the Union and the Confederacy passed confiscation acts in the first year of the Civil War. *See* BURRUS M. CARNAHAN, ACT OF JUSTICE: LINCOLN'S EMANCIPATION PROCLAMATION AND THE LAW OF WAR 90–92 (2007) (discussing Confederate confiscation acts); RANDALL, *supra* note 18, at 275–76 (discussing Confederate confiscation acts passed before and after the First Confiscation Act).

26. First Confiscation Act, *supra* note 25, § 1. Congress clearly had the power to pass such legislation. *See* U.S. CONST. art. I, § 8 (providing Congress power to "make Rules concerning Captures on Land and Water").

27. CARNAHAN, *supra* note 25, at 84. Butler had addressed issues surrounding the runaway slave issue during his service in Maryland. Butler, a lawyer, had argued that slaveowners in Maryland should have their rights to slaves protected because Maryland had remained in the Union. LOUIS S. GERTEIS, FROM CONTRABAND TO FREEDMAN 12–13 (1973); MICHAEL VORENBERG, FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT 24 (2001) (noting that General Butler had "offered to put down a rumored slave rebellion in Maryland").

nel Charles Mallory, had sent to retrieve them.[28] Butler had offered to return the slaves if Mallory would appear at Fortress Monroe and pledge loyalty to the Union.[29] Mallory never appeared; Butler declared the slaves to be contraband of war and declined to return them.[30] Rather than allow those slaves to rejoin their Confederate master, Butler decided to use them for the Union cause.[31] Eventually, Secretary of War Simon Cameron made Butler's policy official War Department policy.[32] Butler's approach was incorporated into the First Confiscation Act.[33]

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28. Finkelman, *supra* note 2, at 364; GERTEIS, *supra* note 27, at 13.

29. Finkelman, *supra* note 2, at 365.

30. *Id.*; GERTEIS, *supra* note 27, at 13 ("Butler now argued that since Rebels in the Hampton area were using blacks to erect fortifications in support of the rebellion, the slave property in his possession was contraband, liable to confiscation by the laws of war.").

31. *See* CARNAHAN, *supra* note 25, at 84; Finkelman, *supra* note 2, at 365 ("Taking slaves away from Mallory and other Confederates served the dual purposes of depriving the enemy of labor while providing labor for the United States."). A number of Union generals grappled with how to address the issue of slavery. In late 1861, General John C. Frémont, military commander in Missouri, declared martial law in Missouri and deemed free all rebel-owned slaves in the state. *See* MICHAEL BURLINGAME, LINCOLN AND THE CIVIL WAR 53 (2011) (discussing General Frémont's emancipation order in Missouri); VORENBERG, *supra* note 27, at 25 (2001) (noting General Frémont's emancipation of slaves, subsequently revoked by Lincoln). Similarly, in early 1862, General David Hunter, commander of U.S. forces in the Department of the South, declared martial law in Georgia, Florida, and South Carolina and deemed all slaves in such states to be free. *See* Finkelman, *supra* note 2, at 375–76 (discussing General Hunter's emancipation order); RANDALL, *supra* note 18, at 354 (discussing General Frémont's general order on emancipation of slaves and General Hunter's similar order); VORENBERG, *supra* note 27, at 25–26 (noting General Hunter's emancipation of slaves in the Deep South, subsequently revoked by Lincoln). President Lincoln countermanded both generals. *See* BURLINGAME, *supra*, at 54 (noting that Lincoln distinguished between commandeering, which military officials can do, and confiscation, which only political branches can order); DOUGLAS, *supra* note 6, at 46 (noting Lincoln's assertion that military officials may have the right to commandeer property for a short amount of time, but had no right to confiscate permanently); Finkelman, *supra* note 2, at 377 (noting Lincoln's claim that he, as Commander in Chief, was the only authority that could order emancipation for military necessity); WILBUR, *supra* note 20, at 61–63 (discussing General Frémont and Hunter's emancipation orders and Lincoln's countermand of them).

32. *See* CARNAHAN, *supra* note 25, at 85–86. Indeed, by August 1861, Butler's policy appeared to have been normalized. *See* Finkelman, *supra* note 2, at 366 ("The U.S. Army could employ any slaves who ran to its lines, provided they came from Confederate states. This was not a general emancipation policy, and, indeed, the army was not supposed to deliberately attempt to free slaves. But the army would not return fugitive slaves to masters in the Confederate states, even if the masters claimed to be loyal to the United States."); WILBUR, *supra* note 20, at 60–61 (noting that Secretary of War Cameron made General Butler's refusal to return fugitive slaves War Department policy, but directed that the labor of slaves used be recorded). Indeed, Secretary of War Simon Cameron attempted to go farther. *See* BURLINGAME, *supra* note 31, at 60 (noting that Secretary of War Cameron had advocated emancipation and arming slaves in his 1861 annual report and was subsequently

The First Confiscation Act required the forfeiture of property used directly against the United States during the war.[34] The forfeiture was not punishment; it was based on the misuse of the property. The property was not merely commandeered; the property rights in the forfeited property were to be transferred to the United States.[35] The Act stated that seized property would be condemned in the appropriate federal district court and sold for the benefit of the United States.[36] It also provided the President with both the right and the obligation "to cause the [subject property] to be seized, confiscated, and condemned."[37]

The Act did not explicitly distinguish between human and non-human property; it did, however, treat the different types of property somewhat differently.[38] Non-human property was to be sold for the benefit of the United States.[39] No provision for sale was made for slaves; instead, the Act merely indicated that slaveowners lost their rights in the slaves, and that the slave would be free of the obligation of labor to the previous owner.[40] The First Confiscation Act did not clarify that slaves seized under the Act were to be emancipated.[41] However, it also did not suggest that those slaves would be treated as U.S. government property, held or possibly sold at some later date.[42]

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removed by Lincoln in January 1862); FRANKLIN, *supra* note 5, at 15–16 (1963) (discussing Secretary of War Cameron's December 1861 suggestion to Lincoln that slaves be freed and armed, which Lincoln rejected and which may have helped precipitate Cameron's removal from his post).

33. CARNAHAN, *supra* note 25, at 86; ALEXANDER TSESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM 34 (2004).

34. First Confiscation Act, *supra* note 25, § 1.

35. *Id.* § 2.

36. *Id.* §§ 2, 3.

37. *Id.* § 1.

38. *See id.* (noting that all property used to support the insurrection was "lawful subject or prize and capture wherever found").

39. *Id.* § 3.

40. *Id.* § 4.

41. *See* RANDALL, *supra* note 18, at 357 (noting that the First Confiscation Act was not clear on whether forfeited slaves were free, "though this was the plain inference").

42. The First Confiscation Act did not foreclose the theoretical possibility that slaves could have been transferred to the United States, with the government owning the labor of slaves and the proceeds of the sale of slaves being used to fight the war. Congress, however, showed no interest in having the United States own slaves and no interest in preserving slavery. *See* FRANKLIN, *supra* note 5, at 18 ("Despite the vagueness of the manner of forfeiture, Congress left no doubt that it was moving toward a policy that embraced emancipation under certain conditions.").

The First Confiscation Act provided at least two incentives, one direct and one indirect. The direct incentive was for Confederates to stop using their property in support of the war against the United States.[43] The indirect incentive was for slaves to run toward Union lines.[44] However ineffective the direct incentive may have been, the indirect incentive was effective. The tide of contraband continued throughout the Civil War, and the Union sought to gain advantages from the tide.[45]

B. The Second Confiscation Act

By the time the Second Confiscation Act[46] was signed on July 17, 1862, the character of the Civil War had changed significantly. The war had not ended quickly. Union forces had not been as successful as some thought they should have been.[47] Congress was not pleased with the prosecution of the war.[48] More radical elements in Congress and in the country were pushing for action regarding slavery and emancipation.[49] To some, the Second Confiscation Act was not bold enough.[50] To others, it was far too bold.[51]

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43. *See* First Confiscation Act, *supra* note 25, § 1.

44. Like the war, the First Confiscation Act may have had the benefit of encouraging slaves to flee their masters and get to Union lines. *See* Fabrikant, *supra* note 12, at 323 ("The [First Confiscation Act] . . . sent a message that Union lines would be a safe haven for fugitive slaves."); Finkelman, *supra* note 2, at 358 ("From the beginning of the war slaves escaped to U.S. army lines whether they assumed (usually correctly) that they would find freedom.").

45. *See* KENNETH M. STAMPP, THE ERA OF RECONSTRUCTION 1865–1877, at 45 (1965) ("By 1865, however, some 150,000 Negroes had escaped from slavery and had either joined the Union Army or performed military service by digging trenches and hauling supplies.").

46. An Act to suppress Insurrection, to punish Treason and Rebellion, to seize and confiscate the Property of Rebels, and for other Purposes, ch. 195, 12 Stat. 589 (1862) [hereinafter Second Confiscation Act].

47. For a discussion of the travails of the Union Army in early 1862, see DAVID HERBERT DONALD, LINCOLN 348–62 (1995); *see also* CARNAHAN, *supra* note 25, at 102–03.

48. Congress eventually instituted oversight of the Civil War effort. *See* FRANKLIN, *supra* note 5, at 17–18 (discussing Congress's attempts to set war policy, including creation of the Committee on the Conduct of the War).

49. *See* DONALD, *supra* note 47, at 364 (noting the numerous visitors Lincoln received urging emancipation); FARBER, *supra* note 6, at 153 (noting Congress's shift toward emancipation).

50. *See* HAROLD HOLZER, EMANCIPATING LINCOLN 31 (2012) (noting that abolitionists William Lloyd Garrison and Wendell Phillips found the Second Confiscation Act inadequate).

51. *See id.* (noting that conservatives thought the Act might alienate border states).

The Second Confiscation Act was more complex than the First Confiscation Act. Its stated goal was "to suppress Insurrection, to punish Treason and Rebellion, [and] to seize and confiscate the Property of Rebels."[52] Unlike the First Confiscation Act, which focused on property used directly in support of the war effort against the United States, the Second Confiscation Act targeted all property of specific groups of people who were fighting or supporting the war against the United States.[53] The Act had multiple aims. One was the confiscation of property.[54] Another was the emancipation of rebel-owned slaves.[55]

The first four sections of the Act focused on crimes.[56] The first two sections focused on the punishment for those convicted of treason and for those convicted of being involved in the rebellion, including providing aid or comfort to the rebellion.[57] The punishment for the criminal offense was, in part, the seizure of the defendant's property and the liberation of the defendant's slaves.[58] The slaves need not have been used to support the Confederate war effort directly. Rather, they merely needed to be the property of people who had supported the war effort and had been convicted of the relevant crime.[59] Section three disqualified anyone convicted under the first two sections from holding federal office.[60] Section four noted that the Act was not to interfere with treason prosecutions that arose before the Act was passed.[61]

The Act's civil provisions focused on the confiscation of property as a way to hasten the end of the war.[62] Section five identified specific

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52. Second Confiscation Act, *supra* note 46. This is the title of the Second Confiscation Act.

53. *Id.* § 5. The Act could have gone farther. *See* Miller v. United States, 78 U.S. 268, 305–06 (1870) (noting that wartime confiscation can reach all those residing in enemy territory whether or not they are sympathetic to the enemy government).

54. Second Confiscation Act, *supra* note 46, § 5.

55. *Id.* § 9.

56. *See Miller*, 78 U.S. at 308–10 (discussing the structure of the Second Confiscation Act).

57. Second Confiscation Act, *supra* note 46, §§ 1, 2.

58. *Id.*

59. *See id.* § 1 (providing for liberation of all slaves owned by persons convicted of treason); *id.* § 2 (providing for liberation of all slaves owned by persons convicted of aiding rebel forces).

60. *Id.* § 3.

61. *Id.* § 4.

62. *See id.* § 5 (noting that the purpose of providing the President the power to confiscate property was "to insure the speedy termination of the present rebellion").

groups of people who were to have their property seized.[63] The groups included officers of the army or navy of the Confederacy, high-level officers in the Confederate government, and lower-level officers in Confederate state governments.[64] Section five also applied to "any person who, owning property in any loyal State or Territory of the United States, or in the District of Columbia, shall hereafter assist and give aid and comfort to such rebellion."[65] The President was charged with seizing subject property and using the proceeds from that property's sale to support the army.[66]

Section six of the Act authorized the President to designate an additional group of people whose property would be subject to seizure.[67] The President was empowered to warn "any person within any State or Territory of the United States . . . being engaged in armed rebellion against the government of the United States, or aiding or abetting such rebellion" to stop supporting the rebellion and return their allegiance to the United States.[68] If they did not do so within sixty days of the warning, their property would be subject to seizure.[69] The President was obligated to seize the subject property and use proceeds from the seizure.[70] The Act provided for proceedings *in rem* —a mechanism that would speed condemnation proceedings by not requiring that the property's owner be granted a personal hearing regarding his property prior to its condemnation.[71] This mechanism was easier for the government to use than the mechanism provided in the First Confiscation Act, though confiscation through courts was not used particularly broadly pursuant to the First or Second Confiscation Act.[72]

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63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* § 6.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* § 7. The *in rem* procedure troubled Lincoln and was part of his objection to the Second Confiscation Act. *See* Fabrikant, *supra* note 12, at 344 ("Lincoln found [the *in rem* provisions] objectionable on the ground that they violated the Constitution by depriving persons of property beyond their lives."). He did not require, however, that the procedure be altered or removed from the Act before signing the law.

72. *See* RANDALL, *supra* note 18, at 288–92 (noting that confiscations were haphazard and did not produce much revenue for the U.S. Treasury).

The Second Confiscation Act explicitly provided for the emancipation of slaves, unlike the First Confiscation Act.[73] Congressmen understood the difference between confiscating slaves—either to stop their owners from using them to make war against the government or to punish them for making war on the United States—and freeing those slaves.[74] The nod toward emancipation was significant. It made clear that confiscation was not merely about trading one set of masters for another, but that confiscation was meant to free slaves.[75]

The substance of the emancipation portion of the Act is significant. The Act freed any slave who escaped into Union lines, was captured from his master, or was found in a place that had been occupied by rebel forces, if the slave's master had engaged in rebellion or had "in any way give[n] aid or comfort" to the rebellion.[76] The Act stated that those slaves "shall be deemed captives of war, and shall be forever free of their servitude, and not again held as slaves."[77] The Act noted that a fugitive slave could be returned to his owner, if the person claiming the fugitive swore an oath that the slave's owner "ha[d] not borne arms against the United States in the present rebellion, nor in any way given aid and comfort thereto."[78] Members of the armed forces, however, could not be party to surrendering fugitive slaves or returning fugitive slaves to their owners.[79] Slaves who ran away to the Union lines were effectively free for the duration of the war.

Lastly, the Second Confiscation Act authorized the President to use "persons of African descent as he may deem necessary and proper for the suppression of this rebellion," freeing the President to use seized, freed, and escaped slaves in the military.[80] Of course, President Lincoln may already have had the power to use whatever re-

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73. *See* Second Confiscation Act, *supra* note 46, § 9; *see also* Fabrikant, *supra* note 12, at 340 ("[S]ection nine of the [Second Confiscation Act] expressly granted freedom, whereas the [First Confiscation Act] spoke only in terms of 'forfeiture.'").

74. *See* WILSON, *supra* note 20, at 127 (noting that during the debate on the Second Confiscation Act congressmen briefly mentioned and rejected the possibility of treating slaves as forfeited property and selling them into the market).

75. *See* RANDALL, *supra* note 18, at 358–59 (noting that slaves were treated differently than property under the Second Confiscation Act and did not appear subject to the onerous forfeiture procedures applicable to other property).

76. Second Confiscation Act, *supra* note 46, § 9.

77. *Id.*

78. *Id.* § 10; *see also* RANDALL, *supra* note 18, at 357 (noting that loyal slaveholders in Union states could recover their fugitive slaves until fugitive slave laws were repealed in mid-1864).

79. Second Confiscation Act, *supra* note 46, § 10.

80. *Id.* § 11.

sources he needed to win the war under his commander-in-chief power.[81] After the Department of War supported General Butler's declaration that runaway slaves were to be contraband of war and his use of the contrabands to support the war effort, the Second Confiscation Act could be deemed functionally superfluous on this point. However, the additional congressional sanction to use blacks to support the Union cause was important if only to signal that Congress supported the President on the issue.[82]

The Confiscation Acts, taken together, allowed slaves used against the United States to be seized.[83] They allowed slaves of rebels fighting against the United States to be freed. They also allowed President Lincoln to decide what additional people would be subject to having their property, including slaves, confiscated or liberated. Finally, the Confiscation Acts gave President Lincoln the authority to use confiscated and runaway slaves in the military in support of the war effort. The two Confiscation Acts alone suggest that Congress was tilting toward emancipation.[84]

C. Other Legislation

Before the Emancipation Proclamation was issued, Congress passed additional legislation suggesting it was becoming more comfortable with emancipation. Between the First Confiscation Act and the Second Confiscation Act, Congress passed legislation prohibiting military officials from returning fugitive slaves to their masters, with President Lincoln signing the law on March 13, 1862.[85] Congress also passed the Militia Act of 1862, which President Lincoln signed into law on July 17, 1862—the same day he signed the Second Confisca-

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81. *See supra* note 4 and accompanying text.

82. Unfortunately, the Second Confiscation Act was not solely focused on bringing slaves into the American polity. It provided for the possible colonization of freed slaves to a country outside of the United States. *See* Second Confiscation Act, *supra* note 46, § 12.

83. The Acts were found to be constitutional. *See* Miller v. United States, 78 U.S. 268, 313–14 (1870) ("Upon the whole, then, we are of opinion the confiscation acts are not unconstitutional . . . .").

84. *See* FARBER, *supra* note 6, at 153 (2003) ("Congress began to move in the direction of emancipation with two Confiscation Acts, providing a mechanism to free the slaves of active rebels on a case-by-case basis."); RANDALL, *supra* note 18, at 342 (suggesting that the Confiscation Acts were steps toward emancipation).

85. An Act to make an additional Article of War, ch. 40, 12 Stat. 354 (1862) [hereinafter Additional Article of War]. The effect was to provide extra support to the war cause. *See* Finkelman, *supra* note 2, at 366 (discussing contraband policy that essentially emancipated the slaves of rebel slaveholders and used the labor of slaves of loyal slaveholders (possibly to be compensated later upon claim by the loyal slaveholders)).

tion Act.[86] This Act authorized using blacks in the military;[87] specifically, it granted freedom to any former slave who rendered military service under the Act if that slave had been owned by someone who levied war on the United States or had given aid or comfort to enemies of the United States during the rebellion.[88] In addition, the former slave's mother, wife, and children would be free based on the former slave's military service if the mother, wife, and children had been owned by someone who had levied war or given aid or comfort to the enemies of the United States.[89] When taken together, the Acts suggest that the government did not intend to use military power to preserve slavery. Rather, the government intended to emancipate many slaves who rendered service to the war effort.

Congress also abolished slavery in areas where it had the clear power to do so. Congress abolished slavery in the District of Columbia, with President Lincoln signing the law on April 16, 1862.[90] Congress also abolished slavery in the U.S. territories, with President Lincoln signing the law on June 19, 1862.[91] Neither of these actions, however, is the equivalent of general emancipation, and may not be considered particularly radical.[92] The Republican platform on which

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86. The Militia Act of 1862, ch. 201, 12 Stat. 597 (1862).

87. *Id.* § 12.

88. *Id.* § 13; *see also* RANDALL, *supra* note 18, at 364 (discussing the Militia Act of 1862: "It was rather surprising that this law did not at the same time provide similar freedom for slave-soldiers owned by loyal masters, with compensation to such masters, for it was widely recognized that no Negro who had served under the colors should be reenslaved."). This was fixed by an Act of February 24, 1864. *Id.* at 364 n.46; DOUGLAS, *supra* note 6, at 40–41 ("By the act of February 24, 1864, 'all able-bodied male colored persons' between the ages of twenty and forty-five were drafted for military service. This law covered Negroes who were slaves as well as Negroes who were free. Slaveowners in the Border States, which had not seceded, violently objected to the taking of their slaves without compensation. . . . So the act provided that when a slave was taken into the Army from the Border States, his master should receive a sum of money (from $100 to $300) and the slave should become a free man.").

89. The Militia Act of 1862, *supra* note 86, § 13.

90. D.C. Emancipation Act, ch. 54, 12 Stat. 376 (1862). *See also* Fabrikant, *supra* note 12, at 337 ("The D.C. Emancipation Act was the first federal law which granted immediate and unconditional freedom to any slave.").

91. An Act to secure Freedom to all persons within the Territories of the United States, ch. 111, 12 Stat. 432 (1862) [hereinafter the Territories Act]. This law functionally nullified *Dred Scott v. Sanford* on the issue of slavery in the territories. *See* TSESIS, *supra* note 33, at 35.

92. Going farther might have been considered radical. *See* Finkelman, *supra* note 2, at 358 ("[A]ny national program for emancipation beyond the territories or the District of Columbia did not fit into any generally recognized interpretation of the Constitution."); *see also* Rierson, *supra* note 18, at 839 (noting that Lincoln opposed the expansion of slavery into the territories, but did not campaign on the abolition of slavery in the states).

Lincoln ran in 1860 favored the abolition of slavery in the territories,[93] and some who favored compensated emancipation supported stopping the spread of slavery wherever possible.[94] Nonetheless, the aActs suggest that Congress was willing to move toward emancipation wherever possible, rather than toward appeasing slaveholders whenever possible.[95]

D. Implications

Taken together, all of the laws mentioned above suggest that Congress was willing to emancipate slaves whenever it thought it was reasonable to support the war effort and wherever it thought it had the authority to do so. The latitude the laws explicitly gave President Lincoln suggests that he had significant power to affect slavery directly. President Lincoln had been given the authority to seize property, to liberate slaves as a result, and to use black Americans militarily whenever appropriate to help suppress the rebellion.[96] President Lincoln was specifically given the authority and duty to confiscate and condemn property that had been used directly against the United States in support of the rebellion.[97] President Lincoln was also specifically given the authority and duty to seize the property of certain groups of people living inside of the Confederate states, and of those living inside of loyal states if they supported or gave aid to the rebellion.[98] Further, President Lincoln was specifically given the authority to issue a proclamation giving notice to people living in Confederate states that he could seize the property of people in those states who continued to aid or abet the rebellion.[99]

President Lincoln was also authorized to use people of African descent in the armed forces as he saw fit.[100] President Lincoln could use now-former slaves and free blacks to supplement the troops fighting the war, and presumably could encourage former slaves to

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93. *See* Andrew T. Hyman, *The Due Process Plank*, 43 SETON HALL L. REV. 229, 230 (2013) (discussing the antislavery plank of the Republican Party platform of 1860).

94. President Lincoln could be counted in this group. *See* FRANKLIN, *supra* note 5, at 21–22 (discussing President Lincoln's efforts in favor of compensated emancipation).

95. *See* RANDALL, *supra* note 18, at 364 (noting the various ways in which Congress sought to and did emancipate slaves leading up to the Emancipation Proclamation).

96. *See supra* Parts I.A–C.

97. *See supra* Part I.A.

98. *See supra* Part I.B.

99. *See supra* Part I.B.

100. *See supra* Part I.C.

become a part of the armed forces to help suppress the rebellion.[101] This was a significant step, as some did not want to see African Americans become part of the armed forces, either because they did not want to make the war about slavery or because they believed that the psychological effect black soldiers might have on the South would guarantee a prolonged or more savage rebellion.[102] In the wake of being granted these powers and duties through legislation, President Lincoln issued the Emancipation Proclamation.

II. THE EMANCIPATION PROCLAMATION

The Emancipation Proclamation was issued in the wake of significant legislation that supported the confiscation and emancipation of slaves as war policy and as general policy.[103] The Emancipation Proclamation, however, is not generally considered an extension of congressional legislation; rather, it tends to be considered the action of President Lincoln alone, even though it lacked his signature linguistic flair.[104] The full story is more complex. When commentators discuss the Emancipation Proclamation, they often refer primarily to the

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101. *See supra* Part I.C.

102. Interestingly, some Confederates would have liked to have seen slaves take up arms in support of the Confederacy. *See* EMORY M. THOMAS, THE CONFEDERATE NATION: 1861–1865, at 261–64 (1979) (discussing General Patrick Cleburne's suggestion in early 1864 that the most loyal slaves be armed and promised freedom if they fought for the war's duration, and noting its sound rejection at the time). Indeed, eventually, the Confederacy did arm former slaves, but only after their masters freed them. Rather than have them fight as slaves with the promise of emancipation, the Confederacy eventually decided to allow some slaves to fight as free men. *See* DOUGLAS, *supra* note 6, at 42–43 (noting the Confederacy's eventual willingness to allow slaves to serve in the military in exchange for possible freedom); THOMAS, *supra*, at 290–96 (discussing Confederate move in late 1864 to arm and emancipate slaves whose masters allowed them to fight for the Confederacy).

103. *See supra* Part I.

104. The dryness of the Emancipation Proclamation may have been due to Lincoln's desire to ensure its constitutionality. *See* Adkins, *supra* note 6, at 245–46 ("Lincoln faced a serious constitutional challenge to his Emancipation Proclamation from a number of prominent critics who concluded Lincoln had no constitutional authority to issue such a document. . . . Lincoln had to carefully craft the proclamation into a dry legal document, denying to it Lincoln's command of beautiful prose."); BURLINGAME, *supra* note 31, at 68 (noting the "cold, legalistic language" of the Emancipation Proclamation); FARBER, *supra* note 6, at 154 ("The Emancipation Proclamation was not up to Lincoln's usual standard of eloquence, but it said what it needed to say."); Finkelman, *supra* note 2, at 351 (noting that stylistically, the Emancipation Proclamation was not Lincolnesque). President Lincoln had reason to worry. *See* JAMES F. SIMON, LINCOLN AND CHIEF JUSTICE TANEY 222 (2006) ("Given the opportunity, there is no doubt that Taney would have declared Lincoln's Emancipation Proclamation unconstitutional. He could have documented his conclusion by citing his own judicial opinions in *Strader v. Graham* (1851), *Dred Scott* (1857), and *Merryman* (1861).").

proclamation issued on January 1, 1863.[105] The Preliminary Emancipation Proclamation, issued on September 22, 1862,[106] however, provides context for the final Emancipation Proclamation. Indeed, the final proclamation was arguably just a confirmation, in somewhat different language, of the preliminary proclamation.[107]

The Preliminary Emancipation Proclamation was issued just after the Battle of Antietam.[108] President Lincoln considered issuing the Emancipation Proclamation throughout much of the summer of 1862.[109] Secretary of State Seward, however, advised President Lincoln that issuing the Emancipation Proclamation during a difficult time for the Union army would make the Proclamation appear to be a desperate ploy.[110] Consequently, Lincoln waited until after a Union victory.[111] When issued, the Emancipation Proclamation was welcomed by some and decried by others.[112] It was, however, undeniably momentous.

A. The Preliminary Proclamation

The Preliminary Emancipation Proclamation began with a statement of purpose declaring that President Lincoln, as President and Commander in Chief, planned to restore the Union.[113] It then suggested that the rebellious states should rejoin the Union and accept

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105. Proclamation No. 17 (Emancipation Proclamation), 12 Stat. 1268 (Jan. 1, 1863) [hereinafter Emancipation Proclamation].

106. Proclamation No. 16 (Preliminary Emancipation Proclamation), 12 Stat. 1267 (Sept. 22, 1862) [hereinafter Preliminary Emancipation Proclamation].

107. *Compare* Preliminary Emancipation Proclamation, *supra* note 106, *with* Emancipation Proclamation, *supra* note 105.

108. DONALD, *supra* note 47, at 374.

109. *See id.* at 362–65 (discussing President Lincoln's thinking during the summer of 1862 about issuing an emancipation order).

110. *See* FRANKLIN, *supra* note 5, at 43 (noting Secretary Seward's concerns regarding the timing of the Emancipation Proclamation).

111. Some did not consider Antietam to be much of a victory, but Lincoln thought it was good enough. *See* FRANKLIN, *supra* note 5, at 46–47 (noting that the Union victory at Antietam was the trigger for issuing the Emancipation Proclamation); WILBUR, *supra* note 20, at 68–69 (discussing positive military results for the Union in early 1862 and noting that popular opinion had suggested that early 1862 had been a poor time for the Union's military fortunes). *But see* Adkins, *supra* note 6, at 248 ("That Lincoln issued the proclamation when he did is almost as inexplicable as his motives. The Union had suffered a long series of military setbacks, and the war had been unexpectedly prolonged.").

112. *See* TSESIS, *supra* note 33, at 36 (discussing reactions to the Emancipation Proclamation).

113. Preliminary Emancipation Proclamation, *supra* note 106, para. 1.

gradual emancipation and the colonization of slaves.[114] The preliminary Proclamation noted that, barring reconciliation, "all persons held as slaves within any State, or designated part of a State, the people whereof shall then be in rebellion against the United States shall be then, thenceforward, and forever free."[115] The preliminary Proclamation indicated that the President would, on January 1, 1863, indicate the areas of the United States to which the Proclamation would apply.[116] It further stated that the government, including the military, would recognize the freedom of slaves and do nothing to impede the exercise of their freedom.[117] The preliminary Proclamation concluded with a pledge from President Lincoln that he would recommend, after the restoration of the Union, that loyalists "be compensated for all losses by acts of the United States, including the loss of slaves."[118]

The preliminary Proclamation noted statutory support for its issuance.[119] It noted the law, passed March 13, 1862, prohibiting the military from helping to return fugitive slaves to their owners.[120] It referenced section nine of the Second Confiscation Act, which freed slaves of persons engaged in rebellion or who had given aid or comfort to the rebellion, whenever those slaves came under the U.S. Army's control.[121] Finally, it noted section ten of the Second Confiscation Act, which barred the return of fugitive slaves unless the person seeking the fugitive slave swore an oath that the owner of the slave had not participated in the rebellion or given aid or comfort to the rebellion, and which also reiterated that the military would not participate in the return of fugitive slaves.[122] Lincoln suggested that these laws, coupled with his commander-in-chief power, provided the authority to free all slaves in areas in rebellion against the United

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114. *Id.* para. 2.

115. *Id.* para. 3.

116. *Id.* para. 4.

117. *Id.* para. 3.

118. *Id.* para. 13.

119. *See* CARNAHAN, *supra* note 25, at 108 (noting that President Lincoln referenced legislation likely to make the Emancipation Proclamation appear less radical and merely the result of carrying out Congress's legislative commands); *see also* FRANKLIN, *supra* note 5, at 48 (noting that obedience to the Second Confiscation Act and an Additional Article of War would lead to much emancipation and suggesting that the Emancipation Proclamation was a continuation of those acts).

120. Preliminary Emancipation Proclamation, *supra* note 106, paras. 5–8 (quoting an Additional Article of War).

121. *Id.* para. 10.

122. *Id.* para. 11.

States.[123] The preliminary Proclamation was met with mixed reaction.[124] The final Proclamation would be met with similar mixed reaction.

B. The Final Proclamation

By January 1, 1863, when the final Emancipation Proclamation was issued, circumstances had changed. The congressional elections of 1862 had occurred; President Lincoln's Republican Party had been trounced.[125] Some anxiously awaited the issuance of the final Proclamation, not knowing whether President Lincoln would make the announcement.[126] President Lincoln did not waver. He issued the final Emancipation Proclamation freeing slaves in the areas of the Confederacy that remained in rebellion.[127]

The final Proclamation confirmed the preliminary Proclamation. However, the final Proclamation focused somewhat more centrally on the President's commander-in-chief power, stating that the Proclamation was "a fit and necessary war measure for suppressing the rebellion."[128] President Lincoln identified the areas in the United States not under the Union's effective political or military control, deemed them to be in rebellion, and declared that all slaves living in those areas were free.[129] He stated:

> I do order and declare that all persons held as slaves within said designated States, and parts of States, are, and henceforward shall be free; and that the Executive government of the United States, including the military and naval authori-

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123. *See* FRANKLIN, *supra* note 5, at 48–49 ("As Commander-in-Chief of the Army and Navy, Lincoln referred to his military powers as the source of his authority to emancipate the slaves. . . . He hoped, finally, to bring about legislative and executive cooperation . . . .").

124. *See id.* at 58–93 (discussing the favorable and unfavorable reactions to the preliminary Proclamation domestically and internationally).

125. *See* Yoo, *supra* note 3, at 2015 (noting the 1862 midterm election results). Indeed, some had wondered if the 1862 midterm elections would stop Lincoln from issuing the Emancipation Proclamation. *See* FRANKLIN, *supra* note 5, at 86.

126. *See* FRANKLIN, *supra* note 5, at 93 (discussing watch parties and anticipation of the issuance of the final Emancipation Proclamation).

127. Emancipation Proclamation, *supra* note 105.

128. *Id.* para. 4. Of course, much of the legislation passed prior to the Emancipation Proclamation reflected Congress's views of what qualified as fit measures for ending the rebellion. *See supra* Parts I.A–C.

129. Emancipation Proclamation, *supra* note 105, paras. 4–6.

> ties thereof, will recognize and maintain the freedom of said persons.[130]

The Proclamation then noted that the then-former slaves could join the United States armed forces.[131]

The Emancipation Proclamation could be thought to be a declaration that every slaveholder in the areas under rebellion was aiding and abetting the rebellion. That would subject all of their property, including their slaves, to forfeiture.[132] Given the Preliminary Emancipation Proclamation's suggestion that loyalists living in areas controlled by rebel forces might have claims after the war for compensation for destroyed property,[133] however, it is unlikely that the final Emancipation Proclamation should be deemed to treat everyone in such areas as collaborating with the Confederacy. Rather than condemning the motives and actions of all persons living in areas in rebellion, the Emancipation Proclamation arguably merely subjected to confiscation the human property of all subjects—loyal and disloyal—living in areas in rebellion, without judgment.[134]

The preliminary and final Proclamations were met with joy by some, but were not universally hailed by those who supported emancipation.[135] Although the Emancipation Proclamation stated United States war policy, declared free slaves in much of the United States, and indicated that national policy was to maintain the freedom of the newly freed slaves, it did not abolish slavery or free all slaves.[136] Indeed, it did not free slaves in areas of the Confederacy that were under Union control.[137] This reality led some to argue that the Procla-

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130. *Id.* para. 6.

131. *Id.* para. 8; *see* FRANKLIN, *supra* note 5, at 104 (noting that the final Emancipation Proclamation indicated that former slaves were to be welcomed into the armed forces, whereas the preliminary Proclamation had not).

132. The Court in *Miller v. United States* would have supported much more confiscation than the Emancipation Proclamation provided. 78 U.S. 268, 306 (1870) (noting that confiscation of all property of loyalists living in the Confederacy would have been constitutional).

133. *See supra* note 118 and accompanying text.

134. *See supra* notes 129–130 and accompanying text.

135. *See* FRANKLIN, *supra* note 5, at 141–43 (noting that the Emancipation Proclamation was not all that abolitionists wanted, but was treated as momentous nonetheless); TSESIS, *supra* note 33, at 36 (same).

136. *See supra* note 129 and accompanying text.

137. *See id.* However, the practical effect of the Emancipation Proclamation was more complex. *See* FRANKLIN, *supra* note 5, at 114–15 (referring to an Emancipation Proclamation celebration in Norfolk, where the Proclamation did not technically free slaves: "This was an example, however, of what happened to slavery when Union forces won control of

mation only "freed" slaves in areas where the Union had no practical power to free slaves.[138] President Lincoln countered that the Emancipation Proclamation, a war measure, could only free slaves in areas still in rebellion and not yet under Union control.[139] As for the bigger issue of full emancipation, President Lincoln clung to the hope that states would accept gradual compensated emancipation.[140] Indeed, he proposed gradual compensated emancipation in his December 1862 message to Congress delivered between the issuance of the preliminary Proclamation and the final Proclamation.[141] Whether the Emancipation Proclamation is thought to be a water glass half-empty or half-full, the more interesting question is whether the Executive's

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an area: slavery merely ceased to exist, the exceptions in the Emancipation Proclamation to the contrary notwithstanding.").

138. *See* WILLIE LEE ROSE, REHEARSAL FOR RECONSTRUCTION: THE PORT ROYAL EXPERIMENT 195–96 (1964) ("The Proclamation had in general emancipated only the slaves *outside* the grasp of the Federal armies and had gone to the lengths of specifically excluding from its liberating provisions the Negroes within [Union] lines . . . ."). There were anomalies. Slaves on coastal islands in South Carolina, who had been practically free and under Union Control since late 1861, were freed by the Emancipation Proclamation. *See id.* at 196.

139. Lincoln's point was both legal and political. Freeing slaves in areas under Union control would be akin to freeing slaves in free states in the Union. *See* JAMES M. MCPHERSON, ORDEAL BY FIRE: THE CIVIL WAR AND RECONSTRUCTION 298 (1982) ("The proclamation was a war measure directed against enemy resources. Under the laws of war, the President and army had the right to seize these resources; but they had no constitutional power over slaves not owned by the enemy."); VORENBERG, *supra* note 27, at 35 ("But many northerners doubted the constitutionality of emancipation in nonrebellious areas, and even more questioned whether black freedom would be constitutional after the war had ended."); *see also* DOUGLAS, *supra* note 6, at vi ("The Emancipation Proclamation, like the Magna Charta, has become a symbol of freedom and equality which was no part of it in the beginning. Lincoln conceived of it as a military measure. It indeed freed only some slaves, not all of them.").

140. Gradual compensation emancipation would have resolved issues of the Proclamation's constitutionality that revolved around the Constitution's Takings Clause. *See* Finkelman, *supra* note 2, at 350 (suggesting that Emancipation Proclamation may have violated the Fifth Amendment's Takings Clause); *see also* Levinson, *supra* note 1, at 1149 (noting argument that, but for the Fourteenth Amendment, emancipation might be better thought to be a taking under the Fifth Amendment that would require compensation); Yoo, *supra* note 3, at 2014 ("The Emancipation Proclamation is usually studied as a question of the war powers of the national government, though it has also been studied as a question of whether it amounted to a taking of property requiring compensation."). Some argue that the takings argument is a loser. *See* FARBER, *supra* note 6, at 156 ("One possible argument is that [the Emancipation Proclamation] violated the takings clause. But this argument should fail. . . . The government's power to seize enemy property when required for military purposes predated the Constitution, and must be considered an implicit condition on title to all real and personal property.").

141. *See* STAMPP, *supra* note 45, at 45 (noting Lincoln's offer of gradual compensated emancipation to states in late 1862 after the issuance of the preliminary Emancipation Proclamation).

duty to "take care that the laws be faithfully executed" provided Lincoln with the authority to start pouring water at all.

III. EXECUTIVE AUTHORITY AND THE EMANCIPATION PROCLAMATION

The President of the United States is vested with the executive authority of the federal government.[142] The executive authority includes several duties and powers, including the commander-in-chief power and the duty to take care that the laws be faithfully executed.[143] Determining the boundaries of executive power is a fascinating and difficult task.[144] This Essay focuses specifically on the Take Care Clause and whether it may have authorized the Emancipation Proclamation.

For the purposes of analyzing the Take Care Clause, all legislation passed by Congress before the Proclamation's promulgation is assumed to be constitutional. That assumption is necessary to isolate the take care issue. The Take Care Clause is triggered when legislation exists for the President to execute faithfully.[145] Whether the Pres-

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142. U.S. CONST. art. II § 1.

143. *Id.* at §§ 2–3. The scope of those powers can be elastic. *See* William G. Howell, *Wartime Judgments of Presidential Power: Striking Down but Not Back*, 93 MINN. L. REV. 1778, 1788 (2009) (noting that robust commander-in-chief power can lead to extra-constitutional actions by the President). Opinion regarding the scope of executive power can vary, as was demonstrated in 1860–1861. *See* Yoo, *supra* note 3, at 2007–08 (contrasting President Lincoln's self-professed constitutional authority to address secession with President Buchanan's self-professed lack of constitutional authority to do so).

144. The most extensive attempt to map the limits of executive power as it interacts with the legislative power may have occurred in Justice Jackson's concurrence in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). Justice Jackson provided a structure for evaluating the proper breadth of executive power in relation to legislative power. *See id.* at 635 (Jackson, J., concurring) ("Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."). The Executive is most free to act when the President acts pursuant to an explicit congressional authorization. *Id.* If the President's act is unconstitutional in this setting, it is likely because the government as a whole cannot act as the President did. *Id.* at 636–37. Thus, the Executive is more limited in acting when Congress has not spoken. Congress and the President may have concurrent authority, but the distribution of that authority may be unclear. *Id.* at 637. The Executive is constrained to act exclusively based on his inherent executive powers when the President acts in contravention of expressed congressional policy. *Id.* In *Dames & Moore v. Regan*, 453 U.S. 654 (1981), the Court praised Justice Jackson's three-tiered power structure, but recognized that it did not easily resolve issues in actual cases. *See id.* at 669 ("[I]t is doubtless the case that executive action in any particular instance falls, not neatly in one of [Justice Jackson's] three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition.").

145. *See* Levinson, *supra* note 1, at 1142 ("Even if the national government is deemed to have certain powers, the President still needs congressional authorization for his actions.

ident has faithfully executed the legislation arguably does not depend on whether the legislation is constitutional. Rather, it depends on whether the President's take care power authorizes the actions taken pursuant to the underlying legislation. Though important, an analysis of the constitutionality of the legislation enacted before the Emancipation Proclamation was issued would be lengthy and is outside of the scope of this brief Essay. A brief discussion of the Take Care Clause is necessary before the Clause is considered in conjunction with the Emancipation Proclamation.

A. Take Care Clause

The boundaries of the Take Care Clause, like the boundaries of executive power in general, are difficult to map.[146] The Clause resides in section three of Article II of the Constitution with a number of other powers and duties given to the President.[147] The Supreme Court has not given much guidance regarding the limits of the Take Care Clause.[148] Consequently, the scope of the Clause remains unclear.[149] Nonetheless, *Youngstown Sheet & Tube Co. v. Sawyer*[150] ("*Steel Seizure*") remains instructive on the reach of the Take Care Clause.

The *Steel Seizure* case did not create clear boundaries for the Take Care Clause, but it did provide a few helpful signposts. The Court reviewed President Truman's seizure of the nation's steel plants during

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This, after all, is the heart of *Youngstown Steel*, which would have been an absolutely easy case had Congress authorized the [steel] seizure in advance.").

146. For a discussion of the breadth of judicial and scholarly commentary on the scope of the Take Care Clause, see Norman W. Spaulding, *Independence and Experimentalism in the Department of Justice*, 63 STAN. L. REV. 409, 430 n.75 (2011).

147. *See* U.S. CONST. art. II § 3 (stipulating presidential duties to provide information to Congress regarding the state of the union, convene and adjourn Congress, receive ambassadors and others, and commission officers of the United States, in addition to "take Care that the Laws be faithfully executed").

148. *See* Richard A. Bales, *A Constitutional Defense of* Qui Tam, 2001 WIS. L. REV. 381, 409–10 (2001) ("Commentators generally agree that at least one purpose of the [Take Care] clause was to make it clear the president cannot arbitrarily suspend the enforcement of laws enacted by Congress. Beyond this, however, relatively little is known about the original meaning of the Take Care Clause, and there similarly are relatively few cases in which the Supreme Court has discussed its breadth.").

149. *See* Michele Estrin Gilman, *The President as Scientist-in-Chief*, 45 WILLAMETTE L. REV. 565, 577 (2009) ("Not only is [its] language vague, but the history surrounding the Take Care Clause is inconclusive because the Framers themselves disagreed over the proper scope of executive power. . . . This uncertainty creates an opening for Presidents to justify their domestic policymaking under the Take Care Clause.").

150. 343 U.S. 579 (1952).

the Korean War.[151] Rather than allow a labor dispute at the plants to resolve itself, and possibly result in a disruptive strike, President Truman determined that he had the constitutional authority to seize the plants and keep them producing.[152] President Truman argued that a strike at the plants would jeopardize national defense by disrupting the production of steel during the Korean War.[153] The Court, however, determined that President Truman did not have the authority to seize the plants.[154]

The Court analyzed President Truman's claim that the Take Care Clause and the commander-in-chief power combined to provide the authority sufficient to seize the steel plants.[155] Rather than accept that the President had the inherent authority to seize the plants under the relevant circumstances, the Court noted that the President may act only pursuant to an explicit or implied grant of power from the Constitution or a statute.[156] After dispensing with the argument that the commander-in-chief power authorized the seizure,[157] the Court addressed the content of the Take Care Clause. The Court viewed the Take Care Clause as a limited grant of power to the President; it allows the President to shape the executive response to legislation, but does not allow the President to invade the legislative power that the Constitution assigns to Congress.[158] The Legislature sets policy; the Executive implements that policy.[159] In sum, when Congress has explicitly stated the policy it wants followed, the President is limited in following a different path. Conversely, when the President follows Congress's lead, the President will have more latitude in crafting a policy response to a situation. The *Steel Seizure* Court provided little additional analysis of the Take Care Clause.

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151. *See id.* at 582 (discussing the genesis of the seizure).

152. *Id.*

153. *Id.* at 583.

154. *Id.* at 588–89.

155. *Id.* at 587.

156. *Id.* at 585 ("The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can fairly be implied.").

157. *Id.* at 587 (noting that the seizure of mills is not a military matter).

158. *Id.* ("In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad.").

159. *Id.* at 588.

In the wake of the Court's limited discussions of the Take Care Clause, the Clause can be considered to provide both a duty requiring the Executive to enforce the law as the legislation demands and a license allowing the President to interpret statutes in the context of determining how to enforce them.[160] What the Take Care Clause allows the President to do depends on how broad the President's job is conceived to be. If the President's job with respect to executing the law is to do only what legislation commands the President to do, the Take Care Clause will be viewed narrowly. Conversely, if the President's job is to execute legislative policy reflected by all of federal law, the latitude the Take Care Clause provides can be viewed expansively. Even when viewed expansively, however, the Clause will always have limits.[161] The President can only interpret the law in the context of executing it.[162] The President cannot interpret the law so aggressively that the President functionally legislates.[163] Where the line between

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160. *See* FARBER, *supra* note 6, at 128–29 (noting the difficulty in using the Take Care Clause to extend presidential authority because "[i]t is phrased as a duty rather than a grant of power"); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1471 (1988) ("The 'take Care' clause, however, is a duty, not a license. The clause requires the President to carry out the law as enacted by Congress."); *see also* Thomas P. Crocker, *Presidential Power and Constitutional Responsibility*, 52 B.C. L. REV. 1551, 1576 (2011) ("The Take Care Clause's meaning is not without its own ambiguity. Is it an assignment of power, as some argue, or a designation of a duty, as many others argue?"). Indeed, some argue that the clause restrains the President. *See id.* at 1554 (arguing that the need to take care that laws are faithfully executed is a restraint on the President).

161. *See supra* note 158 and accompanying text. Nonetheless, Lincoln viewed his commission broadly. *See* Adkins, *supra* note 6, at 243 ("Lincoln construed his oath and the 'take care' clause to mean that he was responsible for preserving the Union.").

162. *See* Neomi Rao, *The President's Sphere of Action*, 45 WILLAMETTE L. REV. 527, 546 (2009) ("To faithfully execute the laws, the President must ensure that various statutory policies and directives work together to create coherent government action. Generating such coherence from our myriad laws will often require detailed and sometimes creative interpretation."); Yoo, *supra* note 3, at 1947 ("[The Constitution] grants perhaps the most significant executive power, that of taking 'Care that the Laws be faithfully executed,' in the president alone. The Take Care Clause makes the president responsible for enforcing federal law, which implies an ancillary authority to interpret it in the course of enforcement.").

163. *See* Medellin v. Texas, 552 U.S. 491, 532 (2008) (noting that the Take Care Clause "allows the President to execute the laws, not make them"); FARBER, *supra* note 6, at 129 ("The 'take care' clause presumably does give the president some discretion in implementing the laws. But it arguably undermines inherent executive power by stressing the president's subordinate role with respect to the lawgivers."); Spaulding, *supra* note 146, at 437 ("However we read the Take Care Clause, it cannot mean that the President is free to execute his *will* rather than the laws."). Some argue that any grant of power the Take Care Clause provides is not broad. *See* Crocker, *supra* note 160, at 1576 ("The Supreme Court has never provided a full exposition of the [take care] clause, and certainly not one that establishes a robust grant of power.").

executing the law and legislating resides, however, is difficult to determine.

Of course, the President must interpret statutes to enforce them. Even at its most restrictive, the Take Care Clause presumably allows the President to interpret a statute to determine what the President is required to do under the statute.[164] If treated more expansively, the Take Care Clause may allow the President to interpret the maze of federal law to determine how the law should best be executed consistent with congressional intent.[165] Any interpretation by the Executive must be faithful to the statutes, but a reasonable amount of interpretive latitude may allow the President to embed the President's policy preferences—consistent with Congress's preferences—in the interpretation.[166] Whether the President has acted consistently with the Take Care Clause may depend on how clearly the President's vision tracks Congress's vision for a particular issue.[167] This is important in considering how the Take Care Clause may have authorized the issuance of the Emancipation Proclamation.

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164. *See supra* note 162 and accompanying text.

165. The take care power that is being suggested here is not in the form of an emergency power, but in the form of a typical interpretation of legislation that has been duly passed. There is an argument, however, that the Take Care Clause provides the President emergency powers that are not explicitly noted in the Constitution. *See* Thaddeus Hoffmeister, *An Insurrection Act for the Twenty-First Century*, 39 STETSON L. REV. 861, 883 n.132 (2010). How broad that power may be is subject to debate. *See* Howell, *supra* note 143, at 1789–90 (noting that the Take Care Clause does not explicitly distinguish between peacetime and wartime, but effectively can provide the President with additional power given that many statutes provide the President with additional power during emergencies). However, wartime does not expand the Executive's power into the legislative realm. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 589 (1952) ("The Founders of this Nation entrusted the law making power to the Congress alone in both good and bad times.").

166. *See* Sunstein, *supra* note 160, at 1471 ("[The Take Care Clause] does accord to the President—and no one else—the authority to control the execution of the law when Congress has not spoken, and that authority will involve a measure of discretion."). Some suggest that any discretion allowed should be exercised carefully. *See* Crocker, *supra* note 160, at 1558 (suggesting that duties to take care and faithfully execute the laws "places virtue at the center of the president's powers").

167. *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654, 678, 680 (1981) ("Although we have declined to conclude that the IEEPA or the Hostage Act directly authorizes the President's suspension of claims for the reasons noted, we cannot ignore the general tenor of Congress' legislation in this area in trying to determine whether the President is acting alone or at least with the acceptance of Congress. . . . Crucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement.").

B. The Take Care Clause and Emancipation Proclamation

Whether the Take Care Clause authorized President Lincoln to issue the Emancipation Proclamation would seem to depend in part on whether, in issuing the Emancipation Proclamation, President Lincoln lagged or outpaced Congress. The former view suggests that the Emancipation Proclamation merely pushed the emancipation issue that Congress had set in motion with its prior legislation.[168] If emancipation was clearly coming, the Emancipation Proclamation could be thought to be a mere continuation of congressional policy that was likely within the President's executive authority.[169] Conversely, the Emancipation Proclamation arguably was a bold step toward freedom well beyond what Congress had authorized or contemplated. If the Emancipation Proclamation was a break with or a radical departure from congressional action, it is less likely to have been within the President's take care authority.[170] Ironically, the Emancipation Proclamation's value as proof of President Lincoln's greatness may be inversely proportional to its apparent constitutionality.[171]

An examination of the constitutionality of the Emancipation Proclamation requires consideration of the legislation that preceded it. At the time the Emancipation Proclamation was issued, Congress had legislated differently with respect to three groups of slaves.[172] The first group consisted of slaves held by disloyal masters.[173] The second group consisted of slaves who escaped or ended up behind Union lines during the war, but were held by loyal masters.[174] The third

168. *See* FRANKLIN, *supra* note 5, at 20–21 (noting that Congress was in front of Lincoln on emancipation issues and that Lincoln held Congress back).

169. The Emancipation Proclamation could have been thought to implement the Second Confiscation Act in part, especially because there had been confusion about how the military was to enforce the Act. *See* RANDALL, *supra* note 18, at 361 ("Neither the military authorities nor the courts had any clear understanding as to how they were to carry out the confiscation law in its relation to the liberation of slaves.").

170. *See supra* notes 161–163 and accompanying text.

171. Some commentators have suggested that the Emancipation Proclamation was consistent with the exercise of executive authority as structured in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), while others disagree. *Compare* FARBER, *supra* note 6, at 156 ("Whereas in *Steel Seizure*, Congress had clearly refused to authorize such seizures, no such history existed in Lincoln's case. Emancipation was consistent with the general trend of congressional action against slavery, including the Confiscation Acts."), *with* Youngstown Sheet & Tube Co., 343 U.S. at 685 (Vinson, C.J., dissenting) ("The most striking action of President Lincoln was the Emancipation Proclamation, issued in aid of the successful prosecution of the War Between the States, but wholly without statutory authority.") .

172. *See infra* Parts III.B.1–3.

173. *See infra* Part III.B.1.

174. *See infra* Part III.B.2.

group consisted of slaves who never escaped through Union lines during the war, but were held by loyal masters.[175] Consequently, though the Emancipation Proclamation provided a blanket emancipation of slaves in Confederate-held areas, practically, it is three separate Emancipation Proclamations. The Proclamation's emancipation of some slaves is on very solid constitutional ground.[176] Its emancipation of other slaves may be on shakier constitutional ground, at least when the President's take care authority is viewed as the only constitutional support for the President's executive authority to issue the Emancipation Proclamation.[177]

1. Slaves of Disloyal Masters

Slaves who were held by disloyal masters arguably were free as soon as President Lincoln issued the final Emancipation Proclamation.[178] Under the Second Confiscation Act, the property of rebels was subject to seizure and forfeiture after the President issued a proclamation warning persons in areas under rebellion to stop supporting the rebellion and declare allegiance to the United States.[179] The Preliminary Emancipation Proclamation served as notice to persons living in areas under rebellion.[180] The property of rebels was subject to seizure when the final Emancipation Proclamation was issued, as the Second Confiscation Act placed a duty on President Lincoln to seize property subject to forfeiture.[181] Section nine of the Second Confiscation Act makes clear that slaves of rebels who physically came under United States military control were free.[182] The easiest way for the slaves of rebels to become emancipated was to cross Union lines. Section eleven of the Second Confiscation Act authorized President Lincoln to use persons of African descent however necessary to suppress the rebellion.[183] Consequently, the Emancipation Proclamation notes

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175. *See infra* Part III.B.3.

176. *See infra* Part III.B.1.

177. *See infra* Parts III.B.2–3.

178. *See supra* notes 129–130 and accompanying text. Practically, slaves of disloyal masters may not have been free until they crossed Union lines.

179. *See* Second Confiscation Act, *supra* note 46, § 6.

180. *See* Preliminary Emancipation Proclamation, *supra* note 106, para. 3. Indeed, the slaves of disloyal masters who lived in loyal states were also subject to confiscation. *See* Second Confiscation Act, *supra* note 46, § 5.

181. Second Confiscation Act, *supra* note 46, § 6.

182. *Id.* § 9.

183. *Id.* § 11.

that newly freed slaves would be welcomed into the armed services.[184] Given congressional directives, the Proclamation can be deemed an attempt to drive slaves already subject to forfeiture toward Union lines as a way to add men who could help the Union suppress the rebellion.[185] President Lincoln would appear to have been authorized under his responsibility to take care that the Second Confiscation Act be faithfully executed to issue the Emancipation Proclamation and apply it to the slaves of disloyal persons.

2. Runaway Slaves of Loyal Masters

President Lincoln's authority to apply the Emancipation Proclamation to slaves who were held by loyal masters living in the Confederacy, but who escaped and ran behind Union lines, is trickier to address. The Second Confiscation Act did not address how to treat slaves who ended up behind Union lines but were owned by loyalists. The Act suggested that under certain circumstances the slaves of loyalists who crossed borders and were found in non-seceding states could be sent back to their loyalist owners.[186] Slaves who crossed Union military lines, but were owned by loyalist owners, however, could not be sent back to their loyalist masters by the military, per Congress's Additional Article of War[187] and the Second Confiscation Act.[188] In addition, the Second Confiscation Act allowed President Lincoln to use freed or fugitive slaves to suppress the rebellion.[189] The Emancipation Proclamation does not appear to be required by the legislation passed before its issuance, but it may help resolve a problem that was created or exacerbated by such legislation.

The legislation enacted before the Emancipation Proclamation was issued complicated a practical problem for military commanders in the field. Since the beginning of the war, military commanders

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184. Emancipation Proclamation, *supra* note 105, para. 8.

185. *See* RANDALL, *supra* note 18, at 381–82 (noting that the Emancipation Proclamation brought many slaves into Union lines, with attendant opportunities for service and accompanying logistical problems); *see also* FRANKLIN, *supra* note 5, at 69, 71–73 (noting the concern at the time that the preliminary Proclamation was the equivalent of a call to slave insurrection).

186. *See* Second Confiscation Act, *supra* note 46, § 10.

187. *See* Additional Article of War, *supra* note 85.

188. *See* Second Confiscation Act, *supra* note 46, § 10. According to *Miller v. U.S.*, 78 U.S. 268 (1870), Congress could have subjected the property of all residents of the Confederacy, loyal or disloyal, to confiscation. *Id.* at 310–12. Whether legislation directed or allowed President Lincoln to do so is a different question.

189. Second Confiscation Act, *supra* note 46, § 9.

had to address the issue of fugitive slaves who crossed Union lines.[190] After the Confiscation Acts were passed, some of the fugitive slaves were essentially free because they had been used in support of the rebellion or were owned by rebel masters.[191] Conversely, other slaves arguably were not free because their masters had remained loyal to the Union.[192] The commanders in the field had little or no way of knowing who was subject to the First Confiscation Act and who was not.[193] Indeed, many commanders may not have cared who was technically free and who was not given that the commanders could not return fugitive slaves to their masters as of March 1862.[194] In addition, under War Department policy as of late 1861 and under the Second Confiscation Act, the fugitive slaves—free or not—could be used to do tasks that regular soldiers would have had to do otherwise.[195] Taken together, the various enactments suggest that commanders were authorized to use, and should have used, whichever people of African descent arrived behind Union lines or in Union encampments in support of the war effort.

The Emancipation Proclamation could be read as a recognition that slaves of loyalists living in the Confederacy would continue to reach Union lines, would be put to work for the Union cause, and almost certainly would not be re-enslaved after the war.[196] Congress's arc toward emancipation makes it difficult to imagine that slaves who served as Union soldiers or otherwise in support of the Union cause would be returned to their loyalist masters after the war.[197] Indeed, President Lincoln's mention in the Preliminary Emancipation Proc-

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190. *See* Finkelman, *supra* note 2, at 366 (noting that in the wake of General Butler's decision to treat runaway slaves as contraband, President Lincoln changed government policy so that slaves from Confederate states would not be returned, but the labor of those slaves would be recorded so that loyal masters might be compensated later).

191. *See supra* notes 37, 76 and accompanying text.

192. *See supra* note 78 and accompanying text.

193. *See* GERTEIS, *supra* note 27, at 17 (noting the inability of military officers to determine the status of slaves).

194. *See* Additional Article of War, *supra* note 85. The contraband issue was serious. *See* MCPHERSON, *supra* note 139, at 298 ("Already [by the time the Emancipation Proclamation was signed] 100,000 or more contrabands within Union lines in Tennessee, Louisiana, Virginia, and elsewhere were free by the realities of war.").

195. *See* Second Confiscation Act, *supra* note 46, § 11 (authorizing use of slaves who were sufficiently fit for military service).

196. *See* STAMPP, *supra* note 45, at 45 (noting that at least by 1865, President Lincoln believed that fugitive slaves who had performed some service for the Union should not be re-enslaved).

197. By 1864, slaves who served in the armed forces were freed whether they had been owned by loyal or disloyal owners. *See supra* note 88.

lamation of future attempts to suggest compensation for those loyalists who lost property in the war could be relevant; it suggests a recognition that loyalists might be compensated for slaves lost or possibly commandeered during the war, but that those slaves might not be returned.[198] Thus, the Emancipation Proclamation's grant of freedom to slaves of loyalists who might escape to Union lines could be viewed as an implied exercise of the President's duty to take care that the laws be faithfully executed. The Proclamation may be justified as a preemptive way to address a problem that federal law helped create but did not solve: the status of fugitive slaves of loyalists behind Union lines who could be used for military purposes and would not be returned to their loyalist owners after the war.

This construction of the President's take care power suggests that a president may or must attempt to faithfully execute all of the laws, as best as possible. That is, when faced with a tangle of laws that creates a practical nightmare, the President may be allowed to choose a path that best addresses the practical problems that the legislation has created or exacerbated. The power to choose the best path would be implied by the more general duty to take care to faithfully execute all of the laws. The Emancipation Proclamation's preemptive freeing of the slaves of both loyalists and rebels appears to go beyond the legislation Congress had passed before the Emancipation Proclamation was issued. However, if the Proclamation is considered an attempt to address the practical problem of contraband fugitive slaves that commanders in the field had seen, and likely would continue to see, because of legislation that tilted toward encouraging fugitive slaves to find refuge behind Union lines and emancipating for former slaves who served in the U.S. armed forces, the Proclamation could be considered well within the Executive's take care authority.[199]

3. Slaves of Loyal Masters Who Never Escaped to Union Lines

The last group of slaves ostensibly freed by the Emancipation Proclamation—slaves who were owned by loyalists and remained in Confederate-controlled areas—is the most difficult group to emancipate constitutionally based solely on the President's take care authori-

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198. *See* Preliminary Emancipation Proclamation, *supra* note 106, para. 13.

199. Practically, how Congress had handled the fugitive slave issue may have forced the emancipation issue. *See* RANDALL, *supra* note 18, at 356 ("This fugitive slave question offers an excellent example of the manner in which the unavoidable incidents of a war over a vastly extended front with a slaveholding power inevitably forced upon the Government the question of emancipation.").

ty.[200] The property of loyalists living in Confederate states had largely been protected under the relevant legislation.[201] In addition, the emancipation of the slaves who stayed in the Confederacy and were owned by loyalists, though a good and just idea, does not appear to resolve any pressing problem created or exacerbated by legislation.[202] A reading of the President's take care authority that provides the President the implied power to go beyond the text of legislation to do what was necessary to effectuate the purposes of a statute's text might not cover the group of slaves at issue, as the law in place when the Emancipation Proclamation was issued appeared to protect the property of loyalists living behind Confederate lines.[203] However, a reading of the take care authority that allows the President to execute policy based on a broader vision of the legislation that Congress passed on a general topic might allow the Emancipation Proclamation to cover the group of slaves at issue.

The mass of legislation that Congress had passed regarding slaves, slavery, and the prosecution of the war provided President Lincoln with significant latitude and authority to confiscate and seize rebel property, emancipate slaves, use former slaves in the armed forces, and be aggressive in suppressing the rebellion. If the President's take care authority is aimed at the general arc of legislation rather than at particular pieces of legislation, the President's take care authority might cover the remaining group of slaves emancipated by the Emancipation Proclamation. That would appear to be a stretch. Such a vision of the Take Care Clause might seem sensible in the context of emancipating slaves during the Civil War, but might not be sensible in other contexts.[204]

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200. Under the President's commander-in-chief power, confiscating the slaves of residents of the Confederacy would have been allowed. *See* The Brig Amy Warwick (The Prize Cases), 67 U.S. (2 Black) 635, 649–52 (1863) (holding that property of all persons residing within rebellious states may be treated as enemy property, regardless of personal allegiance, and thus is subject to capture); FARBER, *supra* note 6, at 138–41 (discussing the Prize Cases); Michael Stokes Paulsen, *The Emancipation Proclamation and the Commander in Chief Power*, 40 GA. L. REV. 807, 814–16 (2006) (discussing the Prize Cases). President Lincoln was reluctant to confiscate the property of loyalists without compensation, but he arguably had the power to do so.

201. *See* Second Confiscation Act, *supra* note 46, § 5 (limiting confiscation to property of disloyal persons).

202. *See id.*

203. *See id.*

204. *See* FARBER, *supra* note 6, at 141 ("A legal state of war would limit the rights of neutral nations to conduct trade with the South, end the ability of noncombatant Southerners to invoke their normal rights as American citizens, and allow combatant Southerners to be treated as prisoners of war rather than criminals or traitors.").

IV. CONCLUSION

The Emancipation Proclamation is fully justified under the President's broad executive authority. The commander-in-chief power alone justifies it. The Emancipation Proclamation, however, may also be largely justified solely by the Take Care Clause, which requires that the President take care that the laws be faithfully executed. The legislation Congress passed prior to the issuance of the Emancipation Proclamation required slaves of rebels to be emancipated, allowed fugitive slaves to be used in the Union war effort, and suggested that slaves should be freed wherever Congress was allowed to free them. Against this backdrop, the Emancipation Proclamation's emancipation of all of the slaves in areas under Confederate control arguably follows from prior legislation.

Functionally, the Emancipation Proclamation freed three groups of slaves. The first group—slaves of disloyal owners—was already subject to confiscation and emancipation under the Second Confiscation Act. The emancipation of those slaves can be justified even with reference to a fairly narrow take care power. The second group—slaves who ran to Union lines but were owned by loyal masters—was available for military use in the Union army based on prior legislation, could not be returned to their slaveholders by the military, and may have been unlikely to have been returned to their masters after the war even if the Thirteenth Amendment had not been passed. Taken together, the relevant legislation suggested that those slaves would remain free, but did not explicitly command such. As importantly, members of the second group of slaves could not be easily distinguished from members of the first group of slaves. The emancipation of the second group of slaves could be justified by a vision of the Executive's take care power that allows the Executive to plot the best way to execute laws that, if applied strictly, would create serious problems for government officials charged with carrying out the congressional policy suggested by the legislation. The third group—slaves who did not run to Union lines and were owned by loyalist owners residing in the Confederacy—did not appear to be subject to confiscation before the Emancipation Proclamation was issued. The Emancipation Proclamation could be authorized with respect to the third group of slaves if the President's take care authority is viewed broadly enough to allow the President to execute broad legislative policy suggested by legislation, for example, Congress's pro-emancipation and anti-slavery Civil War policy, rather than limited to executing commands embedded in particular legislative enactments.

The boundaries of the Take Care Clause are not clear. Consequently, whether President Lincoln was authorized to issue the Emancipation Proclamation based solely on the Take Care Clause is a puzzle subject to vigorous debate and discussion. However, given the ever present specter of expanding executive power generally, the puzzle is worthy of more time and thought than has yet been spent.